

# *Lawrence v. Texas* and the Limits of the Criminal Law

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*Adil Ahmad Haque\**

## I. INTRODUCTION

The criminal law of a jurisdiction can be corrupted by at least two forms of injustice. The law's prohibitions can sweep too broadly, unduly restricting individual liberty, invading personal privacy, or denigrating human dignity. Alternatively, the law's punishments can lack adequate justification, inflicting needless suffering and unwarranted deprivation. In the United States, these forms of injustice are checked by two sets of constitutional norms. The First, Fifth, and Fourteenth Amendments insulate from criminalization a variety of activities through which individuals seek prosperity and fulfillment. Additionally, the Eighth Amendment promises some degree of proportionality between the acceptable goals of punishment and the state's deprivation of an individual's life or liberty. These amendments are seldom discussed as a group, and their judicial elaboration has proceeded largely along separate paths. Constitutional interpretation is often clause-bound in structure; doctrinal categories track different textual headings rather than common themes. The result of this treatment has been a lack of clarity regarding the source and scope of the Constitution's limitations on substantive criminal law. A criminal statute that infringes upon a protected liberty stands or falls on the legitimacy and weight of the state interest the law is meant to serve. The importance of the protected liberty is determined by one body of law, while the legitimacy of the state's interest in punishment is fixed by the other. Only when the two are viewed together does a clear picture emerge.

In *Lawrence v. Texas*,<sup>1</sup> the Supreme Court famously invalidated state criminal laws prohibiting same-sex sodomy. In doing so, the Court overruled *Bowers v. Hardwick*,<sup>2</sup> in which it had upheld a similar law that applied to both same- and opposite-sex partners. The liberty interest *Lawrence* protects rests on strong doctrinal foundations that are both clearly identified and elegantly treated in Justice Kennedy's majority opinion. The Court's Fourteenth Amendment jurisprudence has long recognized non-procreative

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<sup>1</sup> 539 U.S. 558 (2003).

<sup>2</sup> 478 U.S. 186 (1986).

sexual activity as an expression of individual autonomy, and the value of such activity to its participants does not turn on the sex of those involved.<sup>3</sup> However, the *Lawrence* majority did not explain its rejection of the state's asserted interest in the promotion of morality, which was equally important to the outcome of the case. The majority opinion simply states that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."<sup>4</sup> In her concurrence, Justice O'Connor argued that, under the Equal Protection Clause, moral disapproval of same-sex sodomy is functionally equivalent to status-based animosity toward homosexual persons.<sup>5</sup> But the majority chose to overrule *Bowers* on its face, under the Due Process Clause, and described in respectful terms the moral views it rejected as illegitimate grounds for criminalization and punishment.<sup>6</sup>

Justice Kennedy's unexplained rejection of the legal enforcement of popular morality contrasts sharply with his repeated allusions to penal goals he tacitly endorses, goals which sound in the reduction of harm and the vindication of rights. The opinion begins by noting that "[t]he petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual."<sup>7</sup> The opinion ends by reiterating that "[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."<sup>8</sup>

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<sup>3</sup> See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (invalidating a law prohibiting the sale of contraceptives to individuals under sixteen years of age); *Roe v. Wade*, 410 U.S. 113 (1973) (finding a limited right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to unmarried individuals); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting the right of married couples to use contraceptives).

<sup>4</sup> *Lawrence*, 539 U.S. at 578. Justice Kennedy does quote approvingly from a dissent in *Bowers*, in which Justice Stevens observed that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack" and concluded that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . ." *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting). Although laws that forbid interracial marriage violate the Constitution, the state interest asserted in *Loving v. Virginia*, 388 U.S. 1 (1967), was held illegitimate not because it rested on a moral conviction, but because that moral conviction was not "independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." See *id.* at 11 (describing anti-miscegenation laws as "measures designed to maintain White Supremacy").

<sup>5</sup> *Lawrence*, 539 U.S. at 583–84 (O'Connor, J., concurring).

<sup>6</sup> *Id.* at 571 ("The condemnation [of same-sex sodomy] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are . . . profound and deep convictions accepted as ethical and moral principles to which they aspire and . . . determine the course of their lives."). The Court's sympathetic portrayal of moral condemnation of intimate acts contrasts sharply with its denunciation of legislation "born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634 (1996). The Court's distinction between sincere and respectable moral disapproval of same-sex sodomy and status-based animosity toward homosexual persons cannot be analytically satisfying, but it is nonetheless at work.

<sup>7</sup> *Lawrence*, 539 U.S. at 564.

<sup>8</sup> *Id.* at 578.

In the body of the opinion, Kennedy writes that the personal and private nature of sexual intimacy in the home “should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”<sup>9</sup> Finally, Kennedy cites the American Law Institute’s Model Penal Code and the British Wolfenden Report as evidence of an emerging consensus that same-sex sodomy should not be criminalized, in large part because the underlying activity is “private conduct not harmful to others.”<sup>10</sup> This Article explains Kennedy’s rejection of legal moralism and his tacit acceptance of retribution and harm prevention through an examination of the one amendment specifically designed to govern the substantive criminal law.

In its Eighth Amendment jurisprudence, the Court has found several goals of punishment constitutionally acceptable that, though grounded in moral principles, are conceptually distinct from the enforcement of popular morality. Importantly, the penal goals that the Court has endorsed do not support the punishment of harmless acts such as consensual adult sodomy. Close scrutiny of the Supreme Court’s proportionality jurisprudence reveals that the application of a type of punishment to a category of offender or offense violates the Eighth Amendment when the punishment contributes neither to the retributive goal of penalizing rights violations in proportion to the harm caused and the violator’s culpability, nor to the goal of minimizing human suffering through deterrence as well as the incapacitation and rehabilitation of dangerous offenders. The criminalization and punishment of harmless acts is therefore unconstitutional.<sup>11</sup> Significantly, the Court has developed doctrinal techniques that limit the imputation of remote and speculative harms, preventing the prohibition on the punishment of harmless acts from collapsing into vacuity. Moreover, approval of the enforcement of popular morality as an acceptable penal goal would undermine the Court’s specific holdings and challenge the very possibility of proportionality review itself. Although it was important for the *Lawrence* Court to affirm publicly the dignity and self-respect of homosexual persons, in large part to atone for *Bowers*, intimate acts thought im-

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<sup>9</sup> *Id.* at 567.

<sup>10</sup> *Id.* at 572.

<sup>11</sup> See William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1089 (2004) (noting that *Lawrence* appears to prohibit the punishment of harmless acts); James E. Fleming, *Lawrence’s Republic*, 39 TULSA L. REV. 563, 574 (2004) (providing a rationale extending the holding of *Lawrence* to the prohibition of harmless acts); see also 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984) (providing the most detailed and refined exposition of the content and requirements of the harm principle); JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rappaport ed., 1978) (1859) (delineating the classic statement of the harm as a principle as “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”). This Article takes no position on whether the law can punish self-inflicted harm.

moral by legislative majorities need not find their only refuge in the language of liberty and privacy. The Eighth Amendment provides an independent source of substantive limitations on the scope of the criminal law.

This Article takes seriously Justice Kennedy's statement that "[t]he issue [in *Lawrence*] is whether the majority may use the power of the State to enforce [its] views on the whole society through operation of the criminal law."<sup>12</sup> Justice Kennedy sees something distinctive about the criminal law, the ends it can serve, the limits it must observe, the severity of its sanctions, and the stigmatic force it carries. More specifically, Justice Kennedy recognizes, but does not fully articulate, a connection between the constitutional limits of the criminal law and the legitimate aims of criminal punishment. This Article takes up the latter task.

## II. PROPORTIONALITY AND PRINCIPLE

### A. *History of the Doctrine*

The history of proportionality review is simple enough to sketch, but articulating the multiple legal standards governing the uneven terrain requires great care. Presenting chronologically the path of the relevant case law casts some light on why critical but subtle contours of the relevant jurisprudence have remained largely unexplained by judges and unexamined by scholars. This section consolidates the Court's maze of holdings around two distinct legal standards and relates these standards to the acceptable goals of punishment.

In *O'Neil v. Vermont*,<sup>13</sup> the Court dismissed a challenge to a \$6,638 fine for selling alcohol on the grounds that the Eighth Amendment did not apply to the states. Justice Field issued a dissent in which he argued that the Eighth Amendment prohibits not only barbarous modes of punishment but also "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."<sup>14</sup> "The whole inhibition," he wrote, "is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted."<sup>15</sup> Almost twenty years later, in *Weems v. United States*,<sup>16</sup> the Court held for the first time that the

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<sup>12</sup> *Lawrence*, 539 U.S. at 571.

<sup>13</sup> 144 U.S. 323 (1892).

<sup>14</sup> *Id.* at 339–40 (Field, J., dissenting).

<sup>15</sup> *Id.* at 340, *quoted approvingly in* *Weems v. United States*, 217 U.S. 349, 371 (1910). Many state courts have interpreted parallel clauses of their state constitutions along similar lines. *See, e.g.*, *People v. Bullock*, 485 N.W.2d 866 (1992) (overturning under the Michigan Constitution the drug sentencing law at issue in *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion)). Others need not, since their state constitutions contain explicit prohibitions of disproportionate punishment. *See, e.g.*, IND. CONST. art. I, § 16 ("All penalties shall be proportioned to the nature of the offense."); *see also* ME. CONST. art. I, § 9; NEB. CONST. art. I, § 15; N.H. CONST. part 1, art. XVIII; OR. CONST. art. I, § 16; R.I. CONST. art. I, § 8; W. VA. CONST. art. III, § 5.

<sup>16</sup> 217 U.S. 349 (1910).

Eighth Amendment requires that “punishment for crime should be graduated and proportioned to [the] offense.”<sup>17</sup> On that basis the Court held that a fifteen-year prison term involving a form of physical restraint known as *cadena temporal* was unconstitutionally disproportionate to the offense of falsifying a public document. The Court supplemented its finding of disproportionality with a recital of more serious crimes that received lighter sentences in the same jurisdiction and a comparison with federal law, which assigned a maximum sentence of two years’ imprisonment for the same offense.

The Court in *Trop v. Dulles*<sup>18</sup> ruled that an individual’s citizenship cannot be revoked for desertion in wartime, and in *Robinson v. California*<sup>19</sup> ruled that no one can be punished for the status or condition of being addicted to narcotics. Although “imprisonment . . . is not, in the abstract, . . . either cruel or unusual,”<sup>20</sup> the Court held in *Robinson* that there are certain categories of offenses, including status or condition offenses, that cannot be punished at all. The Court explained that “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>21</sup> The Court later stated in *Gregg v. Georgia*<sup>22</sup> that *Robinson* stands in part for the proposition that there exist “substantive limits imposed by the Eighth Amendment on what can be made criminal and punished.”<sup>23</sup>

The Court subsequently ruled that states cannot execute an individual for the rape of an adult woman or for certain forms of accessory felony murder in *Coker v. Georgia*<sup>24</sup> and *Enmund v. Florida*,<sup>25</sup> respectively.

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<sup>17</sup> *Id.* at 367. See also LARRY CHARLES BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 68–70 (1975) (arguing that *Weems* was the culmination of a long movement toward a requirement of proportional punishment).

<sup>18</sup> 356 U.S. 86 (1958). Only Justice Brennan, in his concurrence, directly related the penalty to the purposes of punishment. *Id.* at 105–13 (Brennan, J., concurring).

<sup>19</sup> 370 U.S. 660 (1962). See also *Solem v. Helm*, 463 U.S. 277, 287 (1983) (describing *Robinson* not as *sui generis* but as an application of proportionality review); *Powell v. Texas*, 392 U.S. 514 (1968) (refusing to extend the ruling in *Robinson* to punishment of *behavior* arising from a status, condition, or illness).

<sup>20</sup> *Robinson*, 370 U.S. at 667.

<sup>21</sup> *Id.* See also *Solem*, 463 U.S. at 290 (“A single day in prison may be unconstitutional in some circumstances.”).

<sup>22</sup> 428 U.S. 153 (1976).

<sup>23</sup> *Id.* at 172 (discussing *Robinson*); see also Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 994 (1978) (“[A]ny punishment is disproportionate if the defined offense is deemed not criminalizable.”); Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 655 (1966) (observing that in *Robinson* “the Court used the eighth amendment to limit the concept of a ‘crime’”); Herbert L. Packer, Comment, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1071 (1964) (“*Robinson v. California* may have established in the eighth amendment a basis for invalidating legislation that is thought inappropriately to invoke the criminal sanction . . .”).

<sup>24</sup> 433 U.S. 584 (1977).

<sup>25</sup> 458 U.S. 782 (1982). But see *Tison v. Arizona*, 481 U.S. 137 (1987) (authorizing capital punishment for major participation in a felony that results in death with reckless indifference to life). Reckless indifference is a highly culpable mental state and presupposes

In *Rummel v. Estelle*,<sup>26</sup> the Court upheld a life sentence with the possibility of parole for a third nonviolent felony conviction, and in *Hutto v. Davis*,<sup>27</sup> the Court upheld consecutive twenty-year terms for possession with intent to distribute and distribution of nine ounces of marijuana.

Conversely, just three years after *Rummel*, in *Solem v. Helm*,<sup>28</sup> the Court rejected a life sentence without the possibility of parole for a seventh nonviolent felony, in that case issuing a “no account” check for \$100. The Court later held, in *Thompson v. Oklahoma*,<sup>29</sup> that a death sentence is a disproportionate penalty for murder committed by an individual fifteen years old or younger. In *Harmelin v. Michigan*,<sup>30</sup> the Court upheld a life sentence without the possibility of parole for possession of 672 grams of cocaine. The Court invalidated the application of capital punishment to the mentally retarded in *Atkins v. Virginia*.<sup>31</sup> In *Ewing v. California*,<sup>32</sup> the Court upheld a sentence of twenty-five years to life for a third nonviolent felony, in that case theft of three golf clubs worth \$399 each. Most recently, in *Roper v. Simmons*,<sup>33</sup> the Court held that capital punishment cannot be imposed on those who committed their crimes before the age of eighteen.

Careful examination of the path of Supreme Court precedent reveals a striking pattern. The Court has been willing to invalidate *types* of punishment for *types* of offenses (as in *Trop*, *Robinson*, *Coker*, and *Enmund*) and *types* of punishment for *types* of offenders (as in *Thompson*, *Atkins*, and *Roper*). By contrast, the Court has generally deferred to state legislatures with respect to the appropriate *degree* of punishment (as in *Rummel*, *Davis*, *Harmelin*, and *Ewing*). The seeming exception to the pattern is *Solem*, which held unconstitutional a disproportionate length of imprisonment. However, the *Solem* majority distinguished *Rummel* in part by indicating that life imprisonment without the possibility of parole was, like capital punishment, different *in kind* from imprisonment for a term of years, because it precludes any opportunity for rehabilitation and readmission into society.<sup>34</sup>

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conscious recognition of risk of death. See *id.* at 157–58. The harm to be avoided is reasonably foreseeable and the prospect of punishment might substantially deter subsequent behavior.

<sup>26</sup> 445 U.S. 263 (1980).

<sup>27</sup> 454 U.S. 370 (1982).

<sup>28</sup> 463 U.S. 277 (1983).

<sup>29</sup> 487 U.S. 815 (1988).

<sup>30</sup> 501 U.S. 957 (1991).

<sup>31</sup> 536 U.S. 304 (2002).

<sup>32</sup> 538 U.S. 11 (2003).

<sup>33</sup> 543 U.S. 551 (2005).

<sup>34</sup> *Solem v. Helm*, 463 U.S. 277, 300 (1983). It appears that life without parole presents the rare case in which an incremental difference in degree yields a difference in kind. The difference between a light penalty and no penalty can be similarly characterized, as may the difference between a short stay in a local jail and a long term in a state or federal prison, or the difference between a misdemeanor and a felony sentence.

The differences in outcome follow a difference in analysis. The closest the Court has come to an explicit formulation of its dual standard is in *Coker*, in which the Court held that the Eighth Amendment forbids punishment that “(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”<sup>35</sup> The first standard is properly applied to determine whether the application of a type of punishment to a category of offender or offense measurably contributes to the acceptable goals of punishment, while the second asks whether a certain length of imprisonment is clearly greater than the length justified by acceptable penal goals. The differential treatment of qualitative and quantitative questions accounts for the pattern of Supreme Court rulings.

The Court applies a highly deferential standard for punishments that differ in degree, rather than in kind. The defendants in both *Rummel* and *Hutto* conceded that some length of imprisonment was appropriate for their crimes, but argued that the sentences imposed were “grossly disproportionate” to the length of imprisonment warranted by their offenses. In both cases the Justices, unwilling to “sanction[ ] an intrusion into the basic line-drawing process that is ‘properly within the province of legislatures, not courts,’”<sup>36</sup> deferred to legislative judgment. In *Ewing*—the most recent case involving an Eighth Amendment challenge to a term of years—both Justice O’Connor’s plurality opinion and Justice Breyer’s dissenting opinion embraced a deferential gross disproportionality standard. According to this standard, a length of imprisonment violates the Eighth Amendment only if it so far exceeds the length of imprisonment justified by the acceptable goals of punishment that it is clearly illegitimate.<sup>37</sup> However, the Justices disagreed as to whether the length of imprisonment at issue was “grossly disproportionate” to the crime committed given the acceptable goals of punishment.<sup>38</sup>

By contrast, the Court has applied a more demanding standard to evaluate the application of certain types of punishment for certain kinds of offenses and for certain groups of offenders. Under the measurable contribution standard, the Court must find that a type of punishment of a category of offender for a category of offense furthers the acceptable goals of punishment—retribution, deterrence, incapacitation, and rehabilitation. For instance, the justification offered for the result in *Robinson* was that the law at issue might apply in the absence of retributive desert (for example, in the case of one born addicted to narcotics) and also failed to protect

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<sup>35</sup> 433 U.S. at 592.

<sup>36</sup> *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980)).

<sup>37</sup> *Ewing v. California*, 538 U.S. 11 (2003).

<sup>38</sup> *Id.*

society better than a less severe response such as civil commitment.<sup>39</sup> Similarly, in *Enmund* the Court based its ruling in large part on the fact that the defendant neither killed nor intended to kill and therefore lacked the culpability to justify capital punishment on retributivist grounds. The Court further argued that the death penalty is not an effective deterrent for accessory felony murder because a would-be felon who does not intend or foresee that death will result will not consider such a remote possibility in deciding whether to commit the underlying felony.<sup>40</sup> *Thompson* and *Roper* followed a similar analysis, arguing that minors are both less culpable and less deterrable than adults and that capital punishment will therefore further neither retribution nor harm prevention.<sup>41</sup>

The outlier in this otherwise robust trend is, rather ironically, *Coker*, in which the Court held that execution (a type of punishment) is a grossly disproportionate punishment for the rape of an adult woman (a type of offense). The Court stated that “[b]ecause the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so.”<sup>42</sup> The ruling led early commentators to conclude that the function of the gross disproportionality standard was to make retributive desert an upper bound on the pursuit of harm prevention.<sup>43</sup> Such a reading made some sense at the time because the Court found it sufficient support for its ruling that a rapist who neither kills nor intends to kill lacks the culpability necessary to justify capital punishment. But the contours of the doctrine have shifted since *Coker* was decided. If it was not already clear from *Gregg*, it is now clear that retribution is one of the ac-

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<sup>39</sup> *Robinson v. California*, 370 U.S. 660, 667, 677 (1962).

<sup>40</sup> *Enmund v. Florida*, 458 U.S. 782, 797–801 (1982).

<sup>41</sup> *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 833–38 (1988).

<sup>42</sup> *Coker v. Georgia*, 433 U.S. 584, 592 n.4 (1977).

<sup>43</sup> See Radin, *supra* note 23. It is worth distinguishing Radin’s superb, though unfortunately timed, analysis from the one offered in this Article. Radin correctly distinguished application of the Eighth Amendment to types of punishments (as in *Trop*) from its application to type or amount of punishment for an offender for an offense (as in *Coker*). Radin correctly identified the punishment of acts that cannot be criminalized (as in *Robinson*) as a subset of the latter category, though she did not elaborate on this idea or link it to her central argument with respect to the death penalty. Radin also correctly identified retribution and harm prevention as the acceptable goals of punishment. However, in part because Radin wrote before *Solem*, she misconceived the internal structure of, as well as the relationship between, the two standards in arguing that the gross disproportionality standard made retributive desert an upper limit on measurable contribution to harm prevention. Radin failed to see that the two standards are distinct in structure and apply to different categories of cases. Her analysis therefore cannot explain the different outcomes in post-1978 cases dealing with length of sentence and categories of acts, actors, and punishments. Importantly, the different levels of deference owed to legislatures in the two contexts were not evident when she wrote. So, while Radin correctly carved up the Court’s rulings, at least those she had before her, she incorrectly interpreted (or rather forecasted) its reasoning. She therefore misunderstood how the Court’s reasoning justified its rulings.

ceptable goals of punishment, not a constraint upon the pursuit of harm prevention.<sup>44</sup> It is similarly clear that when the severity of a punishment exceeds what retribution requires, but nonetheless prevents substantial harm, it violates neither the gross disproportionality nor the measurable contribution standard.<sup>45</sup> So in *Enmund*, *Thompson*, and *Atkins* the Court evaluated the punishments imposed for the crimes charged in terms of both retribution and harm prevention.<sup>46</sup> The reasoning in *Coker* therefore misrepresents the organizing principles of the Court's proportionality jurisprudence.

Finally, it is important to note that the pivotal doctrinal distinction is not between death penalty cases and non-death penalty cases.<sup>47</sup> *Weems*, *Trop*, *Robinson*, and *Solem* are non-death penalty cases in which the Court found disproportionality between the kinds of offenses and kinds of punishments. The distinction between judgments of kind and judgments of degree not only extends beyond death penalty cases but also operates within those cases, carving out categories of offenders and offenses and exempting them from capital punishment rather than abolishing the death penalty as a method of punishment.

The use of different standards for *quantitative* questions (regarding length of imprisonment) and *qualitative* questions (whether a given type of punishment, such as imprisonment or death, can be applied to certain offenses and offenders) makes sense structurally. The application of the gross disproportionality standard to terms of years seems reasonable given that there is no judicially manageable formula by which to determine precisely the length of imprisonment that is justified by the need to prevent and punish a given offense.<sup>48</sup> One might believe that the threat of imprisonment deters theft but not know what precise length of imprisonment for theft will deter to the point beyond which further punishment would cre-

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<sup>44</sup> See, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring); *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); see also Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005) (providing incisive criticism of the disjunctive theory and a powerful defense of limiting retributivism as an Eighth Amendment norm).

<sup>45</sup> See, e.g., *Ewing*, 538 U.S. at 29–30 (finding consecutive twenty-five-year terms justified by the goal of incapacitation).

<sup>46</sup> *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 834–38 (1988); *Enmund*, 458 U.S. at 798–801.

<sup>47</sup> Cf. Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426 (2004) (arguing that there is no principled reason to restrict proportionality review to death penalty cases and that the Court should engage in more searching review of terms of imprisonment and mens rea requirements). But see *Harmelin*, 501 U.S. at 994 (plurality opinion) (“[Proportionality review is] an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law. . . . Proportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides.”).

<sup>48</sup> See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (“[O]ur decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years.”).

ate more suffering than it prevents. Similarly, one can believe that those who steal deserve to be punished in proportion to the harm they cause and the attitudes they express, but not know what length of imprisonment is proportionate to the wrongfulness of theft. Some lengths of imprisonment are clearly unjustified by the goals of punishment even in the absence of such a formula.<sup>49</sup> But in the absence of clear disproportionality, judges lack an articulable basis for overriding legislative judgment.

By contrast, categorical distinctions among types of offenses, offenders, and punishments are more amenable to reasoned evaluation in terms of the goals of punishment. They can therefore be held to the more demanding measurable contribution test. If one has reason to believe that punishing addiction fails to vindicate the rights of victims and creates more suffering than it prevents, then one can conclude that any type of punishment imposed on this category of offense fails to further the acceptable goals of punishment. The difference is not one of degree but one of kind, and sharp lines between categories of offenses and offenders can frequently be drawn and defended by reasoned argument from the acceptable goals of punishment. Such reasoned argument is fully in keeping with the role of the judiciary in our constitutional order.

Finally, it is worth noting that the six justices who found popular morality insufficient to justify criminal penalties in *Lawrence* were also concerned about preserving some scope, however limited, for proportionality review under the Eighth Amendment. The *Lawrence* dissenters, by contrast, elsewhere sought to insulate criminal penalties from judicial review. At the time *Lawrence* was decided, the Court was divided into two camps. Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer endorsed a gross disproportionality standard for review of lengths of imprisonment where imprisonment is not unconstitutional *per se*<sup>50</sup> and a measurable contribution standard for review of types of punishments as applied to types of offenders for types of offenses.<sup>51</sup> In contrast, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas rejected proportionality review in principle,<sup>52</sup> though they had indicated their willingness to accept limited proportionality review of capital cases.<sup>53</sup> Time will tell which camp, if either, will win over the Court's newest members.

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<sup>49</sup> See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (“[Deference to the legislature does not entail that] a proportionality principle would not come into play in the extreme example mentioned by the dissent . . . if a legislature made overtime parking a felony punishable by life imprisonment.”).

<sup>50</sup> See, e.g., *Ewing*, 538 U.S. at 35–53 (Breyer, J., dissenting); *Harmelin*, 501 U.S. at 996–1001 (Kennedy, J., concurring).

<sup>51</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>52</sup> See, e.g., *Ewing*, 538 U.S. at 31 (Scalia, J., concurring) (“Out of respect for the principle of stare decisis, I might nonetheless accept . . . that the Eighth Amendment contains a narrow proportionality principle . . . . This case demonstrates why I cannot.”). *Id.* at 32 (Thomas, J., concurring) (“In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.”).

<sup>53</sup> See *Harmelin*, 501 U.S. at 994 (plurality opinion) (“Proportionality review is one of

*B. Foundations of the Doctrine*

The Eighth Amendment to the United States Constitution reads as follows: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>54</sup> As previously discussed, the Court has long held that the “proportionality” or “excessiveness” of a punishment for a crime is determined through reference to the acceptable goals of punishment—retribution, deterrence, incapacitation, and rehabilitation.<sup>55</sup> The infliction of unjustified suffering is certainly one aspect of cruelty, and it stands to reason that in the context of criminal law the goals of punishment should serve as the standard for justification. The *Weems* Court articulated a second rationale—that the Eighth Amendment was designed to check legislative excess rather than judicial overreaching.<sup>56</sup> One can contrast this historical purpose and structural role with that assumed by the parallel passage in the English Declaration of Rights, which was drafted at least partly to combat cruel punishments imposed without statutory authorization.<sup>57</sup> In the English context the term “unusual” was meant to pick out unlawful, illegal, or extra-legal punishments. The Eighth Amendment cannot have shared this target, as Justice Scalia notes: “There were no common-law punishments in the federal system so [the Eighth Amendment] must have been meant as a check not upon judges but upon the Legislature.”<sup>58</sup> The ratification history, though sparse, sup-

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several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides . . . . We would leave it there, but will not extend it further.”)

<sup>54</sup> U.S. CONST. amend. VIII.

<sup>55</sup> “Excessiveness” is perhaps the most accurate description, since strictly speaking the Court has never asserted that the Constitution requires proportionate sentences, only that the sentences not exceed a proportionate punishment in severity. An especially lenient punishment, for instance, would not raise a constitutional problem. The terms “excessiveness” and “proportionality” will generally be used interchangeably. One might label the case law applying the gross disproportionality standard the “proportionality” jurisprudence, and the cases applying the measurable contribution standard the “excessiveness” jurisprudence. But such terminology might confuse more than enlighten. *See also supra* Part II.A (providing a detailed look at the two standards).

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[The Framers’] predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. . . . With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause . . . .

*Weems v. United States*, 217 U.S. 349, 372–73 (1910); *see also* *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (plurality opinion) (“[T]he Eighth Amendment is a restraint upon the exercise of legislative power.”).

<sup>57</sup> *Harmelin*, 501 U.S. at 968–74 (plurality opinion); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 859 (1969).

<sup>58</sup> *Harmelin*, 501 U.S. at 975–76 (plurality opinion) (citation omitted). It is true that

ports the claim that the Cruel and Unusual Punishments Clause was intended, at least in part, as a judicial safeguard on abuses by the national government.<sup>59</sup>

Interestingly, before the Bill of Rights was even drafted, it was suggested that the judicial power itself was directed to the moderation of federal legislation.<sup>60</sup> It may be that the founding generation, far from being suspicious of judicial review, relied upon experienced judges to temper the harshness of criminal statutes.

Fitting punishment to crime has always been and largely remains a judicial function, and there is no reason to believe that judges immersed in the day-to-day workings of the criminal justice system are less suited than career politicians to make determinations of disproportionality between types of offenses and lengths of incarceration.<sup>61</sup> Indeed, precisely because legislatures respond to popular will, they will tend to undervalue the suf-

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the prohibition on excessive fines and, especially, excessive bail indicates that the Amendment was meant to bind federal judges as well. Indeed, parallel clauses in at least two contemporaneous state constitutions were explicitly directed at state judges. *See* MASS. CONST. of 1780, pt. I, art. XXVI (“No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”); N.H. CONST. of 1784, pt. 1, art. XXXIII. At the same time, though fines and bail are generally within the discretion of judges, they can be set by statute, and there is no reason to think that the Amendment reflects an exclusive concern with abuse of judicial discretion. Similarly, there is no reason to think that the Amendment would become inoperative were Congress to take charge of the assignment of fines and bail for categories of offenses. Accordingly, the Eighth Amendment can apply to fines, bail, and punishments authorized by congressional legislation as well as to those left to the discretion of federal judges. Thanks to Akhil Amar for forcing me to confront these issues.

<sup>59</sup> *See, e.g.*, 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, AS RECOMMENDED BY THE GENERAL CONVENTION OF PHILADELPHIA IN 1787, 111 (2d ed. 1863) (recording the objection raised at the 1788 Massachusetts Convention that the unamended Constitution “nowhere restrained [Congress] from inventing the most cruel and unheard-of punishments, and annexing them to crimes”); 3 *id.* at 447 (recording the objection of Patrick Henry that “[i]n this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments”).

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[I]t is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.

THE FEDERALIST NO. 78, at 501 (Alexander Hamilton) (Robert Scigliano ed., 2000).

<sup>61</sup> *See* *Ewing v. California*, 538 U.S. 11, 34 (2003) (Stevens, J., dissenting) (“Throughout most of the Nation’s history—before guideline sentencing became so prevalent—federal and state trial judges imposed specific sentences pursuant to grants of authority that gave them uncabined discretion within broad ranges.”); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9–14 (1998) (arguing that federal judges have historically been given wide sentencing discretion within statutorily imposed sentencing ranges, discretion guided by considerations of retribution and harm prevention).

fering of criminal defendants.<sup>62</sup> As John Hart Ely argued, judicial independence enables courts to protect underrepresented groups from the vicissitudes of majoritarian politics.<sup>63</sup> Just as first-hand experience with the often harsh realities of criminal punishment renders the judiciary a competent branch to guarantee appropriate punishment, the relative inexperience of legislators with these realities makes them less suited to this function. Somewhat paradoxically, the judiciary is qualified for this checking function both by its detachment (in the sense that judges are insulated from political pressure) and by its involvement (in the sense that judges are charged with the day-to-day administration of criminal justice).<sup>64</sup>

There is an alternative view, associated with Justice Scalia, which proposes that the Eighth Amendment forbids only “cruel methods of punishment that are not regularly or customarily employed.”<sup>65</sup> This reading follows from a textual and historical argument, and structural arguments are offered in its defense. The textual strand argues that since some early state constitutions forbade “cruel or unusual punishments,”<sup>66</sup> the use of “and” must be essential to the meaning of the Amendment.<sup>67</sup> Conceding that the term “unusual” could not carry its English meaning of “illegal” or “extra-statutory,” the clause is given the ordinary meaning of the word as it was used in 1791 or thereabouts.<sup>68</sup> On this view the clause does not prohibit

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<sup>62</sup> See, e.g., Sara Sun Beale, *What’s Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997) (arguing that the scope of the criminal law and the severity of criminal penalties is driven by legislators’ desire to appear tough on crime); cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (arguing that the expansion of criminal law is also driven by tacit cooperation between legislators and prosecutors to expand prosecutorial discretion by broadening and strengthening criminal prohibitions).

<sup>63</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); see also Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 527–28 (2005) (drawing on Ely to support strong proportionality review). Stacy’s article appeared after the arguments of this Section were composed and made available online through the Social Science Research Network.

<sup>64</sup> Thanks to Akhil Amar for pointing out the role of first-hand experience in the allocation of legislative and judicial functions.

<sup>65</sup> *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (plurality opinion); see also *Atkins v. Virginia*, 536 U.S. 304, 339–40 (2002) (Scalia, J., dissenting) (“Under our Eighth Amendment jurisprudence, a punishment is ‘cruel and unusual’ if it falls within one of two categories: ‘those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted,’ and modes of punishment that are inconsistent with modern ‘standards of decency,’ as evinced by objective indicia, the most important of which is ‘legislation enacted by the country’s legislatures.’”) (internal citations omitted). It is not clear from his dissent in *Atkins* whether Justice Scalia would reject the non-historicist half of his reconstruction on originalist grounds.

<sup>66</sup> DEL. DECLARATION OF RIGHTS § 16 (1776); MD. DECLARATION OF RIGHTS § 22 (1776); MASS. CONST. of 1780, pt. 1, art. XXVI; N.H. CONST. of 1784, pt. 1, art. XXXIII; N.C. DECLARATION OF RIGHTS § X (1776).

<sup>67</sup> *Harmelin*, 501 U.S. at 967 (plurality opinion) (“[A] disproportionate punishment can perhaps always be considered ‘cruel,’ but it will not always be (as the text also requires) ‘unusual.’”).

<sup>68</sup> Notably, the dictionary Justice Scalia cites is from 1828. *Id.* at 976 (plurality opin-

punishments that are either cruel or unconventional, but only punishments that are both cruel and unconventional. A more direct textual challenge to proportionality review proceeds from the interpretive maxim that “[w]hen two parts of a provision (the Eighth Amendment) use different language to address the same or similar subject matter, a difference in meaning is assumed.”<sup>69</sup> The suggestion is that since the Eighth Amendment uses the term “excessive” to pick out the property that renders bails and fines unconstitutional and the term “cruel” to pick out the property that renders other punishments unconstitutional, the terms must refer to different properties. Indeed, as Justice Scalia observes, were the terms identical in meaning the prohibition on excessive fines (a form of punishment) would be redundant.<sup>70</sup>

In response to the alternative reading, it is submitted that Scalia’s initial step is mistaken. The words “and unusual,” far from essential to the meaning of the Eighth Amendment, are historical artifacts, much like the words “or limb” in the Double Jeopardy Clause of the Fifth Amendment; both are empty formalisms inherited from the common law tradition that in no way modify the content and requirements of the Constitution.<sup>71</sup> Nothing follows from the choice of “and” rather than “or.” If the Framers deviated from the wording of several state constitutions for the specific purpose of permitting cruel but common punishments (a fairly bizarre intent to impute on such a slim linguistic basis), one would expect some discussion, debate, or dissent, particularly from those states whose wording was not adopted. But none is to be found.<sup>72</sup> Even Justice Scalia suggests that the difference in wording is best explained by a desire to follow the wording of the English Declaration of Rights.<sup>73</sup> As for the argument from Justice Scalia’s interpretive maxim, it should be sufficient to observe that just

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ion).

<sup>69</sup> *Id.* at 978 n.9. Note that the validity of the quoted maxim is assumed strictly for the sake of argument. One can contrast Akhil Amar’s view that constitutional provisions were ratified as coherent wholes, not as isolated parts. On his view, interpretation should attempt to stress the common elements linking connected clauses. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998). This alternative conception of textual analysis would seem to support Justice Field’s interpretation. See *supra* notes 14–15 and accompanying text.

<sup>70</sup> *Harmelin*, 501 U.S. at 976 (plurality opinion).

<sup>71</sup> It is common knowledge that the Eighth Amendment forbids mutilation. See *Coker v. Georgia*, 433 U.S. 584 (1977). Accordingly, the Fifth Amendment cannot support a reading that one can even once be placed in jeopardy of losing one’s limbs (as opposed, for instance, to one’s life). In the constitutional context, as opposed to the common-law context from which it originates, the phrase “or limb” is merely rhetorical.

<sup>72</sup> See *Furman v. Georgia*, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting) (“There was no discussion of the interrelationship of the terms ‘cruel’ and ‘unusual,’ and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law.”). For extended discussion of this point see Stacy, *supra* note 63, at 502–07. Stacy also observes that several state constitutions ratified after the Federal Constitution dropped the phrase entirely from their parallel provisions. *Id.* at 504.

<sup>73</sup> *Harmelin*, 501 U.S. at 966 (plurality opinion).

because “cruel” and “excessive” are not coextensive does not mean that they are mutually exclusive. It is both linguistically natural and entirely compatible with the conclusion drawn to say that excessive punishments that deprive individuals of *life or liberty* are “cruel” within the meaning of the clause, but that excessive deprivations of *property* are not—hence the need for separate treatment.

The historical strand of Scalia’s argument proceeds from the claim that the Eighth Amendment was intended and understood to prohibit certain methods of torture and mutilation, not excessive or disproportionate punishments.<sup>74</sup> Justice Scalia argues that the fact that several state constitutions explicitly forbade disproportionate punishments indicates that the Eighth Amendment was not meant to do so. The assumption must be that, if the Framers meant to forbid disproportionate punishments, they would have done so specifically, as these states had done. It is one thing to say that a given provision forbids those activities it was intended to prohibit; it is quite another to say that the provision permits all others. Indeed, it has been suggested that the consistent practice of constitutional adjudication has been to expand upon, but never to contract, the intended scope of constitutional prohibitions.<sup>75</sup> The Framers neither specifically intended nor specifically understood the First Amendment to apply to the Internet, but no one contends that the Free Speech and Free Press Clauses do not protect electronic communication.<sup>76</sup> As the *Weems* Court noted, “Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”<sup>77</sup> If punishments that do not further the acceptable goals of punishment inflict unjustified suffering, and if punishments that inflict unjustified suffering are cruel, then it would display greater fidelity to our predecessors to extend our Eighth Amendment jurisprudence beyond its original targets to forbid punishments that in kind, in degree, or in application display the same property—cruelty—that makes the paradigmatic evils as odious to us as they were to generations past.<sup>78</sup> As for

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<sup>74</sup> *Id.* at 978–86; see also Granucci, *supra* note 57, at 839–42.

<sup>75</sup> See generally JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005).

<sup>76</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that provisions of the Communications Decency Act placing content-based restrictions on internet communication violate the First Amendment); see also *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J., concurring) (“Judges given stewardship of a constitutional provision . . . whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. . . . [I]t is the task of the judge in this generation to discern how the framers’ values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy.”).

<sup>77</sup> *Weems v. United States*, 217 U.S. 349, 373 (1910).

<sup>78</sup> See JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 224–25 (Wilfrid Sellars & Keith Lehrer eds., 1979) (arguing that respect for the Framers demands that the

the suggestion that the Framers specifically intended to *exclude* excessive punishments from the scope of the Eighth Amendment, it is again doubtful that so much can be inferred from silence. The states that specifically forbade excessive punishments may have understood the Eighth Amendment to encompass such penalties as well, and therefore felt no need to argue for a broader prohibition. As for original understanding, it strains credulity to think that a lay reader in 1791 would inform her reading of the Federal Constitution through comprehensive and rigorous comparative analysis of existing state constitutions, including those other than her own.

Finally, Justice Scalia offers a structural argument. He claims that “[w]hile there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are ‘cruel and unusual,’ *proportionality* does not lend itself to such analysis.”<sup>79</sup> In other words, since there is no formula to guide assessments of proportionate length of imprisonment, courts should defer to state and federal legislatures, whose judgments at least have the virtue of democratic legitimacy.<sup>80</sup> It is worth wondering whether it is a subtle or a confused view according to which the same provision is meant to serve both as a judicial check on legislative excess and as a requirement of judicial deference to legislative wisdom. Justice Scalia agrees that the purpose of the Eighth Amendment was to prevent legislative imposition of penalties that are too severe, not to prevent judicial intervention that, if incorrect, results in penalties that are not severe enough. The relative costs of error seem to favor excessive review. As for decision and agency costs, we have seen that the two standards the Court has developed for questions of degree (length of imprisonment where some imprisonment is admittedly justified) and questions of kind (types of punishment for categories of offense and offender) adequately enable principled evaluation, criticism, and reversal by reviewing courts.<sup>81</sup> Justice Scalia’s structural argument can therefore apply only to the former, not to the latter.

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Eighth Amendment apply to punishments that share the same wrong-making property as those specifically intended and understood to be forbidden).

<sup>79</sup> *Harmelin*, 501 U.S. at 985 (plurality opinion).

<sup>80</sup> *Id.* at 987–88.

<sup>81</sup> One might construct a second structural argument based on the historical narrative sketched by Akhil Amar. *See* AMAR, *supra* note 69. At the time of ratification, the Bill of Rights reflected a fear of centralized government and a reliance on state government and local institutions (such as the jury) to protect citizens from misuse of federal power. It could be argued that, by restricting the methods of punishment available to the federal government to those customarily inflicted by state governments, citizens could control federal penal practice from a distance. But as Amar forcefully argues, the meaning of the Bill of Rights cannot be controlled by the fears of the founding generation, for subsequent events radically changed the perception of the role of the federal government. Following the Civil War, the federal government was seen as a protective force while state governments were seen as threats to individual rights. The incorporation of the Bill of Rights through the Fourteenth Amendment requires reinterpretation of the original amendments in light of a new skepticism regarding state governments and a new reliance on federal courts to provide justice to individuals in the face of recalcitrant state practice. So even if the words ‘and

It is important not to lose sight of how impoverished our law would become were Justice Scalia's reading of the Eighth Amendment to prevail. By focusing on methods of punishment in the abstract, Justice Scalia's reading ignores the cruelty and injustice that arise in and through the application of such methods. Imprisonment has been regularly employed since 1791. Imprisonment for status or condition, disproportionate length of imprisonment, and inhumane conditions of imprisonment would all comport with Justice Scalia's view of the Constitution.<sup>82</sup> Execution is similarly customary in its employment; as such, there could be no principled objection to execution of adolescents or the mentally retarded, or to execution for crimes that do not involve intent to kill or intent to participate in criminal activity that involves killing. Not all share the view that one purpose of adjudication is to narrow the divide between law and justice, between reason and authority. But a socially beneficial development of the law should not be reversed on the uncertain basis of silence or on the inaccurate view that every word of the constitutional document corresponds to a norm of the constitutional arrangement.

### C. *Structure of the Doctrine*

Proportionality review is guided by three factors. First, courts are to compare the gravity of the offense and the culpability of the offender with the severity of the punishment inflicted. Courts are to apply the gross disproportionality standard when length of sentence is at issue and the measurable contribution standard when the challenge is to the application of a type of punishment to a category of offense or offender. Next, courts are to compare the severity of the challenged penalty with those imposed for offenses of greater and lesser gravity and upon offenders of greater and lesser culpability within the same jurisdiction. Judges are guided in these inquiries by certain "generally accepted criteria for comparing the severity of different crimes on a broad scale,"<sup>83</sup> including the level of violence involved, the magnitude of the harm caused, and the offender's mental state.<sup>84</sup> Finally, courts are to compare the severity of the punishment inflicted

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unusual' originally reflected localism (and not linguistic convention or a desire to track the language of the English Declaration of Rights), it remains the case that the Eighth Amendment that has come down to us reflects a skepticism of state practice that undermines Justice Scalia's formulation.

<sup>82</sup> See, e.g., *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (finding that conditions of solitary confinement can violate the Eighth Amendment); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that deliberate indifference to a prisoner's serious illness or injury constitutes cruel and unusual punishment in violation of the Eighth Amendment).

<sup>83</sup> *Solem v. Helm*, 463 U.S. 277, 294 (1983).

<sup>84</sup> *Id.* at 292–94 (noting that violent crimes generally warrant more severe punishment than nonviolent crimes, that more harmful acts generally warrant more severe punishment than less harmful acts, and that intentional harms generally warrant more severe punishment than negligent harms).

with the severity of punishment imposed for the same offense in other jurisdictions.<sup>85</sup>

With respect to the first factor, the Court has held that “the Eighth Amendment does not mandate adoption of any one penological theory.”<sup>86</sup> Judicial comparison of punishment severity, offense gravity, and offender culpability must therefore be guided by consideration of the contribution made by the punishment to four legitimate goals of punishment: retribution, deterrence, incapacitation, and rehabilitation.<sup>87</sup> Importantly, while application of the gross disproportionality standard is accompanied by “substantial deference” to legislative judgment,<sup>88</sup> application of the measurable contribution standard requires at most that judicial uncertainty be resolved in favor of the state.<sup>89</sup> Indeed, the Court has suggested that the state bears the burden of demonstrating a measurable contribution under the applicable standard.<sup>90</sup>

Though the relationship of the three factors has not always been clear, it seems that the second and third factors play an evidentiary role by providing intersubjective support for a judicial finding with respect to the first factor. In Justice Kennedy’s words, “[t]he proper role of comparative analysis of sentences . . . is to validate an initial judgment that a sentence is grossly disproportionate to a crime.”<sup>91</sup> The first factor calls for an independent judicial determination of proportionality given the aims of punishment; the second factor provides a baseline for comparative assessment of gravity, culpability, and severity; and the third factor provides evidence of an emerging legislative consensus that a type of offense or offender deserves a less severe punishment or no punishment or that a type of punishment should no longer be imposed.<sup>92</sup> The purpose of the second

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<sup>85</sup> *Id.* at 289–92. The role of the two standards in the first factor is not discussed explicitly, but is clear from the case law discussed in Part II.A, *supra*.

<sup>86</sup> *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

<sup>87</sup> *Id.*; see also *Weems v. United States*, 217 U.S. 349, 381 (1910) (“The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.”).

<sup>88</sup> See *Harmelin*, 501 U.S. at 998–99 (Kennedy, J., concurring).

<sup>89</sup> See *Gregg v. Georgia*, 428 U.S. 153, 175, 183–87 (1976) (plurality opinion) (suggesting that the Court must presume the validity of criminal punishment unless it finds reason to disagree).

<sup>90</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 837–38 (1988) (“[W]e are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve.”); *Enmund v. Florida*, 458 U.S. 782, 798–99 (1982) (“We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken.”).

<sup>91</sup> *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring); see also *Solem v. Helm*, 463 U.S. 277, 291–92 (1983) (“[I]t may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. . . . [C]ourts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.”).

<sup>92</sup> Justice Scalia has argued that interjurisdictional comparisons violate principles of federalism. *Harmelin*, 501 U.S. at 989–90 (plurality opinion) (“[States can punish] the killing

factor is to aid a reasoned demonstration of disproportionality; the purpose of the third requires more careful elaboration.

The validity of a judicial determination of excessiveness cannot depend on the agreement of a majority of states, for such a rule would effectively insulate from proportionality review federal laws with no state law analogues. For example, in *Trop*, a quintessentially federal offense (desertion in wartime) was met with a quintessentially federal penalty (denaturalization).<sup>93</sup> No state consensus was demonstrable because none was conceivable, yet this did not prevent the Court from striking down the law as unconstitutionally excessive.<sup>94</sup> Furthermore, the fact that a number of legislatures disagree with a judge's finding is not itself a reason to think the finding false, though it is a reason for careful scrutiny of the arguments offered in support of the unpopular conclusion. As the Court indicated in *Atkins*, where a consensus existed, "[the Court's] judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."<sup>95</sup> The Court then proceeded to "review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider[ed] reasons for *agreeing or disagreeing* with their judgment."<sup>96</sup> The Court can neither blindly accept nor simply dismiss an existing legislative consensus, but must articulate either reasons to agree or reasons to disagree with that consensus. The Court cannot simply dismiss a legislative consensus since "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."<sup>97</sup> But the Court also cannot blindly accept a consensus because "the Constitution contemplates that in the end our own judgment will be brought to bear" on questions of proportionality.<sup>98</sup> Judicial disagreement with leg-

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of endangered wild animals for which other States are offering a bounty.""). With respect to this objection, it must be remembered that the entire purpose of incorporating the Bill of Rights through the Fourteenth Amendment was to ensure greater uniformity among the states with respect to matters of basic justice. *See, e.g.,* AMAR, *supra* note 69 (arguing that the Fourteenth Amendment incorporates a single set of individual rights to be held equally by all American citizens against all states). If requiring all states to obey a constitutional norm is not a violation of federalism, it is unclear how fixing the content of the norm in part through canvassing state law could make it so. In any event interjurisdictional comparisons, though they "may be helpful," are neither necessary nor sufficient to establish disproportionality of punishment to crime. *Solem*, 463 U.S. at 291–92; *see also* *Robinson v. California*, 370 U.S. 660 (1962) (finding disproportionality without interjurisdictional comparisons).

<sup>93</sup> *See Trop v. Dulles*, 356 U.S. 86, 87 (1958).

<sup>94</sup> Interestingly, the *Trop* Court merely looked to foreign jurisdictions. *See id.* at 102–03. This is not the time or the place to defend reference to the laws of other nations to evaluate national laws with no state law analogues, but notice that in the absence of relevant state law, foreign law provides objective indicia of disproportionality.

<sup>95</sup> *Atkins v. Virginia*, 536 U.S. 304, 313 (2002) (citation omitted).

<sup>96</sup> *Id.* (emphasis added).

<sup>97</sup> *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

<sup>98</sup> *Coker v. Georgia*, 433 U.S. 584, 597 (1977); *see also id.* at 603 n.2 (Powell, J., concurring in part and dissenting in part) ("These objective indicators are highly relevant, but

islative consensus calls not for blind deference but for reasoned argument from the goals of punishment.

Because the second and third factors are designed to help in the determination of the first factor, there is no reason to think that the first factor corresponds to the word “cruel” and the third factor to the word “unusual” in the Eighth Amendment. Rather, the standard remains whether a punishment of an offender for an offense is justified by the acceptable goals of punishment. The second and third factors merely provide evidence that a punishment is not so justified. Widespread infliction cannot render a disproportionate or otherwise cruel punishment constitutionally permissible, though it can cast doubt on a judge’s finding of disproportionality. Similarly, failure to graduate the relative severity of different punishments according to the gravity of different offenses and the culpability of different offenders supports a judicial finding of disproportionality by providing baselines for comparison. If an offense is punished more severely than a number of graver crimes, and if the punishments for those other crimes are not unusually lenient, there is a strong indication that the first offense has been punished too severely.<sup>99</sup> However, an offense or offender punished less severely than more serious offenses or more culpable offenders may yet call for still less punishment or no punishment at all. Importantly, the second and third factors are rules of adjudication addressed to courts, not constitutional norms under the Eighth Amendment addressed to citizens, legislators, and executive officers.

Finally, the second and third factors ought to play a reduced role in discussions of categorical distinctions of types of offense, offender, and punishment.<sup>100</sup> Because there is no formula by which a uniquely proportionate prison term can be determined, judges must rely either on gross disproportionality or on comparative assessment not only to corroborate their independent judgment but also to justify their ruling to the public. In the case of categorical distinctions, however, judges can articulate reasons of principle in support of their rulings. One may plausibly argue that the lesser capacity of children and the mentally retarded to regulate their behavior through an understanding of their legal obligations renders capital punishment for these offenders both undeserved on retributivist grounds and useless in preventing substantial harm.<sup>101</sup> It is far more difficult to explain

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the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment as the plurality notes must be decided on the basis of our own judgment in light of the precedents of this Court.”) (citation omitted).

<sup>99</sup> Cf. Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1966) (“If one defendant receives a punishment far more severe than those imposed on others who have committed the same crime . . . [this is] evidence in itself that his punishment may be disproportionate . . .”).

<sup>100</sup> See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (finding disproportionality without interjurisdictional comparisons).

<sup>101</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 317–21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 833–38 (1988).

why a sentence of ten years for drug distribution is proportionate but one of twenty years is not. Categorical questions of the former sort can admit of principled disagreement, but at least there are principles about whose proper application one can disagree. Considerations of judicial transparency and accountability therefore support emphasizing the role of the first factor and minimizing the role of the second and third with respect to questions of kind as opposed to degree.

### III. THE ACCEPTABLE GOALS OF PUNISHMENT

The previous discussion has demonstrated that the Court has endorsed retribution and harm prevention as acceptable goals of punishment. The Court thus requires that the application of a type of punishment to a category of offender or offense measurably contributes to one or both of these aims. The following sections demonstrate that both retribution and harm prevention are analytically distinct from the enforcement of popular morality as such; that the punishment of harmless acts fails to contribute measurably to either goal and is therefore unconstitutional; and that the Court has crafted judicial techniques to limit the imputation of unforeseeable and insubstantial harm to acts, thus making meaningful this constitutional constraint and preventing cooption of harm reduction rhetoric by legal moralists.

The following section begins with a discussion of the acceptable goals of punishment. Retribution invokes the idea of a victim whose rights society must vindicate and whose violation society must avenge. By contrast, deterrence, incapacitation, and rehabilitation are all methods of harm prevention. The punishment of harmless acts cannot be justified by the accepted goals of punishment since such punishment creates more suffering than it prevents and fails to vindicate the rights of victims.

#### *A. Retribution*

As shown in Part II, the Court has looked to the relationship between harm and culpability to evaluate punishments in light of retributivist goals. The proportionality principle at the heart of retributivist theories of punishment states that the severity of punishment should be a function of the harmfulness of the criminal act and the culpability of the agent.<sup>102</sup> It follows that retributive justice supports punishment only of the harmful acts of culpable actors rather than all wrongful acts as such. Robert Nozick

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<sup>102</sup> See, e.g., Hugo Adam Bedau, *Classification-Based Sentencing: Some Conceptual and Ethical Problems*, in *CRIMINAL JUSTICE* 89, 102 (J. Roland Pennock & John W. Chapman eds., 1985) (arguing that retributive criminal penalties “must be based on two basic retributive principles: (1) the severity of the punishment must be proportional to the gravity of the offense, and (2) the gravity of the offense must be a function of fault in the offender and harm caused the victim.”).

famously characterizes the retributive function of harm and culpability as  $R = r \times H$ , where  $R$  is the retribution justified,  $r$  the degree of culpability graded on a scale from zero to one inclusive, and  $H$  the magnitude of the harm caused or risked.<sup>103</sup> When  $r$  equals zero, as in cases of infancy or insanity,  $R$  equals zero as well, so no retribution is called for. When  $H$  equals zero, as in the case of harmless acts,  $R$  again equals zero. In other words, in the absence of either harm or culpability, no type or degree of punishment can be justified on retributive grounds. The punishment of harmless acts therefore fails to contribute measurably to retributivist goals.<sup>104</sup>

The retributivist function of harm and responsibility reflects a more basic and general feature of retributive justice, namely, that punishment cannot properly be characterized as retributive in the absence of a victim who has been wronged. Retribution, like the associated concepts of retaliation, reprisal, reciprocation, and revenge, involves the idea of a victim whose rights the state seeks to vindicate. The role of the victim gives sense to retributivist metaphors of “payback,” “getting even,” and “balancing the scales.”<sup>105</sup> However, because harmless acts by definition have no victim, there is no sense in which the punishment of harmless acts amounts to retribution.<sup>106</sup>

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<sup>103</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 60 (1974); see George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 *BUFF. CRIM. L. REV.* 275, 289–90 (proposing the formula “ $C = W$  times  $r$ , where  $W$  stands for wrongdoing,  $r$  for the degree of personal responsibility, and  $C$  for the level of culpability.  $W$  increases with the level or harm or proximity of the threat of harm;  $r$  varies between 0 and 1. It is lower for negligently risking harm than for intentionally bringing it about. In the case of excuses,  $r$  is reduced to 0.”) (internal citations omitted); see also MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE* (1992) (providing the view that just punishment negates the unfair advantage that a criminal gains by refusing the burden of compliance with a given law while benefiting from the compliance of others). Note that since individuals gain no personal benefit from general obedience to impersonal moral norms, they gain no unfair advantage by violating such norms themselves. Davis’s view therefore entails that violation of impersonal norms should not be punished.

<sup>104</sup> Cf. H. L. A. HART, *LAW, LIBERTY, AND MORALITY* 59–60 (1963) (arguing that retributive justifications of punishment are most plausible when the act punished involves both an offender and a victim); Michael Davis, *Harm and Retribution*, 15 *PHIL. & PUB. AFF.* 236, 248 (1986) (“The criminal law cannot make a ‘harmless’ act punishable because without harm there is, according to *lex talionis*, nothing to measure deserved punishment against. Since it would be unjust to punish to any degree what cannot deserve punishment to any degree, for *lex talionis* prelegal conditions limit what the law can punish.”); Douglas N. Husak, *Desert, Proportionality, and the Seriousness of Drug Offenses*, in *FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH* 187, 217–18 (Andrew Ashworth & Martin Wasik eds., 1998) (“If the seriousness of crime is dependent on harm and culpability, a criminal offense designed to prevent an obscure harm, and which involves little or no culpability, must have a degree of seriousness that approaches zero . . . . If a person does not deserve to be punished for what he has done, his conduct should not have been criminalized in the first place.”).

<sup>105</sup> For an extended treatment of this point see 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 159–65 (1988) [hereinafter FEINBERG, *HARMLESS WRONGDOING*]. Surprisingly, Feinberg does not explicitly link the role of the victim in retributive theory to the harm principle he articulates.

<sup>106</sup> At least one prominent retributivist has argued that an act intended to harm another should be punished even when no harm occurs. See Michael S. Moore, *The Independent*

In *Roper*, Justice Kennedy offers two interpretations of retribution: “as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim.”<sup>107</sup> On the latter interpretation, retribution clearly requires the existence of a victim whose rights the state seeks to vindicate through punishment. The former, expressivist interpretation seems not to require the existence of a victim, but its broad language is misleading. Kennedy immediately goes on to state that the punishment that is the medium of expression must be proportional to the offending act.<sup>108</sup> The clearest statement of the Court’s conception of proportionality comes from Justice O’Connor’s dissenting opinion in *Roper*, which endorses the majority’s approach but differs as to the result. Justice O’Connor cites her opinion in *Enmund* for the proposition that “the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant’s blameworthiness.”<sup>109</sup> The expressivist interpretation remains tethered to the retributivist commitment to the rights of victims, and the attitudes expressed through punishment include not only outrage at the act and disavowal of the actor but also, critically, solidarity with victims.<sup>110</sup>

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*Moral Significance of Wrongdoing*, 1994 J. CONTEMP. LEGAL ISSUES 237. According to this view, which can be called the intended-harm view, punishment can qualify as retributive even when there is no actual victim, so long as there is an intended victim. Note that even under the intended-harm view, punishment is justified not by the wickedness of an individual’s inner thoughts but by the attempt to harm another. Thus even under the intended-harm view, punishment of acts that neither harm nor attempt to harm does not further retributive goals.

There is a more parsimonious account, which can be called the actual-harm view, according to which attempts to injure do in fact harm the individual to whom the attempts are directed. Under the actual-harm view, attempts violate an individual’s right to be free from unreasonable risks deliberately or recklessly imposed by others, and damage her interest in security from such deprivations. Just as not every diminution of welfare is a harm (e.g., the withdrawal of a benefit), not every harm is a diminution of welfare. Cf. Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963 (2003). Finally, under the actual-harm view, the rights that attempts violate and the interests that attempts set back are of less importance than the rights violated and interests set back by completed crimes. Cf. Feinberg, *supra* note 11, at 207 (arguing that interests in welfare are more important than interests in security, though both ought to be protected by the criminal law). The actual-harm account therefore supports less punishment for attempts than for completed acts, another distinguishing feature of retributive accounts. See, e.g., George P. Fletcher, *What is Punishment Imposed For?*, 1994 J. CONTEMP. LEGAL ISSUES 101; Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 697–99 (1994); Moore, *supra*.

Note that Kadish’s critique of “the harm doctrine” (that completed crimes should be punished more severely than attempts) is not a critique of the harm principle (that only acts that harm or attempt to harm can be punished). So far as the harm principle is concerned, attempts and completed crimes can be punished identically. The arguments below deploy the actual-harm account, though they could, *mutatis mutandis*, deploy the intended-harm account to equal effect. On either conception, punishment of acts that do not cause, threaten, or intend harm does not further retributive goals.

<sup>107</sup> *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

<sup>108</sup> *Id.*

<sup>109</sup> *Enmund v. Florida*, 458 U.S. 782, 815 (1982) (O’Connor, J., dissenting).

<sup>110</sup> See *infra* Part IV.C.

Some have argued that retributivism takes an offender's bad character rather than an offender's wrongdoing to justify criminal punishment.<sup>111</sup> It is difficult to identify a prominent retributivist who has argued that punishment can be deserved in the absence of a wrongful act, nor have any appeared to suggest that the severity of punishment should primarily reflect the defectiveness of the offender's character rather than the wrongfulness of the offense. Confusion might arise from two areas of penal law in which wrongdoing and character interact to determine an offender's just deserts. First, some legal excuses disassociate an offender from an offense by showing that the offense does not spring from defects in the offender's character. Second, character evidence sometimes provides aggravating and mitigating factors at sentencing; the wrongfulness of the act sets a range within which consideration of the agent's character can yield a specific point. Retribution is imposed *for* an act but *upon* an agent, and for this reason the act must arise from the agent's beliefs, desires, and dispositions. Otherwise, we would hardly be justified in holding the act against the agent or holding the agent answerable for the act. Hence the effect of legal excuses is to relieve offenders of criminal liability.<sup>112</sup> Moreover, the scope, stability, and duration of the motivational basis of the act determine the degree to which the act reflects upon the agent. A higher sentence may be warranted when the offense reflects a negative character trait rather than the interaction of unusual circumstances with beliefs, desires, and dispositions that are not themselves vicious.<sup>113</sup>

Confusion might also arise due to an ambiguity in the views of one prominent retributivist. Some think that Immanuel Kant argued that retributive justice involves the distribution of happiness and misery in proportion to the relative moral virtue of individuals. This understanding mistakes Kant's view of retributive justice, which focuses on rights violations,<sup>114</sup> for his view of distributive justice, which focuses on moral character.<sup>115</sup>

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<sup>111</sup> See, e.g., Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1903 (2006).

<sup>112</sup> This is the meaning of Nozick's statement that punishment is only appropriate for acts "that stem from some or another character defect." ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 383 (1981). Greene incorrectly takes this statement to indicate that retributive punishment is a response to bad character rather than wrongdoing. See Greene, *supra* note 111, at 1903 n.233.

<sup>113</sup> For a more thorough discussion of the relationship between action, character, and blameworthiness, see GEORGE SHER, *IN PRAISE OF BLAME* (2006).

<sup>114</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 105 (Mary Gregor ed., 1996) (1797) ("*Punishment by a court (poena forensis)*—that is distinct from *natural punishment (poena naturalis)*, in which vice punishes itself and which the legislator does not take into account—can never be inflicted merely as a means to promote some other good for the criminal or for civil society. It must always be inflicted upon him only *because he has committed a crime.*")

<sup>115</sup> IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 206 (Thomas Kingsmill Abbott ed., Longman's Green & Co. 1909) (1873) ("[T]he distribution of happiness in exact proportion to morality (which is the worth of the person, and his worthiness to be happy) constitutes the *summum bonum* of a possible world.")

Kant never intended his distributive principle to be applied by human institutions since, in his view, we can neither know nor judge the contents of the human will. Indeed, Kant's argument for the existence of an omniscient and just God hinges on both the moral validity of the distributive principle and the inability of human beings to satisfy its demands.

By contrast, the structure of Kant's political philosophy compels a victim-centered theory of punishment. Kant begins with a conception of rights as coercively enforceable moral claims. Disagreement over the boundaries of rights leads individuals in the state of nature into perpetual conflict, all believing their use of force morally justified. The sole purpose of the state, then, is to define the boundaries of rights through legislation, to settle disputes over those boundaries through adjudication, and to create an executive with sole and exclusive authority to coercively enforce the rights delineated.<sup>116</sup> The only acts that may be criminalized and punished are, therefore, acts that violate the rights of individuals or that impair the ability of the state to perform its rights-delineating and rights-enforcing functions. Kant's character-centered theory of distributive justice must not be confused with his victim-centered theory of retributive justice.<sup>117</sup>

There is, however, one leading retributivist who has departed from the victim-centered tradition of retributive theory. In recent years, Michael Moore has proposed a form of retributivism in which punishment is justified not by the violation of a right but by the violation of an obligatory (as opposed to a supererogatory) moral norm.<sup>118</sup> Moore is quick to add that punishment is justified only by violation of true or correct moral norms, not merely those moral norms accepted by society.<sup>119</sup> He also notes that in his view the moral norms that are both correct and obligatory are predominantly rights based and victim relative.<sup>120</sup> Moore also argues that social

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<sup>116</sup> Christine M. Korsgaard, *Taking the Law into Our Own Hands: Kant on the Right to Revolution*, in RECLAIMING THE HISTORY OF ETHICS: ESSAYS FOR JOHN RAWLS 297, 300–03 (Andrews Reath, Barbara Herman & Christine Korsgaard eds., 1997); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996).

<sup>117</sup> See also Thomas E. Hill, *Kant's Anti-Moralistic Strain*, in DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 176 (1992); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 524–28 (1987). Similarly, the suffering of individuals of bad character can satisfy certain common human emotions, but these are not retributive emotions. The punishment of vice as a character trait, considered as an aspect of the legal enforcement of popular morality, will be addressed and critiqued in Part IV.A. At this stage, we need only flag this goal as an alternative to, rather than an aspect of, retributive justice.

<sup>118</sup> Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 69–70 (1999).

<sup>119</sup> MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 662–63 (1997).

<sup>120</sup> Moore, *supra* note 118, at 70–71. Note that Moore in this essay labels (and rejects) “rights-based retributivism,” the view that victims should have the right to spare the offender any punishment. *Id.* at 75–77. This view is of course different from “the basic retributivist conclusion that culpably done wrongs (rights-violations) demand punishment.” *Id.* at 84.

costs can justify withholding even deserved punishment for minor offenses,<sup>121</sup> that a presumption of liberty always counts against criminalization,<sup>122</sup> and that respect for a moral right to make self-defining choices forbids punishment of certain kinds of wrongs (e.g., self-regarding wrongs).<sup>123</sup> Moore's substantive moral positions therefore close any gap between the policy outcomes generated by victim-centered and norm-centered retributivism.<sup>124</sup>

One can certainly imagine, however, an unrestricted norm-centered retributivism that rejects the qualifications introduced by Moore's substantive moral positions. Such a view would lie outside the mainstream retributive tradition, centered around *lex talionis* and related concepts of returning harm for harm. The persuasiveness of the view would also suffer. Moore defends his position by soliciting moral intuitions regarding hypothetical cases in which punishment would not prevent future harm and may therefore be justified only as a response for past wrongs. To accommodate his own substantive moral views, Moore's central examples involve serious rights violations where the offenders have escaped justice for many years, are largely forgotten, and no longer pose a threat to society. These examples draw upon the sense of many people that to fail to punish in such cases would be to abandon the victims of past wrongs and to ignore the independent moral significance of their past suffering.<sup>125</sup> These victim-centered intuitions lie at the core of the retributive impulse, which cannot be sustained absent a victim to ground a continuing duty to punish.

It cannot suffice to argue that norm-centered retributivism is not the best or most convincing form of retributivism from a philosophical perspective. Doctrinal reasons may ultimately prove decisive. Victim-centered retributivism helps to ground the "generally accepted criteria" of relative seriousness discussed in *Solem*.<sup>126</sup> These criteria are meant to consolidate retributivist and preventionist concerns with relative harmfulness and the relative advertence to harm which grounds both culpability and responsiveness to deterrent sanctions. However, according to norm-centered retributivism, appropriate punishment is a function of the relative importance of the norm violated. Although Moore argues that the relative importance of a norm is in turn a function of the harm caused by its violation, this

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<sup>121</sup> MOORE, *supra* note 119, at 663–65.

<sup>122</sup> *Id.*, at 747–48; Moore, *supra* note 118, at 76–78.

<sup>123</sup> MOORE, *supra* note 119, at 763–77.

<sup>124</sup> See, e.g., *id.* at 756 (arguing that most private sexual activity, including that between same-sex couples, is not immoral and therefore should not be criminalized, regardless of the views of democratic majorities).

<sup>125</sup> These intuitions are only imperfectly captured by George Fletcher's arguments—which Moore rightly criticizes but too lightly casts aside—that punishment disrupts the continued domination of offender over victim and that failure to punish demonstrates a lack of concern and respect for victims. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51 (1999).

<sup>126</sup> See *supra* note 84 and accompanying text.

view derives not from the structure of his penal theory but from the content of his independent, substantive moral theory. On other views, harm can play a limited role, or even no role at all, in determining the importance of a norm. In the face of social disagreement over the correct moral theory, judges will be unsure how to measure the severity of any norm violation, whether harmful or harmless. Such determinations are arguably not within the competence (or at least the comfort level) of judges. Moreover, if judges are already inclined to defer to legislative judgments of relative harmfulness they will be even more inclined to defer to legislative judgments of relative wrongfulness.

The relationship between wrongfulness and harmfulness is not determined by norm-centered retributivism, but rather by the substantive moral positions of its adherents, which may vary considerably. This view cannot provide alternative criteria for judicial assessment of relative seriousness, and undermines even the limited ability of harm prevention concerns to limit permissible punishment. Since retribution and harm prevention apparently provide alternative bases for punishment, punishments whose severity is justified by one cannot be limited through reference to the other. Judicial endorsement of unrestricted norm-centered retributivism would not only introduce a substantively dubious penal theory into constitutional law, but also spell the end of proportionality review itself.

### *B. Harm Prevention*

In addition to retribution, the Court has identified deterrence, incapacitation, and rehabilitation as acceptable goals of punishment, goals which seek not the vindication of rights but the prevention of harm. Harm prevention as a penal goal has historically arisen in association with the utilitarian theory of criminal punishment. Utilitarian theories of punishment begin with the intuition that all human suffering is equally objectionable, and conclude that the proper purpose of punishment must be to minimize human suffering through specific and general deterrence, incapacitation, and rehabilitation. Punishment is considered excessive when the suffering imposed on those who commit a given offense is greater than the suffering prevented.<sup>127</sup> Punishment of harmless acts inflicts suffering on the offenders while failing to prevent suffering through either deterrence of the harmless acts in question or incapacitation or rehabilitation of dangerous offenders. Punishment of harmless acts therefore does not further preventionist goals.

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<sup>127</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 159 (J. H. Burns & H. L. A. Hart eds., 1970) (1789) (arguing that punishment should not be imposed when “there is no mischief for it to prevent,” when “the mischief it would produce would be greater than what it prevented,” or when “the mischief may be prevented . . . at a cheaper rate”); see also MILL, *supra* note 11 at 73–113.

The Court's endorsement of harm prevention does not extend, however, to an endorsement of what can be called unrestricted utilitarianism. Unrestricted utilitarianism seeks not merely to prevent suffering but also to create happiness, and in the penal context this goal could potentially justify punishment of acts beyond the point of optimal deterrence, (where an increase in severity fails to generate a decrease in overall suffering), if society would take pleasure in the suffering of the defendant. It is doubtful that the Court would contemplate negative external preferences in marking the bounds of permissible punishment.<sup>128</sup> In addition to sadistic punishment, unrestricted utilitarianism considers all human suffering equally regrettable, in opposition to those who would count the welfare of future victims more heavily than the welfare of past offenders.<sup>129</sup> The Court has not taken a position on the question of equal weight. However, as the following Section shows, the harm prevented must be substantial, even if it does not exceed the harm to the offender, which unrestricted utilitarianism would require.

### C. *Limitations on the Imputation and Punishment of Harm*

The *Lawrence* Court left unclear whether the activity *Lawrence* protected fell under a fundamental right, the infringement of which calls for strict scrutiny, or merely a liberty interest subject to rational basis review. This ambiguity leaves *Lawrence* vulnerable to circumvention by states claiming their sodomy laws are designed not to enforce popular morality but to prevent harm by stemming the spread of disease. Though both over- and under-inclusive, such a rationalization may nonetheless satisfy the highly deferential rational-basis test.<sup>130</sup> More generally, it could be argued that the preventionist conception of harm is too broad to determine

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<sup>128</sup> Negative external preferences are desires that the welfare of others be reduced. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 234–36 (1977) (arguing that a utilitarian commitment to the equal importance of each person's welfare cannot co-exist with the legal enforcement of negative external preferences). Among other things, legal validation of such sadistic impulses seems incompatible with the proposition that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). It would be bizarre to count the pleasure a violent criminal takes in brutalizing another person as weighing against, rather than in favor of, punishment, and it is unclear why similarly malevolent preferences should be endorsed elsewhere.

<sup>129</sup> Joel Feinberg has argued that the law need not give equal weight to the rights of victims and the welfare of rights violators. The law can be partial to victims and can sacrifice the welfare of rights violators to better protect rights from violation. FEINBERG, *supra* note 11, at 189. Such an approach might be plausible but, since acts that do not violate rights have no victims, the punishment of harmless acts cannot be justified by the law's preference for victims.

<sup>130</sup> See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999) (arguing that legal moralists have co-opted the language of harm prevention to rationalize criminalization of putatively immoral behavior, and specifically discussing disease-prevention rationales for prohibitions on same-sex sodomy suggested during the early days of the spread of HIV/AIDS).

the limits of criminal legislation.<sup>131</sup> Critics charge that it is always possible to impute some harm, however minor or remote, to a category of apparently harmless acts.<sup>132</sup> Such a charge endangers not only the right protected by *Lawrence*, but also any broader prohibition on the punishment of harmless acts.

Interestingly, the Court's Eighth Amendment jurisprudence contains techniques with which to limit the imputation of harm as a basis for criminal punishment. In cases in which the application of some type of penalty to the act and actor punished is concededly constitutional, and the only question is how severe the punishment may be, the Court has promised to sustain penalties except where "grossly disproportionate" to the crime committed given the acceptable goals of punishment. The gross disproportionality standard is a direct analogue to the rational-basis test, which demands deference to the legislature so long as some reasonable relation to a legitimate state interest can be found.<sup>133</sup> By contrast, in cases that challenge the application of a type of punishment to a category of offense or offender, the Court has made a more searching inquiry into whether the sentence imposed for the crime committed makes a "measurable contribution" to acceptable penal goals. In cases such as *Lawrence*, which challenge the application of any type of punishment to a given category of act, the stricter measurable contribution standard applies. Importantly, the Court's elaboration of this latter standard has provided legal techniques by which to limit the class of harms imputable to acts and actors to those that are reasonably foreseeable and the occurrence of which will be substantially reduced by criminal punishment. In this way the Court's Eighth Amendment jurisprudence precludes co-option of the acceptable goals of

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<sup>131</sup> For the preventionist, harm describes any diminution in welfare, paradigmatically physical or psychological suffering. For the retributivist, focused on the role of the victim in the justification of punishment, the concept of harm incorporates the idea of a wrong to the individual whose welfare is diminished. Only setbacks of interest that are or follow upon wrongs to the victim, violations of her rights, are considered harms. For this reason, the retributivist conception of harm is not as elastic as the preventionist conception.

<sup>132</sup> See Harcourt, *supra* note 130; cf. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29 (arguing that minor quality-of-life and public-order offenses can create a culture of disorder in which more serious crimes will occur). *But see* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001) (disputing Wilson's view and empirical support offered for it). Wilson himself has come to view the broken windows theory as "speculation." Dan Hurley, *On Crime as Science (One Neighbor at a Time)*, N.Y. TIMES, Jan. 6, 2004, at F1.

<sup>133</sup> Indeed, Justice Kennedy has come perilously close to equating the two standards. See *Ewing v. California*, 538 U.S. 11, 30 (2003) ("[California's three-strikes law] reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."); *Harmelin v. Michigan*, 501 U.S. 957, 1004 (1991) (Kennedy, J., concurring) ("[A] rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which 'no sentence of imprisonment would be disproportionate.'") (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.15 (1983)).

punishment in order to rationalize criminal laws enacted and supported on moralistic grounds.

In both *Enmund* and *Thompson* the Court made clear that a measurable contribution to preventative aims must be neither speculative nor insubstantial. Even when the harm to be prevented was death, the Court found that a preventative effect that is fictional at worst and marginal at best fails to justify criminal punishment.<sup>134</sup> Presumably, no measurable contribution to preventative aims would be found when the harm asserted is less grave and the preventative effect of legislative response equally speculative or insubstantial. One way of characterizing this result is to say that the Eighth Amendment, no less than the Fourteenth, requires a fit between ends and means and that the breadth of criminal legislation cannot be justified by its preventative effect in isolated cases.

In a similar vein, *Enmund* indicates the existence of constitutional principles of fair imputation of harm to an individual, such that only foreseeable and avoidable harms that enable specific deterrence and establish moral culpability may provide the basis for punishment.<sup>135</sup> Punishment for harms that are not foreseeable or not avoidable will not have a clear and substantial preventative effect, nor does their occurrence typically speak to the moral quality of the underlying act. Thus there is precedent for limiting imputable harms to those foreseeable and avoidable by the putative offender. Indeed, the Court has gone further still. Citing *Weems* and *Robinson*, the majority noted that “the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing” and found that the defendant in *Enmund* could not be punished for

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<sup>134</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 837–38 (1988) (“[E]xcluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders . . . . The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent . . . . We are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve.”) (emphases added); *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (“[T]here is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself. This conclusion was based on three comparisons of robbery statistics, each of which showed that only about one-half of one percent of robberies resulted in homicide.”) (citations omitted).

<sup>135</sup> *Enmund*, 458 U.S. at 798 (“The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund’s own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on ‘individualized consideration as a constitutional requirement in imposing the death sentence,’ which means that we must focus on ‘relevant facets of the character and record of the individual offender.’”) (citations omitted); *id.* at 800 (“As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund’s culpability—what Enmund’s intentions, expectations, and actions were.”); *id.* at 801 (“Enmund’s criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.”).

the death caused by his accomplices contrary to his “intentions, expectations, and actions.”<sup>136</sup> Although the focus on intentional wrongdoing appears within a discussion of the retributive basis for punishment of accessory felony murder, the Court has suggested that retributive desert, though not an upper bound on the severity of punishment, is a necessary condition for the application of punishment in the first instance.<sup>137</sup> In sum, the Court’s discounting of speculative and minimal preventative effects and restriction of imputable harms to those foreseeable and avoidable by the putative offender prevent the constitutional prohibition on the punishment of harmless acts from collapsing into vacuity.

#### IV. THE ENFORCEMENT OF POPULAR MORALITY

It has been argued above that neither retribution nor harm prevention supports the criminalization and punishment of harmless acts. However, the immorality asserted in *Lawrence* was not linked to the violation of a right or to the infliction of suffering, but to impersonal norms of appropriate sexual behavior. As we have seen, the *Lawrence* Court declined to expand the list of constitutionally legitimate aims of punishment to include the enforcement of popular morality. What remains to be shown is that the Court was correct to exclude this aim from the set of acceptable penal goals.

The enforcement of popular morality is susceptible to multiple interpretations, not all of which can be addressed here. The following discussion focuses on the punishment of bad character, the deterrence of immoral behavior, and the expressive condemnation of wrongful acts. The first and second interpretations directly challenge both the specific holdings and the conceptual coherence of the Court’s Eighth Amendment jurisprudence, bringing them squarely within the scope of this Article. The third interpretation suggests that accepting the powerful insights of expressive theories of crime commits one to an expressive theory of punishment sufficiently capacious to justify criminalization of any act that expresses incorrect values, simply to express moral condemnation. Given the considerable appeal of the expressive theory of crime, its relationship to the expressive theory of punishment demands immediate attention.

##### A. *Punishing Character*

The punishment of bad moral character might be valued in itself as a requirement of quasi-Kantian distributive justice, according to which happi-

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<sup>136</sup> *Id.* at 800.

<sup>137</sup> See *Thompson*, 487 U.S. at 834 (“It is generally agreed ‘that punishment should be directly related to the personal culpability of the criminal defendant.’”) (citation omitted); *id.* at 836 n.44 (citing *Enmund* for the position that with respect to retributive desert, “[w]e have invalidated death sentences when this significant justification was absent”).

ness should be proportioned to virtue and misery to vice.<sup>138</sup> Alternatively, the punishment of bad character might be valued as a means of cultivating good moral character for its own sake rather than for the sake of any harm prevention that might result. The punishment of vicious character, though occasioned by action, targets thought, and so cannot be accepted in a liberal democracy in which freedom of one's mental life is accorded foundational value.<sup>139</sup> Moreover, punishment of the mere desire for sexual intimacy with a member of one's own gender would run against the strong indication of *Robinson v. California* that mere dispositions cannot be the object of criminal law.<sup>140</sup>

Punishment as a means of instilling virtue operates not to penalize some thoughts but rather to compel others, an equally unacceptable objective. Of additional concern in the context of same-sex sodomy is that the calculated elimination of homosexuality—a way of life which certainly goes beyond, but also necessarily includes, the desire for sexual intimacy with members of one's own gender—amounts to a kind of cultural genocide. As the Court found in *Romer*, the desire to heap disadvantage for its own sake upon a despised group cannot be countenanced as a legitimate state interest.<sup>141</sup> Accordingly, though it would be surreal to speak of extermination as a mere disadvantage, the prohibition clearly applies.

### B. *Deterring Immoral Behavior*

Popular morality might also be enforced through deterrence of harmless but immoral behavior. On such a view, the goal of deterrence is untethered from its traditional utilitarian moorings. If the goal is simply to minimize wrongdoing, then the severity of punishment is constrained not by the suffering averted but by the margin beyond which an increase in severity fails to yield an increase in compliance. Acceptance of such a goal in the context of harmless acts would sanction the infliction of great

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<sup>138</sup> See *supra* notes 115–117 and accompanying text.

<sup>139</sup> See *United States v. Balsys*, 524 U.S. 666, 714 (1998) (“[T]he First Amendment protects against the prosecution of thought crime.”); *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (“[The government] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.”); *Wieman v. Updegraff*, 344 U.S. 183, 193 (1952) (Black, J., concurring) (“Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts.”).

<sup>140</sup> 370 U.S. 660, 678–79 (1962) (Harlan, J., concurring) (“Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act, [which] is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law.”); see also *Powell v. Texas*, 392 U.S. 514 (1968) (declining to extend the ruling in *Robinson* to punishment of *behavior* arising from a status, condition, or illness). Note that dispositions to perform certain actions under certain conditions are not the only form of disposition; we can also speak of dispositions to believe or to desire.

<sup>141</sup> See *Romer v. Evans*, 517 U.S. 620, 634 (1996).

suffering while preventing none (utilitarian failure) where the severity of punishment is not a function of the gravity of the offense or the culpability of the offender (retributive failure).

The implications of such a goal range far beyond harmless acts. Given that most criminal acts are arguably immoral, the sub-optimal deterrence of harmless wrongdoing would utterly eviscerate the Eighth Amendment's guarantee of proportionality. Such a view would sanction, if not "[a] statute that levied a mandatory life sentence for overtime parking [to] deter vehicular lawlessness,"<sup>142</sup> equally severe punishments for, say, petty theft by a first-time offender. The Court could not accept a goal that would so completely undermine any notion of proportionate sentencing.<sup>143</sup>

One might argue that the deterrence of wrongdoing could be limited by weighing the suffering of the defendant against not the harmfulness but the wrongfulness of the act committed. However, as shown in Part III.C, if the wrongfulness of the act is determined neither by the harm caused or risked nor the fault of the actor but rather by the importance of the violated norm, then the importance of the norm is fixed not by the structure of the accepted penal theory but by substantive moral theory. Unable to rely on the objective criteria relating to harm and advertence to harm cited in *Solem*—which derive from retribution and harm-prevention—and forbidden from relying on their own personal moral views, judges would have no choice but to abandon proportionality review entirely.

### C. *Expressive Condemnation*

In recent years the ongoing debate over the enforcement of popular morality has featured a new voice, one fluent in the idiom of expressive or communicative theories of law.<sup>144</sup> Dan Kahan is the most significant contemporary author to suggest that the expression of social condemnation may be sufficient to justify punishment of individuals who display defective moral values.<sup>145</sup> Before turning to Kahan's interesting and im-

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<sup>142</sup> See *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting), cited approvingly by the majority at 274 n.11.

<sup>143</sup> It is also worth asking whether a liberal democracy, in which persons are thought to be the principal objects of moral concern, can accept a penal goal that does not ultimately refer to the rights or welfare of persons. This is not to ask whether social ideals can be pursued through the criminal law, only whether the ideals pursued can be impersonal in the sense that their achievement will not ultimately redound to the advantage of persons in the enjoyment of their rights or the pursuit of their happiness.

<sup>144</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (discussing the difference between expressive and communicative theories).

<sup>145</sup> Kahan is known for his sophisticated expressive theory of crimes, sketched below, and in his writing he often assumes that an expressive theory of punishment follows from it. To date he has not, in writing, fully elaborated the argument discussed in this Article, which he has posed to the author in conversation. Indeed Kahan has, in at least one case, deliberately avoided drawing out the implications of his view for victimless crimes. In the introductory section of one writing, Kahan observes that "the law often treats disgust to-

portant argument, it is worth noting that his is a minority view even among expressive theorists of the criminal law.

Joel Feinberg's landmark article examined various evaluations expressed through criminal punishment, including condemnation of acts, disavowal of actors, and absolution of others, and argued that the expression of such evaluations distinguishes punishment from other forms of regulation.<sup>146</sup> At the same time, Feinberg rejected the imposition of "hard treatment" based on expressive considerations alone, favoring a preventive justification of punishment.<sup>147</sup> For Feinberg, expressive condemnation is a structural feature of punishment, not a justification for punishment; it is an aspect of the means used, not of the objective sought. Other leading expressivists have self-consciously articulated expressive theories of retribution. Rather than reject the principle of retributive justice that the severity of punishment should be a function of the harmfulness of the act and the fault of the actor, Jean Hampton and George Fletcher attempt to explain the normative force of that principle. Both Hampton and Fletcher show that retributive justice expresses social solidarity with victims, acknowledges their moral equality to the offender, and reaffirms their individual moral worth.<sup>148</sup> Importantly, none of these approaches call for punishment in the absence of a victim.

As a general matter, expressive and communicative theories of punishment are subject to several powerful objections. Proponents may believe that the communication of moral judgments is desirable because internalization might improve moral character, or because the stigma that attaches to immoral acts might reduce their incidence. Communicative

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ward an activity—such as obscenity or sodomy—as sufficient to make it criminal” and asks “[i]s disgust by itself a legitimate ground for coercion?” Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1623 (1998). Strangely, Kahan never returns to this question, even though he addresses each of the questions that precede it. In any case, the argument addressed in this Article is one he has privately endorsed.

<sup>146</sup> Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965).

<sup>147</sup> See *id.* at 423 (“[T]he more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes and the degree to which people are disposed to commit it.”); see also 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* 150 (1985).

<sup>148</sup> See, e.g., George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1633 (1993) (“The state’s intervention communicates condemnation of the crime and solidarity with the victim. By prosecuting, the state’s officials say to the victim and his or her family: ‘You are not alone. We stand with you, against the criminal.’”); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992) (arguing that the purpose of punishment is “to vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity”). Similarly, at least one leading torts scholar has sought to explain the normative force of the principle of corrective justice as “a way of expressing the nature of responsible agency to one another in our legal practices.” Jules Coleman, *The Costs of The Costs of Accidents*, 64 MD. L. REV. 337, 353 (2005).

goals, however, face the same difficulties as the punishment of bad moral character and the deterrence of harmless immorality. Because punishment is itself the conduit of the moral message, its infliction to further the ends listed amounts to the compulsion of thought and sets no acceptable cap on its severity.<sup>149</sup> Similarly, the notion that the expression of moral attitudes is intrinsically valuable is subject to well-known criticisms.<sup>150</sup>

Interestingly, Kahan's contentions run orthogonally to arguments regarding the intrinsic or instrumental value of the expression of moral attitudes through punishment. Kahan sets out to show that such expression so thoroughly pervades our criminal law that a rejection of its legitimacy would be tantamount to a rejection of the criminal law enterprise itself. Kahan's argument can best be understood as a refinement of a classic argument in support of pure morals legislation. The argument from the moral gradation of punishment begins by observing that the severity of criminal punishment typically corresponds to the moral depravity of the punished act, infers that moral depravity as such is the true target of punishment, and concludes that morally depraved acts may be criminalized and punished even in the absence of harm.<sup>151</sup> Kahan sharpens the classic argu-

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<sup>149</sup> It is not enough to say that the punishment should be "only severe enough to deter non-compliance," because this limits severity only by the margin at which an increase in severity fails to increase compliance. This again vitiates the principle that punishment must be proportionate to the crime. An additional concern is that punishment of harmless acts can actually send the wrong message, namely that society does not take victim harm very seriously, since punishment is inflicted in its presence or in its absence. As A. C. Ewing observes, "[t]o punish a lesser crime more severely than a greater would be either to suggest to men's minds that the former was worse when it was not, or, if they could not accept this, to bring the penal law in some degree into discredit or ridicule." A. C. Ewing, *A Study on Punishment II: Punishment as Viewed by the Philosopher*, 21 CANADIAN B. REV. 102, 115 (1943). Were harmless acts punished as or more severely than harmful acts, the lesson presumably would be either that the victimization of another makes no moral difference or that it is actually better to harm another person than to violate the impersonal norm in question. Either lesson would blunt rather than sharpen our moral sense.

<sup>150</sup> As Hart famously argued, it is not clear that the infliction of suffering is either necessary to express our disavowal of a harmless act or sufficient to justify the willful infliction of human suffering when doing so increases the net amount of suffering in the world without vindicating the rights of victims of past violations. H. L. A. HART, *LAW, LIBERTY, AND MORALITY* 65–66 (1963). Especially when there is no victim with whom to show solidarity or whose disrespected value calls for affirmation, it seems that vocal disapproval and other diffuse social sanctions are more humane methods of communication. In the absence of both retribution and harm prevention, the creation of human suffering for the sole purpose of public condemnation "is uncomfortably close to human sacrifice as an expression of religious worship." *Id.* at 66.

<sup>151</sup> See, e.g., JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY: AND THREE BRIEF ESSAYS*, 143–44 (Univ. of Chicago Press 1991) (1873). As observed by Hart, among others, the argument is a non sequitur. It is perfectly consistent to say that only harmful acts can be punished and that the degree of punishment can track moral depravity as well as harm. HART, *supra* note 150, at 34–38. Consistency, however, is often not enough to persuade, and here we are invited to ask a further question: if it is possible to justify inflicting or withholding some quantum of punishment not in terms of harm but in terms of moral depravity, why should it matter whether that quantum is the sole punishment inflicted or merely part of a greater punishment? Hart himself thought the moral gradation of punishment a compromise between the general justifying aim of harm reduction

ment by providing a theory of how moral wickedness affects the severity of punishment. He argues that in a broad range of areas the severity of punishment responds to society's evaluation of an offender's motive, particularly the evaluation of the victim implicit in the motive. A variety of legal distinctions—between premeditated and provoked homicide, intentional and negligent acts, rape and battery—“don't turn on the injury that the offenders impose on their victims . . . the injuries are, roughly speaking, the same. Rather they turn on the law's assessment of the offender's reasons for bringing those harmful consequences about.”<sup>152</sup> Kahan's argument is that since the severity of criminal punishment typically corresponds to the impropriety of the evaluation expressed by the punished act, improper evaluation as such must be the true target of punishment. Kahan then concludes that acts expressing improper evaluations may be criminalized and punished even in the absence of harm.

As a matter of logic, Kahan's argument that improper evaluation is sufficient for criminality and that expressive condemnation is sufficient for punishment must fail. Like the argument from the moral gradation of punishment, the inference suggested is a non sequitur. It is perfectly consistent to punish only (though not all) injurious acts, and to punish acts that inflict the same degree of injury more or less depending on the moral quality of the offender's motive.<sup>153</sup> The argument can also be run the other way; the inference suggested is no more valid than the converse inference that since offenses are also graded by injuriousness, as in the case of successful and failed attempts, injuriousness alone is sufficient for criminalization and punishment. These arguments are indeterminate with respect to whether harmfulness is a necessary condition, or improper evaluation a sufficient condition for punishment. Clearly both concepts are in play. What is needed is a theory of the relationship between the harmfulness of an offense and the moral quality of the offender's motive, and for this we must turn to examine the somewhat elusive but critically important notion of expressive harm.

Expressive harm results when someone “is treated according to principles that express negative or inappropriate attitudes toward her.”<sup>154</sup> All immoral acts express improper evaluations of some kind, but acts inflicting expressive harm specifically deny the equal moral worth of an identifiable victim. In such cases the offender's inappropriate evaluations are not

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and either the need to avoid conflict with existing moral sensibilities, which “might either confuse moral judgments, bring the law into disrepute, or both,” or “principles of justice or fairness [that] require morally distinguishable offenses to be treated differently and morally similar offenses to be treated alike.” *Id.* at 37.

<sup>152</sup> Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20 L. & PHIL. 175, 178 (2001). Kahan makes these and similar arguments at length in Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

<sup>153</sup> See HART, *supra* note 150.

<sup>154</sup> Anderson & Pildes, *supra* note 144 at 1528.

“free-floating evils” but grounds for a personalized grievance.<sup>155</sup> Kahan may be correct that deliberate acts are punished more severely than negligent acts, rape more than battery, and hate crimes more than others, because the former acts generally express morally worse evaluations than the latter. However, the former acts are not merely morally worse for the offender, not merely manifestations of a defective moral character. These acts are morally worse for the victim, deeper violations of her claim to equal respect and concern. Punishment is called for not by something internal to the offender—her improper evaluations—but by the externalization of these evaluations through injurious acts.<sup>156</sup>

This last point requires some elaboration. It is true that the evaluations of others can by their own strength make one better or worse off. It is better to be liked than disliked by one’s peers and co-workers, even if incentives are such that the same level of cordiality and cooperation would be displayed in either case.<sup>157</sup> But a person does not have a general right that others hold only appropriate attitudes toward her, or even that they give voice only to such attitudes. Such a right held by any individual would negate the freedom of thought and expression enjoyed by others.<sup>158</sup> It is only when an act violates an independent right that the act’s expressive dimension can be punished, for then the expression is not in the offender’s mind or on her lips but subsists in the act itself. For example, the moment an act of physical aggression is chosen as the conduit of a political message, the act leaves the zone of freedom surrounding thought and speech and enters the realm of permissible criminalization. When an evaluation of a victim’s worth is expressed in and through an independently harmful action—and no longer resides in the private thoughts or protected speech of the actor—the resulting expressive harm (if any) to the victim can justify greater or lesser punishment. In contrast, improper evaluations cannot be the target of punishment in the absence of independently harmful actions. In this way an interrogation of the concept of expressive harm divorces the expressive theory of crime from the expressive theory of punishment,

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<sup>155</sup> “Free-floating evils” are those morally objectionable acts, events, or states of affairs whose moral disvalue does not derive from a wrong or other harm to any person. FEINBERG, *HARMLESS WRONGDOING*, *supra* note 105, at 4; *cf.* Hampton, *supra* note 150, at 1666 (“All wrongful actions are actions that violate a moral standard applicable in the circumstances. However, I will say that some moral actions violate those standards in a particular way insofar as they are also *an affront to the victim’s value or dignity*. I call such an affront a *moral injury*.”) (emphases added).

<sup>156</sup> For an extended discussion of expressive harm, see Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 *BUFF. CRIM. L. REV.* 273, 313–15 (2005).

<sup>157</sup> See, e.g., MEIR DAN-COHEN, *Harmful Thoughts*, in *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 172 (2002).

<sup>158</sup> Note that because freedom of thought and expression inhere in individuals, it remains permissible to forbid state entities from expressing certain negative evaluations (e.g., racist attitudes) even in the absence of otherwise injurious conduct (e.g., material inequality of conditions).

leaving the limitation of punishment to harmful acts more sensitive to the variety of wrongful harms and the legal enforcement of popular morality without support.

#### V. SODOMY AND THE EIGHTH AMENDMENT<sup>159</sup>

In his concurrence to *Bowers v. Hardwick*, Justice Powell “agree[d] with the Court that there is no fundamental right—i.e., no substantive right under the Due Process Clause” to engage in same-sex sodomy.<sup>160</sup> Powell was quick to add, however, that “a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue,”<sup>161</sup> though no Eighth Amendment claim was before the Court. Though several Eighth Amendment challenges have been brought against sodomy laws, most challenged the length of the sentence, not the constitutionality of criminalization, and thereby invited application of the deferential gross disproportionality standard. Cases before *Bowers* refused to invalidate prison terms whose length was authorized by statute,<sup>162</sup> and generally granted the legislature tremendous

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<sup>159</sup> Due to the focus of this Article on supporting the *Lawrence* decision, forms of arguably harmless conduct other than private consensual sodomy cannot be given extended treatment at this time. Certainly it is a direct implication of the argument of this Article that the criminalization and punishment of conduct such as prostitution, adult incest, and adultery must be justified in terms of the vindication of rights or the prevention of suffering. A brief look at prostitution provides a gesture toward the fruits of such an extended inquiry. The traditional justification for punishment of prostitutes is that they entice individuals to immorality. Once intrinsic immorality is discarded as a justification for punishment, we can find that the wrong in prostitution is not the spread of vice but the exploitation of disadvantaged individuals. This being the case, we can choose to shift criminal liability from prostitutes to their employers and clients. In this way our conception of the ground of punishment can alter our conception of who should be punished.

<sup>160</sup> 478 U.S. 186, 197 (1986) (Powell, J., concurring).

<sup>161</sup> *Id.* Justice Powell was, of course, the author of the majority opinion in *Solem*, and one has to wonder whether his *Bowers* concurrence reveals an understanding of the implications of proportionality review for the criminalization and punishment of harmless acts. It is a pleasant irony that Justice Powell, widely condemned for setting back sexual rights for a generation, left behind a legal framework with which to support sexual rights decisions. It is unfortunate that procedural posture and subsequent neglect by criminal and constitutional scholars have left his insight largely unexplored. *But see* J. Drew Page, Comment, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the Solem v. Helm Test*, 56 U. CHI. L. REV. 367, 377–91 (1989) (arguing that the *Solem* test is not sufficiently objective to prevent judicial imposition of personal values); *see also* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992) (arguing that sodomy statutes encourage violence against homosexuals in violation of the Eighth Amendment); Claude Millman, Note, *Sodomy Statutes and the Eighth Amendment*, 21 COLUM. J. L. & SOC. PROBS. 267 (1988) (taking up Justice Blackmun’s suggestion in *Bowers*, 478 U.S. at 202 n.2 (Blackmun, J., dissenting), that sodomy statutes punish a status or condition as forbidden by *Robinson v. California*, 370 U.S. 660 (1962)).

<sup>162</sup> *State v. Stubbs*, 145 S.E.2d 899, 902 (N.C. 1966) (“When punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense.”); *see also* *Carter v. State*, 500 S.W.2d 368, 373 (Ark. 1973); *Griffith v. State*, 504 S.W.2d 324, 330 (Mo. Ct. App. 1974).

deference.<sup>163</sup> The leading case decided after *Bowers* held that “only where the *actual sentence imposed* upon the defendant is so grossly disproportionate as to shock the conscience will it be set aside as unconstitutional” and that “legislative discretion must be deferred to unless, under the circumstances, the sentence shocks the conscience.”<sup>164</sup> In all these cases the deciding courts either applied a gross disproportionality standard rather than a measurable contribution standard or granted the deference to the legislature appropriate to the former standard but not to the latter. To be fair, the different standards of proportionality review were articulated for the first time in *Coker*,<sup>165</sup> in which, ironically, they were misapplied. Thus the cases decided before 1977 should be neither criticized nor relied upon for their (mis)management of the evolving doctrine.

As argued in Part II, an Eighth Amendment challenge to the application of a type of punishment (whether imprisonment as in *Robinson* or death as in *Coker* and *Enmund*) to a category of offense (whether addiction in *Robinson*, rape in *Coker*, or accessory felony murder in *Enmund*) must be evaluated under a “measurable contribution” standard, and no deference need be given to the legislature when reasoned argument aided by intra-jurisdictional and interjurisdictional comparisons dictate the opposite result. The correct challenge to the punishment of private, consensual sex acts, then, is that such acts form a category and that no type of punishment (and therefore no degree of punishment) of acts within that category measurably contributes to the acceptable goals of punishment. Such has been the challenge posed in this Article.

Importantly, while Michael Hardwick faced a minimum prison sentence of one year and a maximum prison sentence of twenty years, John Lawrence and Tyron Garner were jailed overnight and then fined.<sup>166</sup> It is worth pausing to ask whether the nature of the latter penalty affects the application of the relevant constitutional principles. The Supreme Court has struck down a government-imposed fine as excessive only once, in *United States v. Bajakajian*.<sup>167</sup> In that case, the defendant was sentenced to three years of probation and assessed a \$5,000 fine for failure to report exported currency. He was also ordered to forfeit \$15,000 of the \$357,144 he attempted to remove from the country. The defendant conceded that

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<sup>163</sup> *Doe v. City of Richmond*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (“If a State determines that punishment [of same-sex sodomy], even when committed in the home, is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so”), *aff’d*, 425 U.S. 901 (1976). The holding begs the question of what limits the Eighth Amendment places on the states’ police power. If the punishment of harmless wrongdoing fails to contribute measurably to the acceptable goals of punishment, then the states’ power to promote the morals of their citizens must defer to the demands of the Constitution.

<sup>164</sup> *Lambeth v. State*, 354 S.E.2d 144, 145 (Ga. 1987).

<sup>165</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

<sup>166</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) with *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

<sup>167</sup> 524 U.S. 321 (1998).

the offense was properly subject to criminal punishment and accepted the primary fine, but argued that forfeiture of the full \$357,144 would be unconstitutionally excessive.<sup>168</sup>

The majority argued that the absence of precise judicial criteria for excessiveness warrants deference to legislative line drawing.<sup>169</sup> The Court therefore held that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”<sup>170</sup> Viewed in this light, it is not surprising that four defenders of proportionality review under the Cruel and Unusual Punishments Clause (Justices Stevens, Souter, Ginsburg, and Breyer) joined Justice Thomas’s opinion. *Bajakajian* does not indicate, however, that the Court would decline to apply its measurable contribution standard in a case alleging that any fine imposed for a particular type of offense would be unconstitutional. It is doubtful, for instance, that the result in *Robinson* would have been different had the state of California decided to fine rather than imprison those addicted to narcotics. On the contrary, *Bajakajian* emphasizes the continuity of the Excessive Fines Clause and the Cruel and Unusual Punishments Clause.<sup>171</sup> It therefore appears that the measurable contribution standard applies to the facts of both *Bowers* and *Lawrence* without significant modification.

Private sex acts between consenting unmarried unrelated adults (abbreviated below as “private sex acts”) have long numbered among the paradigm cases of harmless acts.<sup>172</sup> As H. L. A. Hart famously argued, though many believe some such acts morally wrong, no one contends that they violate the rights of the parties, or otherwise diminish their welfare.<sup>173</sup> Devlin’s prediction that the legalization of same-sex sodomy in the United Kingdom would result in societal disintegration has, unsurprisingly, proven false.<sup>174</sup> As Bernard Harcourt has noted, the only harm that might in some

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<sup>168</sup> The case did involve the question of whether the exported currency was properly subject to forfeiture. The Court held that the latter question turns on whether the forfeiture was intended to be punitive, not on whether it actually contributed to the acceptable goals of punishment. *Id.* at 334.

<sup>169</sup> *See id.* at 336.

<sup>170</sup> *Id.* at 334.

<sup>171</sup> *See id.* at 336 (transplanting the gross disproportionality standard directly from *Solem v. Helm*, 463 U.S. 277, 288 (1983)).

<sup>172</sup> *See* Jeremy Bentham, *Offenses Against One’s Self: Paederasty* (pts. 1 & 2), 3 J. HOMOSEXUALITY 389 (1978), 4 J. HOMOSEXUALITY 91 (1978).

<sup>173</sup> *See* HART, *supra* note 150 (arguing that the harm principle precludes punishment of private sex acts). The punishment of private sex acts was rejected by the Wolfenden Commission and the American Law Institute. *See* MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962); COMM. ON HOMOSEXUAL OFFENCES AND PROSTITUTION, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957).

<sup>174</sup> PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 1–25, 89–90 (1965) (arguing that decriminalization of morals offenses such as same-sex sodomy will undermine the shared moral beliefs that bind society together); *cf.* Sex Offenses Act, 1967, c. 60 (Eng.) (repealing criminal penalties for private, consensual same-sex sodomy, with no disastrous effect on English society). For contemporaneous criticism, *see* HART, *supra* note 150, at 50 (“[N]o evidence is produced to show that deviation from accepted sexual morality, even by

circumstances be prevented by legal restrictions on private sex acts is the transmission of disease.<sup>175</sup> Absent epidemic conditions such a rationale would likely fall in light of the Court's rejection of minimal and speculative preventative effects as support for broad prohibition and punishment. Such would be the case in our own society, in which, thankfully, sexually transmitted disease has never reached such dire levels as to lend plausibility to an invasive legal regime.<sup>176</sup>

One might seek to distinguish *Enmund* by noting that accessory felony murder laws punish a result (death), while sodomy laws punish conduct (sodomy, obviously). This distinction might be significant because if death occurs very infrequently during the course of certain felonies, then the threat of extra punishment if death results is unlikely to affect criminal behavior. On the other hand, since punishment attaches to the act of sodomy itself the deterrent effect of the law is not affected by the relative infrequency of resulting infection. There is something to this objection, but not enough. It is not the case that Florida could have responded to the *Enmund* decision by extending the death penalty to all felonies, including felonies in which death is neither intended nor foreseen nor the risk of death recklessly disregarded. This is in part because such offenders lack the requisite culpability to warrant the application of the death penalty and in part because the harm prevented by the increase in punishment (i.e., the handful of deaths resulting from certain felonies) is not substantial enough to constitute a measurable contribution to the acceptable goal of harm reduction. Similarly, sodomy laws cannot rest on either the culpa-

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adults in private, is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it."); see also H. L. A. HART, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967) (arguing that Devlin's thesis is conceptually confused).

<sup>175</sup> Harcourt, *supra* note 130, at 161-67 (describing restrictions targeting homosexuals as justified in terms of preventing the transmission of HIV).

<sup>176</sup> The absolute number of sexually transmitted infections is quite high. The Center for Disease Control and Prevention (CDC) estimates that "approximately 15.3 million people in the United States become infected with at least one STI annually." NAT'L INST. OF ALLERGY & INFECTIOUS DISEASES, U.S. DEP'T OF HEALTH & HUMAN SERVS., PROFILE: FISCAL YEAR 2005, available at [http://www.niaid.nih.gov/about/overview/profile/fy2005/pdf/fy2005\\_profile.pdf](http://www.niaid.nih.gov/about/overview/profile/fy2005/pdf/fy2005_profile.pdf). Relative to the total number of annual acts of sodomy, for which no statistics are available but which can be estimated to run into the hundreds of millions, the probability that any particular act will result in infection is likely close to the one half of one percent found unacceptable in *Enmund*. See generally *supra* note 134. Note also that while the harm in *Enmund* was death, many sexually transmitted diseases have no observable symptoms or untreatable effects on overall health. It is conceivable that a true epidemic of sexually transmitted disease would justify legal requirements to submit to regular testing and disclose the results of tests to sex partners. In the context of epidemic or widespread infection, such a regime would prevent avoidable suffering, promote informed assumption of risk, and enforce rights to be free from intentionally, recklessly, or negligently imposed threats to one's health. Moreover, such a regime would restrict liability to a limited class of individuals who have by their behavior revealed a dangerous and morally culpable willingness to forego reasonable precautions against harming others. But a flat ban on a particular category of private sex acts seems so ill-fitted to the aim of public health that it could only provide a pretext for other, illegitimate objectives.

bility of the participants, who generally neither intend nor foresee nor recklessly disregard the risk of infection, or on the minimal decrease in infection that such punishment might achieve. In further support of this latter point, recall that the *Enmund* Court observed that interjurisdictional inconsistency and underenforcement of laws undermine their deterrent effect.<sup>177</sup> Given the gradual elimination of sodomy statutes and their infrequent enforcement where they still exist (trends to which we shall turn presently), it is even less likely that the remaining statutes make a measurable contribution to harm prevention.

Turning to the evidentiary considerations the Court has endorsed, even at the time *Bowers* was handed down, intrajurisdictional analysis confirmed that the severity with which sodomy was punished was excessive in relation to the gravity of the offense.<sup>178</sup> By the time *Lawrence* was decided, interjurisdictional analysis revealed a stark decline in the number of states which criminalized same-sex sodomy.<sup>179</sup> In light of the Court's holding in *Atkins*, both "the number of these States" and "the consistency of the direction of change"<sup>180</sup> seem to support the initial finding that the punishment of same-sex sodomy does not measurably contribute to the acceptable goals of punishment.

## VI. CONCLUSION

This Article began in search of a doctrinal framework within which to locate and defend the *Lawrence* Court's claim that the enforcement of popular morality does not constitute a legitimate state interest. Close analysis of the Court's Eighth Amendment jurisprudence reveals that the application of a type of punishment to a category of offense must measurably contribute to the acceptable goals of punishment to survive constitutional review. The Court has endorsed retribution and harm prevention, neither of which is furthered by any form or degree of punishment applied to harmless but purportedly immoral acts. Importantly, the Court has developed techniques by which the imputation of harm can be limited and

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<sup>177</sup> See *Enmund v. Florida*, 458 U.S. 782, 799–800 (1982).

<sup>178</sup> *Bowers v. Hardwick*, 478 U.S. 186, 197–98 (1986) (Powell, J., concurring) ("Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, first-degree arson, and robbery.") (citations omitted).

<sup>179</sup>

The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.

*Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

<sup>180</sup> *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

by which the prohibition on the punishment of harmless acts can be made meaningful as a limitation on criminal legislation. Finally, it has been argued that the enforcement of popular morality as such conflicts with constitutional principles and gains no support from expressive theories of criminal law.

As its title indicates, this Article examines constitutional limitations on the content of the criminal law. It is equally true, however, that this Article demonstrates how theories and approaches derived from the criminal law—with respect to the purposes of punishment, the imputation of harm, and the relationship of motive to culpability—fill out the content of constitutional provisions and illuminate the doctrinal development of their animating values. Constitutional law does not operate merely as an external check on the vagaries of criminal legislation, but also internalizes criminal law concepts and doctrines.<sup>181</sup> If the argument above is correct, then it is not enough to constitutionalize substantive criminal law, as many have advocated.<sup>182</sup> We must, so to speak, criminalize constitutional law as well. Only then will the two dominant discourses regarding the scope and limits of state power share a common tongue.

Importantly, the argument of this Article depends upon and is limited by the supposition—intuitively compelling and borne out by the cases—that a state's legitimate interests in criminal legislation must refer to the constitutionally acceptable penal goals in terms of which criminal punishment is legitimated. The argument therefore shows only that the enforcement of popular morality is not a legitimate state interest in the important but limited context of criminal legislation. It leaves open the possibility that other forms of legislation can legitimately implement popular moral views. In particular, it does not speak to the refusal of a state to empower same-sex couples to marry. If such restrictions on the legal powers of homosexuals are to be unseated through constitutional litigation, it will not be through appeal to the constitutional limits of the criminal law, but through arguments from the equal dignity of homosexual persons, the affirmation of which is a part—but not the whole—of the legacy of *Lawrence*.

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<sup>181</sup> For a contrary view, see Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005).

<sup>182</sup> See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431 (1958).

