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# Judging Cruelty

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*The wisdom of the death penalty has recently come under attack in a number of states. This raises the question of whether states' retreat from the death penalty, or other punishments, will pressure other states — either politically or constitutionally — to similarly abandon the punishment. Politically, states may succumb to the trend of discontinuing a punishment. Constitutionally, states may be forced to surrender the punishment if it is considered cruel, and, as a result of a large number of states renouncing it, the punishment also becomes unusual. If a punishment is thus found to be both cruel and unusual, it will be proscribed under the Eighth Amendment Punishments Clause of the U.S. Constitution.*

*Considering the disappearance of some punishments and the emergence of new ones, whether a punishment is cruel under the Punishments Clause is an important question. Curiously, there has been very little discussion of what constitutes a cruel punishment, as distinguished from whether a punishment is also unusual. This Article examines the concept of cruelty as enshrined in the Eighth Amendment Punishments Clause and suggests that the Supreme Court focus on this elusive concept through its independent judgment analysis. The Article emphasizes that such an independent judgment focus on cruelty should be constrained by specific, identified factors and that these factors should go beyond examining the penological purposes of punishment. The Article asserts that motive and the nature and quality of a punishment are central to the concept of cruelty and suggests that a more nuanced understanding of punishment rationales, supplemented by factors focused on elements such as the bloody*

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*or lingering nature of the punishment, is necessary in properly determining whether a punishment is cruel under the Punishments Clause.*

TABLE OF CONTENTS

|  |     |
|--|-----|
| INTRODUCTION .....   | 83  |
| I. THE COURT’S PUNISHMENTS CLAUSE JURISPRUDENCE.....   | 85  |
| II. THE COURT’S HISTORICAL CONSULTATION OF ITS<br>INDEPENDENT JUDGMENT AND CRITICISMS SUCH JUDGMENT<br>HAS ATTRACTED .....   | 88  |
| III. RESORT TO INDEPENDENT JUDGMENT IS CUSTOMARY, BUT<br>THE COURT’S INDEPENDENT JUDGMENT IN THE PUNISHMENTS<br>CLAUSE CONTEXT IS UNCONVENTIONALLY UNLIMITED ..... | 95  |
| IV. FACTORS THE COURT RELIES ON IN REACHING ITS<br>INDEPENDENT JUDGMENT UNDER THE PUNISHMENTS CLAUSE....   | 99  |
| A. <i>The “Death is Different” Principle</i> .....   | 99  |
| B. <i>Human Dignity</i> .....  | 100 |
| 1. Punishments Involving the Unnecessary and<br>Wanton Infliction of Pain.....   | 101 |
| a. <i>Retribution</i> .....  | 102 |
| b. <i>Deterrence</i> .....   | 108 |
| 2. Grossly Disproportionate Punishments .....  | 113 |
| C. <i>Competency</i> .....   | 117 |
| D. <i>Other Systemic Concerns</i> .....  | 118 |
| V. THE NEED FOR A MORE FOCUSED INDEPENDENT JUDGMENT<br>INQUIRY.....  | 119 |
| A. <i>The Meaning of “Cruel”</i> .....   | 121 |
| B. <i>Finding Cruelty</i> .....  | 124 |
| 1. Brutal Punishments: Those That Are Inhuman,<br>Hard-Hearted, Barbarous, Bloody, or Destructive,<br>or That Involve a Lingering Death .....                      | 124 |
| 2. Punishments Inflicted for a Purpose Other than<br>Punishment .....  | 128 |
| a. <i>Additional Rationales for Punishment</i> .....   | 132 |
| b. <i>The Incompleteness of Retribution and Deterrence</i> ..  | 136 |
| 3. Concerns Aside from Retribution and Deterrence.....   | 141 |
| 4. Repetitive Inquiries of Independent Judgment<br>Factors .....   | 142 |
| 5. Supplementing the Cruelty Inquiry .....   | 148 |
| CONCLUSION.....  | 149 |

## INTRODUCTION

A number of states have recently reconsidered the wisdom of the death penalty. For example, in the last few years, New Jersey and New Mexico have abolished the death penalty,<sup>1</sup> and state prosecutors throughout the nation have reported seeking capital punishment in significantly fewer cases.<sup>2</sup> Further, organizations such as the American Law Institute have hurled their weight behind the death penalty abolition movement.<sup>3</sup> This raises the question of whether these retractions by individual states and withdrawal of organizational support for the death penalty will pressure other states to similarly abolish the death penalty, ultimately leading to the rejection of capital punishment in the United States — a position already prevalent in the vast majority of the developed world.<sup>4</sup> This pressure could be either political or constitutional in nature. Politically, states may succumb to the trend of cutting costs and according greater tolerance for human frailty by imposing life without parole instead of death for the worst crimes. Constitutionally, states may be forced to abolish the death penalty if the punishment of death is considered cruel, and, as a result of a large number of states repealing their death penalty statutes, the

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<sup>1</sup> See *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16 (“Gov. Bill Richardson signed legislation Wednesday to repeal New Mexico’s death penalty . . .”); Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3 (reporting that Governor Corzine “signed a bill repealing New Jersey’s death penalty . . . making the state the first in a generation to abolish capital punishment”).

<sup>2</sup> See, e.g., Frank R. Baumgartner, *Death Penalty’s Vanishing Point?*, NEWS & OBSERVER, Jan. 24, 2010, at 17A (“Recent trends suggest that in fact, juries and prosecutors across [North Carolina] have already dramatically reduced their attachment to the death penalty. . . . [P]rosecutors who once sought capital punishment in 10 percent to 12 percent of all murders statewide have moved to seeking it in less than 2 percent of the cases.”); David Pittman, *Death Penalty Pursuit: Cost vs. Certainty*, AMARILLO GLOBE-NEWS (Feb. 1, 2010), [http://amarillo.com/stories/020110/new\\_news3.shtml](http://amarillo.com/stories/020110/new_news3.shtml) (“More prosecutors are deciding not to seek the death penalty in cases where it’s an option . . . . Many prosecutors weight the lack of certainty in securing a conviction against the high cost of litigation as reasons for not seeking the death penalty when available.”).

<sup>3</sup> Cf. Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11 (reporting that “the American Law Institute, which created the intellectual framework for the modern capital justice system almost 50 years ago, pronounced its project a failure and walked away from it”).

<sup>4</sup> See Chief Judge Robert Henry, *A Decent Respect to the Opinions of Mankind Sometimes Requires a Second Look*, 62 SMU L. REV. 1865, 1876 (2009) (noting that “the United States is one of the few economically developed countries in the world that has a death penalty”).

punishment also becomes unusual. If a punishment is thus found to be both cruel and unusual, it will be proscribed under the Eighth Amendment Punishments Clause of the U.S. Constitution.<sup>5</sup>

Considering that historical punishments are frequently disappearing and new punishments are emerging,<sup>6</sup> whether a punishment is cruel under the Punishments Clause is an important question. Curiously, there has been very little discussion of what constitutes a cruel punishment, as distinguished from whether a punishment is also unusual.<sup>7</sup> Whether a punishment is cruel must be addressed more thoroughly because cruelty will likely become a pivotal issue as punishments become increasingly ephemeral due to rising costs and evolving technologies.

This Article examines the concept of cruelty as enshrined in the Eighth Amendment Punishments Clause and suggests that the Supreme Court ought to explore this elusive concept through its independent judgment analysis. The Article emphasizes that such an independent judgment examination of cruelty should be constrained by specific, identified factors, which will lend greater consistency and predictability, and thus also credibility, to the Court's analysis in this area. Part I of the Article reviews the Court's Punishments Clause jurisprudence, explaining how the Court's analysis focuses on both objective indicia of contemporary values and the Court's own independent judgment.<sup>8</sup> Part II traces the history of the Court's use of independent judgment in this context and notes that its reliance on

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<sup>5</sup> See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); see also *infra* note 221 (noting ambiguity about what Punishments Clause actually proscribes).

<sup>6</sup> See, e.g., ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 3-12, 57-68 (1992) (describing evolution of punishments in early America); John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 291-92 (2009) (explaining that "[t]he preferred method of execution shifted from the noose and firing squad to electrocution and the gas chamber to what we predominantly use today: lethal injection"); *Developments in the Law — The Law of Prisons*, 115 HARV. L. REV. 1838, 1841-43 (2002) (briefly describing rise of incarceration in America).

<sup>7</sup> See Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 591-600 (2010) [hereinafter *Eighth Amendment*] (explaining that Supreme Court and scholars have failed to disentangle distinct concepts of cruelty and unusualness). *But see generally* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009) (exploring meaning of cruelty in context of prison conditions).

<sup>8</sup> See *infra* Part I.

this judgment has been somewhat controversial.<sup>9</sup> Part III explains that, while the Court traditionally relies on its own judgment in determining the outcomes of cases, the Court's use of independent judgment in the Punishments Clause context is unique in that the Court's judgment is virtually unlimited in definition and scope.<sup>10</sup> Part IV outlines the Court's reliance on a number of different factors in forming its judgment in the Punishments Clause context, including the "death is different" principle, the nebulous concept of human dignity, offender competency, and other systemic concerns.<sup>11</sup> Part V argues that predictability in Punishments Clause jurisprudence requires a more focused independent judgment analysis by the Court and suggests that such an analysis should concentrate on concrete factors.<sup>12</sup> These factors, the Article avers, should aim at exploring the concept of cruelty.<sup>13</sup> This Article concludes that, in forming its independent judgment, the Court should more thoroughly examine the various penological purposes justifying the punishment at issue with the understanding that such penological purposes are used for plumbing the elusive element of motive. Also, the Court should supplement its examination of what constitutes a cruel punishment by scrutinizing factors related to the nature and quality of the punishment.

#### I. THE COURT'S PUNISHMENTS CLAUSE JURISPRUDENCE

The Eighth Amendment Punishments Clause provides that "cruel and unusual punishments" shall not be inflicted.<sup>14</sup> Since its 1958 case of *Trop v. Dulles*,<sup>15</sup> the Supreme Court has interpreted this prohibition as drawing "its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>16</sup> Cases following *Trop* have expanded upon this edict, delineating a framework by which the Court can determine whether a particular punishment comports with the evolving standards of decency.<sup>17</sup> Under this framework, the Court

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<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* Part IV.

<sup>12</sup> See *infra* Part V.

<sup>13</sup> *Id.*

<sup>14</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>15</sup> 356 U.S. 86 (1958) (plurality opinion).

<sup>16</sup> *Id.* at 101.

<sup>17</sup> See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649, 2663-65 (2008) (suggesting that assessing evolving standards of decency involves examining reliability

first examines certain objective indicia of contemporary values.<sup>18</sup> The Court's primary objective indicator of contemporary values is legislation adopted by the various states as well as the legislation and rules adopted by the federal government, the District of Columbia, and the U.S. military.<sup>19</sup> In addition to examining such legislative action,

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of potential testimony); *Atkins v. Virginia*, 536 U.S. 304, 311-12, 321 (2002) (consulting evolving standards of decency in reaching conclusion that it is unconstitutional to execute mentally retarded individuals). In reviewing Punishments Clause challenges involving the death penalty when either the method of punishment or its proportionality is in question, the Court has primarily used a framework in which it examines objective factors and then applies its own independent judgment. Frequently, the Court has constructed categorical rules in this context, such as when it stated in *Roper v. Simmons* that it is unconstitutional to execute juvenile offenders. 543 U.S. 551, 578 (2005). Often, when other punishments are at issue, such as the punishment of life without the possibility of parole, the Court has engaged in a similar examination, focusing on certain objective factors and its own judgment. *See, e.g., Solem v. Helm*, 463 U.S. 277, 296-303 (1983) (determining that defendant's sentence was "the most severe punishment that the State could have imposed on any criminal for any crime," that those committing worse offenses within jurisdiction were punished less severely, that defendant "could not have received such a severe sentence in 48 of the 50 States," and that defendant's sentence was "significantly disproportionate to his crime"); *see also infra* note 182. In this context, though, the Court has ordinarily refrained from creating categorical rules but has instead proceeded on a case-by-case basis. In its recent case of *Graham v. Florida*, 130 S. Ct. 2011 (2010), however, the Court moved away from this underlying distinction between capital and non-capital punishments and upset its previous jurisprudence somewhat. In that case, the Court stated that the Eighth Amendment prohibits both inherently barbarous punishments, as well as those disproportionate to the crime. *See id.* at 2021. The Court determined, then, that unconstitutionally disproportionate crimes fall into two categories — categorical restrictions on punishments and "as applied" challenges in which the determination of constitutionality rests on the particular facts of the case. *Id.* at 2021-23. The Court stated that the case at hand, which involved the constitutionality of the punishment of life without the possibility of parole as applied to a juvenile offender, was a case in which a categorical rule should be constructed. *See id.* at 2022-23. The Court then followed its prior practice of consulting the objective indicia of contemporary values and its own judgment. *See id.* at 2023-30.

<sup>18</sup> *See, e.g., Kennedy*, 128 S. Ct. at 2650 ("In these cases the Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'"); *Roper*, 543 U.S. at 564 (referencing "objective indicia of consensus"); *Atkins*, 536 U.S. at 312 (referencing "objective evidence of contemporary values").

<sup>19</sup> *See Atkins*, 536 U.S. at 312 ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (examining "legislation enacted by the country's legislatures" and "data concerning the actions of sentencing juries"). *But cf. Graham*, 130 S. Ct. at 2023 (stating that examination of state legislative action "is incomplete and unavailing"); *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (suggesting that actions of juries are equally important). While the

the Court also intermittently considers secondary sources that, like legislative action, are purportedly reflective of society's contemporary values.<sup>20</sup> The secondary sources the Court has cited consist of how frequently judges and juries impose the punishment where permitted,<sup>21</sup> whether public opinion polls demonstrate that the public is opposed to the punishment,<sup>22</sup> professional organizations' opinions on the punishment's acceptability,<sup>23</sup> and international opinions of the punishment, including whether foreign nations employ the punishment.<sup>24</sup> Finally, the Court most often draws on its own

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Court has historically been relatively consistent in concluding that state legislative action is the primary objective indicium of contemporary values, in *Graham*, the Court overlooked state legislative action that arguably supported the conclusion that a consensus existed *in support of* sentencing juvenile offenders to life in prison without parole. *See Graham*, 130 S. Ct. at 2023 (“Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile non-homicide offender in some circumstances.”); *see also id.* at 2048-49 (Thomas, J., dissenting) (noting “that 37 out of 50 States (a supermajority of 74%) permit the practice” and that “[n]o plausible claim of a consensus against this sentencing practice can be made”). Instead, the Court concluded that evidence of state legislative action was “incomplete and unavailing” and stated that “[a]ctual sentencing practices are an important part of the Court’s inquiry into consensus.” *Id.* at 2023. However, while the Court has been fairly consistent in consulting state legislative action, it has been inconsistent in its analysis of this data. For example, in *Kennedy*, the Court counted the number of states employing the practice at issue, focusing on the fact that just six states imposed the death penalty for child rape in reaching its conclusion that such a punishment is unconstitutional. *See* 128 S. Ct. at 2651-53. In *Atkins*, though, the Court instead focused on the *change* in state legislative action, stating that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.” 536 U.S. at 315. For further discussion of inconsistencies in the Court’s assessment of state legislative action, *see* Ryan, *Eighth Amendment*, *supra* note 7, at 587-88.

<sup>20</sup> *Cf.* Ryan, *Eighth Amendment*, *supra* note 7, at 593-97 (explaining that state legislative action and secondary sources serve only as imperfect proxies for concept of cruelty).

<sup>21</sup> *See, e.g., Graham*, 130 S. Ct. at 2023 (“Actual sentencing practices are an important part of the Court’s inquiry into consensus.”); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (“The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.”).

<sup>22</sup> *See, e.g., Penry*, 492 U.S. at 334-35 (examining evidence from public opinion polls).

<sup>23</sup> *See, e.g., Atkins*, 536 U.S. at 316 n.21 (noting that opinions of professional organizations confirm that legislative judgment reflects broader professional consensus).

<sup>24</sup> *See, e.g., Graham*, 130 S. Ct. at 2033 (“There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.”); *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005) (examining international opinion and laws of other nations); *Atkins*, 536 U.S. at 316 n.21 (noting

independent judgment to determine whether the objective indicia of contemporary values conform with its own views.<sup>25</sup>

## II. THE COURT'S HISTORICAL CONSULTATION OF ITS INDEPENDENT JUDGMENT AND CRITICISMS SUCH JUDGMENT HAS ATTRACTED

Historically, the Court has been somewhat inconsistent in whether it consults its independent judgment in the Punishments Clause context. It seems that the Court first explicitly relied on its independent judgment in the 1977 case of *Coker v. Georgia*.<sup>26</sup> In that case, the Court faced the question of whether imposing the death penalty for the crime of raping an adult woman violates the

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that evidence such as opinions “within the world community” “makes it clear that this legislative judgment reflects a much broader social . . . consensus”). Although the Court has consulted the actions and opinions of other nations, whether this is appropriate remains debated. The Court, however, has not always expressed that it is appropriate to examine the actions of other nations. In *Stanford v. Kentucky*, for example, the Court “emphasize[d] that it is *American* conceptions of decency that are dispositive.” 492 U.S. at 369 n.1.

<sup>25</sup> It is somewhat debatable whether the Court's consultation of its own independent judgment has any real significance. The Court claims to consult its own judgment in determining the validity of the conclusions it reaches by evaluating the objective indicia of contemporary values, but the Court has never rested on its own judgment to compel a conclusion different from that it reached based on the objective indicia. See *Roper*, 543 U.S. at 615-16 (Scalia, J., dissenting) (stating that Court's resort to its independent judgment is “rule . . . reflected solely in dicta and never once in a *holding* that purports to supplant the consensus of the American people with the Justices' views”); William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1381 (2005) (arguing that “there is no case in which the majority's ‘independent judgment’ has diverged from their conclusions about contemporary standards of decency,” thus “[t]he public-sentiment dog has wagged the tail of independent judicial judgment”). Accordingly, it is unclear how much weight the Court places on its own independent judgment. *But cf.* *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008) (stating that objective evidence of contemporary values is entitled to only “great weight” and that, “in the end, [the Court's] own judgment will be brought to bear on the question of the acceptability of [a punishment] under the Eighth Amendment”) (internal quotations omitted).

<sup>26</sup> 433 U.S. 584, 592, 597-600 (1977) (plurality opinion). In the earlier case of *Trop v. Dulles*, 356 U.S. 86 (1958), the Court did refer to its own judgment, however. It stated that “the task of resolving [the Punishments Clause issue] inescapably” belongs to the Court and that it “requires the exercise of judgment, not the reliance upon personal preferences.” *Id.* at 103. “Courts must not consider the wisdom of statutes,” the Court stated, “but neither can they sanction as being merely unwise that which the Constitution forbids.” *Id.* The judgment to which the Court refers seems to be the more generalized judgment that the Court claimed in *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1803), see *infra* text accompanying notes 84-85, rather than the specific “independent judgment” that the Court articulated in *Coker*.

prohibition of cruel and unusual punishments.<sup>27</sup> In answering this question, the Court first surveyed state legislative action, determining that “[a]t no time in the last 50 years [had] a majority of the States authorized death as a punishment for rape”<sup>28</sup> and that Georgia was the only jurisdiction in the United States to authorize death for the crime of adult rape.<sup>29</sup> After assessing state legislative action, the Court examined jury decisions within the jurisdiction and concluded that, “in the vast majority of cases, at least 9 of 10, juries ha[d] not imposed the death sentence.”<sup>30</sup> The Court then took a singular step in augmenting its Punishments Clause analysis. Without citing any precedent, the Court stated:

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.<sup>31</sup>

Under this rubric of independent judgment, the Court explained that rape lacks the moral depravity that a crime, such as murder, must have to make the offender eligible for death because committing a rape, by itself, does not involve the taking of human life.<sup>32</sup>

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<sup>27</sup> See *Coker*, 433 U.S. at 586.

<sup>28</sup> *Id.* at 593. The *Coker* Court further stated that, even after it had invalidated most of the capital punishment statutes in *Furman v. Georgia*, 408 U.S. 238 (1972), only Georgia, North Carolina, and Louisiana reenacted statutes providing for capital punishment for those convicted of rape of an adult woman, and when North Carolina’s and Louisiana’s laws were invalidated for unconstitutionally mandatorily imposing death, they did not reenact them. See *Coker*, 433 U.S. at 593-94.

<sup>29</sup> See *Coker*, 433 U.S. at 595-96.

<sup>30</sup> *Id.* at 597.

<sup>31</sup> *Id.* Although *Coker* is a plurality opinion garnering just four votes, Justice Powell, in his supplemental opinion, amplifies the plurality’s position on the role the Court’s independent judgment should play in its Punishments Clause jurisprudence, stating that “the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment . . . must be decided on the basis of our own judgment . . . .” *Id.* at 604 n.2 (Powell, J., concurring in part and dissenting in part).

<sup>32</sup> See *id.* at 598-600. The Court reaffirmed this sentiment in its 2008 case of *Kennedy*, in which it determined that imposing the sentence of death for the crime of child rape violates the Punishments Clause because, “[a]s it relates to crimes against individuals, . . . the death penalty should not be expanded to instances where the

To some extent, the Court mitigated this unprecedented resort to its own judgment by stating that independent judgment “should not be, or appear to be, merely the subjective views of individual Justices; judgments should be informed by the objective factors to the maximum possible extent.”<sup>33</sup> Despite this blunting of the Court’s vanguard approach, the Court has, in subsequent cases, often repeated the *Coker* language that the objective factors of consensus “do not wholly determine” Punishments Clause questions and that “in the end [the Court’s] own judgment will be brought to bear on” such questions.<sup>34</sup> For example, in its 1981 case of *Rhodes v. Chapman*,<sup>35</sup> the Court reiterated the language of *Coker* and called on its independent judgment to uphold an Ohio prison’s practice of “double celling” inmates.<sup>36</sup> Despite using *Coker*’s language, however, the *Rhodes* court did not bring its own judgment to bear in the explicit fashion that it had in *Coker*.<sup>37</sup> Instead, the Court cursorily determined only that the district court’s factual findings and its conclusion that the practice of double celling violated the Punishments Clause were insupportable.<sup>38</sup>

In the decades that followed, the Court, for the most part, embraced its reliance on its own judgment more boldly.<sup>39</sup> For example, in its

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victim’s life was not taken.” *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008).

<sup>33</sup> *Coker*, 433 U.S. at 592.

<sup>34</sup> *Id.* at 597.

<sup>35</sup> 452 U.S. 337 (1981).

<sup>36</sup> *See id.* at 346 (“[T]he Constitution contemplates that in the end a court’s own judgment will be brought to bear on the question of the acceptability of a given punishment.”) (internal alterations and quotations omitted).

<sup>37</sup> *See generally id.* (failing to actually apply its own judgment in any explicit fashion).

<sup>38</sup> *See id.* at 347-50. Despite the Court’s partial bypass of independent judgment in *Rhodes*, the Court’s language in that case helped set the groundwork for the Court’s later assessments of cruelty, because, in citing *Gregg v. Georgia*, 428 U.S. 153 (1976), the *Rhodes* Court furthered the notion that the Punishments Clause prohibits punishments that “involve the unnecessary and wanton infliction of pain . . . or are grossly disproportionate to the severity of the crime.” *Rhodes*, 452 U.S. at 346 (quoting *Gregg*, 428 U.S. at 173); *see also infra* Part IV.B (explaining that Supreme Court has suggested that punishment is unconstitutional if it fails to comport with dignity of man, meaning that it is excessive — “it either involves the unnecessary and wanton infliction of pain or is grossly out of proportion to the severity of the crime”) (internal quotations and alterations omitted). The *Rhodes* Court also cited *Gregg* for the proposition that “[a]mong ‘unnecessary and wanton’ inflictions of pain are those that are ‘totally without penological justification.’” *Rhodes*, 452 U.S. at 346 (quoting *Gregg*, 428 U.S. at 183).

<sup>39</sup> *See, e.g., Enmund v. Florida*, 458 U.S. 782, 797 (1982) (stating that it is Court’s role to judge whether there has been Punishments Clause violation); *see also infra* text accompanying notes 40-43.

1982 case of *Enmund v. Florida*<sup>40</sup> — decided just a year after *Rhodes* — the Court stated that:

It is for [the Court] ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.<sup>41</sup>

Similarly, in *Thompson v. Oklahoma*<sup>42</sup> — a case in which the issue was whether it was constitutional to impose the death penalty on an individual who was under the age of sixteen when he committed his crime — the Court again asked whether the punishment comported with the Court’s own sense of what violates the Punishments Clause.<sup>43</sup>

The Court’s embrace of its independent judgment has received significant criticism, however. For example, in *Thompson*, Justice Scalia stated in his dissent that it was surely not the Court’s place to judge the constitutionality of a punishment based on the notion that certain punishments “are out of accord with the perceptions of decency, or of penology, or of mercy, entertained . . . by a majority of the small and unrepresentative segment of our society that sits on th[e] Court.”<sup>44</sup> Justice Scalia explained that it is certainly for the Court to ultimately determine what is permissible under the Punishments Clause but that this determination should be based on the original understanding of the Clause or the standards of decency that have evolved from that understanding.<sup>45</sup> Justice O’Connor fairly agreed with Justice Scalia regarding the Court’s use of its own judgment in *Thompson*, stating that she “would not substitute [the Court’s] inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation’s legislatures.”<sup>46</sup>

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<sup>40</sup> 458 U.S. 782 (1982).

<sup>41</sup> *Id.* at 797.

<sup>42</sup> 487 U.S. 815 (1988).

<sup>43</sup> *See id.* at 833 (“Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty . . .”).

<sup>44</sup> *Id.* at 873 (Scalia, J., dissenting).

<sup>45</sup> *Id.* (“It is assuredly ‘for [the Court] ultimately to judge’ what the Eighth Amendment permits, but that means it is for [the Court] to judge whether certain punishments are forbidden [based on] . . . the original understanding of ‘cruel and unusual,’ or . . . the ‘evolving standards of decency’ . . .”).

<sup>46</sup> *Id.* at 854 (O’Connor, J., concurring). In her *Thompson* concurrence, Justice

The Court later came to agree with Justice Scalia and Justice O'Connor, candidly turning away from its historical reliance on its independent judgment, although only briefly.<sup>47</sup> When the Court held in its 1989 case of *Stanford v. Kentucky*<sup>48</sup> that the Punishments Clause does not prohibit the execution of sixteen- and seventeen-year-old offenders, it explicitly rejected the suggestion that it should consult its own judgment in determining the constitutionality of a punishment.<sup>49</sup> Instead, the Court focused on its mitigating language in *Coker*,<sup>50</sup> stating that “Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices.”<sup>51</sup> Justice Scalia, who authored the majority opinion, went even further, stating that he “emphatically reject[s] [the] suggestion that the [Punishments Clause] permit[s] [the Court] to apply [its] ‘own informed judgment’ regarding the desirability of [a punishment].”<sup>52</sup> According to Justice Scalia, to judge “on the basis of what [the Court] think[s] ‘proportionate’ and ‘measurably contributory to acceptable goals of punishment’ — to say and mean that, is to replace judges of the law with a committee of philosopher-kings.”<sup>53</sup> Justice Scalia justified his and the Court’s extraordinary rejection of the independent judgment doctrine by asserting that the Court had “never invalidated a punishment on this basis alone.”<sup>54</sup> Justice Brennan, along with Justices

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O'Connor further suggests that she also expressed opposition to the Court’s use of its independent judgment in her dissent in *Enmund v. Florida*, 458 U.S. 782 (1982). See *Thompson*, 487 U.S. at 854 (O'Connor, J., concurring) (citing *Enmund*, 458 U.S. at 826 (O'Connor, J., dissenting)). In that case, she stated that “the decision of whether or not a particular punishment serves the admittedly legitimate goal of retribution seems uniquely suited to legislative resolution.” *Enmund*, 458 U.S. at 826 n.42 (O'Connor, J., dissenting).

<sup>47</sup> See generally *Stanford v. Kentucky*, 492 U.S. 361, 378-80 (1989) (rejecting use of Court’s independent judgment in Punishments Clause case).

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 369; see also *id.* at 378 (stating that certain members of Court “emphatically reject [the] suggestion that the issues in th[e] case permit [the Court] to apply [its] ‘own informed judgment’ . . . regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds”).

<sup>50</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“[T]hese Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”); see also *supra* text accompanying note 33.

<sup>51</sup> *Stanford*, 492 U.S. at 369 (quoting *Coker*, 433 U.S. at 592).

<sup>52</sup> *Id.* at 378. Only Chief Justice Rehnquist, Justice White, and Justice Kennedy joined Justice Scalia in this part of the *Stanford* opinion. See *id.* at 378 (plurality opinion).

<sup>53</sup> *Id.* at 379.

<sup>54</sup> *Id.*

Marshall, Blackmun, and Stevens dissented, pressing the majority and Justice Scalia on the historical pedigree of the independent judgment doctrine.<sup>55</sup> They extolled the virtues of the doctrine, stating that the very purpose of the Bill of Rights is to protect individuals from the power of the majority.<sup>56</sup> This counter-majoritarian power, the dissenters explained, is undermined by relying solely on the Court's consultation of the objective factors, such as state legislative action, and by eschewing the Court's own judgment on the issue.<sup>57</sup>

Despite the Court's position in *Stanford*, the Court returned to its practice of relying on its own judgment in *Atkins v. Virginia*,<sup>58</sup> a case in which the Court found that executing mentally retarded<sup>59</sup> offenders violates the Punishments Clause.<sup>60</sup> In that case, the Court resurrected the progressive language of *Coker*, stating that its "own judgment will be brought to bear" on the constitutionality of a punishment.<sup>61</sup> As in *Thompson*, Justice Scalia dissented in *Atkins*, finding the majority's approach vexing<sup>62</sup> because the Court's judgment was not "confined . . . by the moral sentiments originally enshrined in the Eighth Amendment . . . nor even by the current moral sentiments of the American people"<sup>63</sup> but was instead nothing more than "the feelings and intuition of a majority of the Justices."<sup>64</sup> In Justice Scalia's opinion, "[t]he arrogance of this assumption of power takes one's breath away."<sup>65</sup>

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<sup>55</sup> See *id.* at 391-92 (Brennan, J., dissenting).

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> 536 U.S. 304 (2002).

<sup>59</sup> While a term such as "developmentally delayed" may be considered more politically correct than "mentally retarded," I use the latter term throughout this Article because it is the term the *Atkins* Court uses.

<sup>60</sup> See *Atkins*, 536 U.S. at 321.

<sup>61</sup> *Id.* at 312-13, 348 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)). In outlining its opinion, the *Atkins* Court stated that it would "first review the judgment of legislatures that have addressed the suitability of [the practice] and then consider reasons for agreeing or disagreeing with their judgment." *Id.* at 313. After completing its analysis, the Court stated that it had consulted its own judgment and had found "no reason to disagree with the judgment of 'the legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for a mentally retarded criminal." *Id.* at 321.

<sup>62</sup> See Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 MIL. L. REV. 66, 95 (2005) (noting that "Justice Scalia found the majority's approach extremely arrogant").

<sup>63</sup> *Atkins*, 536 U.S. at 348 (Scalia, J., dissenting).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Regardless of Justice Scalia's steadfast position and the sentiment the Court expressed in *Stanford*, the Court has remained consistent in consulting its own independent judgment when assessing the constitutionality of punishments under the Punishments Clause since *Stanford* was decided.<sup>66</sup> For example, in its 2005 case of *Roper v. Simmons*,<sup>67</sup> the Court turned to its independent judgment to determine the constitutionality of imposing the death penalty on a juvenile offender.<sup>68</sup> The Court stated that its judgment would be brought to bear on the question of proportionality, that is, whether the imposition of the death penalty was necessarily disproportionate to the crime committed when applied to juvenile offenders.<sup>69</sup> The Court acknowledged its rejection of the independent judgment doctrine in *Stanford* but stated that "this rejection was inconsistent with prior Eighth Amendment decisions"<sup>70</sup> and that it was "also inconsistent with the premises of [the Court's] recent decision in *Atkins*."<sup>71</sup> Justice Scalia again argued against applying the Court's independent judgment in *Roper*, asking why "nine lawyers [can] presume to be the authoritative conscience of the Nation"<sup>72</sup> and stating that applying such judgment "has no foundation in law or logic."<sup>73</sup> In the 2008 *Kennedy v. Louisiana*<sup>74</sup> decision, the Court again consulted its own independent judgment in determining the constitutionality of imposing the death

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<sup>66</sup> See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008) ("The Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.") (internal alterations omitted); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) ("We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."); *Atkins*, 536 U.S. at 313 ("Thus, in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.") (internal citations omitted); see also Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1156 (2006) (stating that, in *Roper*, "the Supreme Court overruled *Stanford* and strongly endorsed the independent judgment model" for Punishments Clause jurisprudence).

<sup>67</sup> 543 U.S. 551 (2005).

<sup>68</sup> See *id.* at 564 ("We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.").

<sup>69</sup> See *id.*

<sup>70</sup> *Id.* at 574.

<sup>71</sup> *Id.* at 575.

<sup>72</sup> *Id.* at 616 (Scalia, J., dissenting).

<sup>73</sup> *Id.*

<sup>74</sup> 128 S. Ct. 2641 (2008).

penalty on child rapists.<sup>75</sup> There, the Court once again quoted the progressive language of *Coker*, stating that “the Constitution contemplates that in the end [the Court’s] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>76</sup> Most recently, in the Court’s 2010 case of *Graham v. Florida*,<sup>77</sup> the Court consulted its own judgment in determining that it is unconstitutional to impose a sentence of life imprisonment without the possibility of parole on a juvenile offender who has not committed homicide.<sup>78</sup> In reaching its holding, the Court reiterated that “the task of interpreting the Eighth Amendment remains [the Court’s] responsibility.”<sup>79</sup>

III. RESORT TO INDEPENDENT JUDGMENT IS CUSTOMARY, BUT THE COURT’S INDEPENDENT JUDGMENT IN THE PUNISHMENTS CLAUSE CONTEXT IS UNCONVENTIONALLY UNLIMITED

While the Court seems likely to continue along this path of consulting its own judgment in Punishments Clause cases, this reliance on the Court’s independent judgment has remained the subject of sharp criticism, primarily for the reason noted by Justice Scalia: allowing judges unrepresentative of the American public to rely on their own judgment is anti-democratic.<sup>80</sup> As Texas Court of Appeals Justice Evelyn Keyes has explained, the Court’s resort to its independent judgment suffers from the flaws of the “perfectionist conception of law”:

[It] shifts from the people to the judiciary the powers to define the empirical limits of personal liberty and equality, to restrain personal and collective liberty in accordance with its own

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<sup>75</sup> See *id.* at 2650-51, 2658-64 (“Based both on consensus and our own independent judgment, . . . a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional . . .”).

<sup>76</sup> *Id.* at 2658.

<sup>77</sup> 130 S. Ct. 2011 (2010).

<sup>78</sup> *Id.* at 2026-30, 2034 (holding that it is unconstitutional to impose sentence of life imprisonment without possibility of parole on juvenile offender who has not committed homicide).

<sup>79</sup> *Id.* at 2026 (quoting *Roper v. Simmons*, 543 U.S. 551, 575 (2005)).

<sup>80</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 251-54 (1990); Raymond A. Lombardo, Note, *California’s Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sexual Offenders*, 65 *FORDHAM L. REV.* 2611, 2629 (1997).

conception of the common good, and to make general laws that further its conception of the common good, rendering the Tenth Amendment police power, the Fourteenth Amendment power of Congress to enforce the provisions in the amendment, and the Article V power of the people to amend the Constitution nugatory or, at best, vestigial.<sup>81</sup>

Professor Roger Alford has similarly identified the risks of “judicial hegemony and substantive indeterminacy” that Justice Scalia articulated in *Thompson* and the Court’s subsequent Punishments Clause cases.<sup>82</sup> Moreover, Professor Alford points out that a decision reached on the ground of the Court’s independent judgment “is suspect in terms of its sociological legitimacy, which depends on the public perception that the Court is adhering to principled legal norms.”<sup>83</sup>

Although scholars criticize the Court’s consultation of its own independent judgment, judicial interpretation of the Constitution, as well as of statutes and the common law, is nothing new. As the Supreme Court stated in the renowned case of *Marbury v. Madison*,<sup>84</sup> “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>85</sup> The Court has been relying on this doctrine for over two centuries, interpreting constitutional provisions and statutes and promulgating the limits of federal law. For example, the Court has relied on its independent judgment to interpret the scope of individual constitutional rights such as the rights to freedom of speech and equal protection.<sup>86</sup> In the freedom of speech context, courts must sometimes consider whether speech “is directed to inciting or producing imminent lawless action

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<sup>81</sup> Evelyn Keyes, *Two Conceptions of Judicial Integrity: Traditional and Perfectionist Approaches to Issues of Morality and Social Justice*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 233, 283-91 (2008).

<sup>82</sup> Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 17 (2005); see *supra* text accompanying notes 44-57.

<sup>83</sup> Alford, *supra* note 82, at 17.

<sup>84</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>85</sup> *Id.* at 177; see also *Thompson*, 487 U.S. at 838 n.40 (“That the task of interpreting the great, sweeping clauses of the Constitution ultimately falls to [the Court] has been for some time an accepted principle of American jurisprudence, [beginning with case of *Marbury v. Madison*].”).

<sup>86</sup> See Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 494-95 (2005) (explaining how Court has exercised its independent judgment in interpreting individual rights such as right to equal protection and right of free speech).

and is likely to incite or produce such action” before they can determine whether the speech is protected under the First Amendment.<sup>87</sup> In the equal protection context, they must sometimes ascertain whether a class is “suspect” and then apply the appropriate level of scrutiny.<sup>88</sup> Even within the realm of criminal procedure, courts turn to their own judgment in deciding case outcomes. For example, in assessing whether information from an informant is sufficient to justify a finding of probable cause, courts are charged with deciding, by the totality of the circumstances, whether there is a “fair probability that . . . evidence of a crime will be found in a particular place.”<sup>89</sup> In

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<sup>87</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 876-77 (2007) [hereinafter *Does Stare Decisis Apply*] (explaining that lower courts often decide legal questions within framework set by precedent and citing First Amendment as just one example of this). Surprisingly, the Court has neglected to state clearly whether the intent and probability aspects of this determination are questions of law or fact. See J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 548 (1985). It seems that the most persuasive legal authority on the issue is the 1951 case of *Dennis v. United States*, 341 U.S. 494 (1951), which commented on the law/fact distinction when the “clear and present danger” test, which predates this “incitement” test, was applied in this context. See Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 38 (2003) (“The *Dennis* Court . . . concluded that the first-order determination whether the speech at issue creates a clear and present danger is a question of law to be determined by the Courts, not impassioned juries.”); cf. Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 766 (1986) (“[Q]uestions of imminence and likelihood in the application of *Brandenburg v. Ohio* are not left even to properly instructed juries, but, as *Hess v. Indiana* teaches us, remain subject to judicial scrutiny.”). But cf. Parker, *supra*, at 549-50 (explaining that “*Dennis* was written at a time of great national and international stress” and arguing “that *Dennis* should be rejected on the law application point . . . [because] it represents a break from the clear understanding of the Supreme Court prior to that time, . . . it did not command a majority, . . . [and] it is inconsistent with the historical role of juries in American practice . . .”). The *Dennis* Court explained that:

When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.

*Dennis*, 341 U.S. at 513.

<sup>88</sup> See, e.g., Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938-42 (1991).

<sup>89</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Although a totality-of-the-circumstances evaluation may come closer to the wide-ranging assessment that the

evaluating this, courts specifically consider the veracity of the informant and his basis of knowledge.<sup>90</sup> Similarly, in determining whether a defendant has been denied effective assistance of counsel, to which every defendant is constitutionally entitled under the Sixth Amendment,<sup>91</sup> courts must judge “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>92</sup>

While the Court’s dependence on its independent judgment in the Punishments Clause context is not unique, the fact that the scope of its judgment seems unlimited in this context is exceptional. In other contexts, the Court has confined itself to the bounds of certain legal frameworks in forming its judgments. This can be seen in the previous examples of incitement,<sup>93</sup> equal protection,<sup>94</sup> probable cause,<sup>95</sup> and ineffective assistance of counsel.<sup>96</sup> In contrast, the Court has set few, if any, limits on the factors that may be considered in its independent judgment inquiry, and it has also been inconsistent in the factors it actually examines in independently judging the constitutionality of a punishment under the Punishments Clause. In consulting its judgment, the Court oftentimes thoroughly reviews the culpability of the offender or class of offenders<sup>97</sup> but in other cases bases its independent judgment primarily on the competency of the offender or class of offenders.<sup>98</sup> In recent cases, the Court has even considered factors such as the reliability of possible witnesses testifying at trial in

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Court has performed in the context of assessing its independent judgment, at least in the context of evaluating whether an informant’s information justifies probable cause, the Court’s evaluation is more clearly aimed at the issue at hand: probable cause.

<sup>90</sup> See *id.*

<sup>91</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

<sup>92</sup> *Strickland v. Washington*, 466 U.S. 668, 668 (1984).

<sup>93</sup> See *supra* text accompanying note 87.

<sup>94</sup> See *supra* text accompanying note 88.

<sup>95</sup> See *supra* text accompanying notes 89-90.

<sup>96</sup> See *supra* text accompanying notes 91-92.

<sup>97</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 568-75 (2005) (stating that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution’ ” and concluding that juveniles have “diminished culpability”).

<sup>98</sup> See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 406-07 (1986) (explaining that Blackstone stated that “if, after judgment, [an offender] becomes of nonsane memory, execution shall be stayed”; offering possible justification for this rule that “it is uncharitable to dispatch an offender ‘into another world, when he is not of a capacity to fit himself for it’ ”; and holding that insane person on death row cannot be executed even if he was not insane when he committed his crime).

reaching its own conclusion about the constitutionality of a punishment.<sup>99</sup>

#### IV. FACTORS THE COURT RELIES ON IN REACHING ITS INDEPENDENT JUDGMENT UNDER THE PUNISHMENTS CLAUSE

Although it is difficult to discern exactly what factors the Court relies on in formulating its own judgment,<sup>100</sup> the Court has commented on a number of matters in reaching its judgment in Punishments Clause cases. Historically, the Court has focused on the uniqueness of the death penalty and on whether the punishment comports with human dignity. This could include examining the penological justifications of retribution and deterrence or evaluating whether the punishment is grossly disproportionate to the crime for a particular offender.<sup>101</sup> The Court also occasionally makes reference to an offender's competency and various systemic concerns, such as the risks of insufficient legal representation and wrongful conviction. Ultimately, the Court has been inconsistent in which factors it consults in these Punishments Clause cases.

##### A. The "Death is Different" Principle

When the Court first explicitly applied its independent judgment in *Coker*, it did not clearly delineate what specific factors influenced its judgment.<sup>102</sup> Instead, the Court explained that, "in terms of moral depravity and of the injury to the person and to the public, [the crime of the rape of an adult woman] does not compare with murder . . ." <sup>103</sup> "[T]he death penalty," the Court stated, "is unique in its severity and irrevocability [and] is an excessive penalty for the rapist who, as such, does not take human life."<sup>104</sup> Five years later in *Enmund*, the Court

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<sup>99</sup> See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008). In *Kennedy*, the Court stated that "[t]here are . . . serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases." *Id.*

<sup>100</sup> See *supra* note 25 (explaining that weight Court accords its independent judgment is somewhat debatable).

<sup>101</sup> See *infra* Parts IV.A-B (examining "death is different" principle and role of human dignity in Court's independent judgment analysis).

<sup>102</sup> See *Coker v. Georgia*, 433 U.S. 584, 597-600 (1977).

<sup>103</sup> *Id.* at 598.

<sup>104</sup> *Id.* This notion that death is different can be traced back to Justice Brennan's concurrence in *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972), in which Justice Brennan stated that death is different because of its severity; because it is "unusual in

again invoked this *Coker* sentiment when it confronted the question of whether the Punishments Clause precludes imposing the death penalty on an offender who aided and abetted a felony during which a murder was committed but who was not, himself, involved in the murder.<sup>105</sup> The *Enmund* Court emphasized the uniqueness of the death penalty and concluded that it “is an excessive penalty for the robber who, as such, does not take human life.”<sup>106</sup> The Court further developed this “death is different” principle in its 2008 case of *Kennedy*.<sup>107</sup> In forming its own judgment in that case on the question of whether the death penalty may be imposed for the crime of child rape, the Court stated that, for crimes against individuals, the punishment of death is unconstitutional unless the victim’s life was taken because homicides are incomparable in terms of their “severity and irrevocability.”<sup>108</sup> The Court noted, however, that in determining whether a punishment is constitutional, it must distinguish between such crimes against individuals and crimes against the state, such as “treason, espionage, terrorism, and drug kingpin activity,” which may be deserving of death even if no loss of life was involved.<sup>109</sup>

### B. Human Dignity

Even before the Court explicitly invoked its independent judgment in *Coker*, it asserted that the Punishments Clause demands that a

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its pain, in its finality, . . . in its enormity”; and because it is imposed so infrequently. *Furman*, 408 U.S. at 287, 291; see also Ryan, *Does Stare Decisis Apply*, *supra* note 87, at 859-61 (outlining history of “death is different” doctrine).

<sup>105</sup> See *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that it is unconstitutional to execute man “who aid[ed] and abet[ted] a felony in the course of which a murder [was] committed by others but who [did] not himself kill, attempt to kill, or intend that a killing take place or that lethal force [would] be employed”). In its later case of *Tison v. Arizona*, 481 U.S. 137 (1987), the Court refined its holding in *Enmund*, stating that “*Enmund* explicitly dealt with . . . the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state.” *Id.* at 149. In contrast, the *Tison* case dealt with “the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life.” *Id.* at 152. In this situation, the court determined, imposing capital punishment does not violate the Punishments Clause. See *id.* at 158. But see Application to File Supplemental Letter Brief and Supplemental Letter Brief, *People v. Letner*, 235 P.3d 62 (Cal. 2010), No. S015384, 2010 WL 2066494, at \*4-9 (arguing that “the recent case of *Kennedy v. Louisiana* . . . has put the *Tison* holding squarely in jeopardy”).

<sup>106</sup> *Enmund*, 458 U.S. at 797-98.

<sup>107</sup> See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008).

<sup>108</sup> *Id.* at 2659-60.

<sup>109</sup> *Id.* at 2659.

punishment must comport with the “dignity of man.”<sup>110</sup> A punishment does not meet this criterion, the Court has said, if it is excessive — meaning that it either “involve[s] the unnecessary and wanton infliction of pain” or is “grossly out of proportion to the severity of the crime.”<sup>111</sup>

#### 1. Punishments Involving the Unnecessary and Wanton Infliction of Pain

In its 1976 case of *Gregg v. Georgia*,<sup>112</sup> the Court suggested that the first type of punishment failing to comport with the dignity of man — punishments “involv[ing] the unnecessary and wanton infliction of pain”— are those that are “totally without penological justification.”<sup>113</sup> The Court has embraced this definition and, to this end, the Court most frequently examines the penological justifications for specific punishments in forming its independent judgment.<sup>114</sup> In *Enmund*, for example, the Court examined the “two principal social purposes” of the death penalty — retribution and deterrence — and concluded that executing an aider and abettor who did not kill or intend a killing would serve neither purpose.<sup>115</sup> Similarly, in cases such as *Thompson*, *Atkins*, *Roper*, *Kennedy*, and *Graham*, the Court examined whether the punishment at issue served the goals of retribution and deterrence,

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<sup>110</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958), *quoted in Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>111</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *see also Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (“Today the Eighth Amendment prohibits punishments which, although not physically barbarous, ‘involve the unnecessary and wanton infliction of pain,’ or are grossly disproportionate to the severity of the crime.”). Although punishments that are “grossly out of proportion to the severity of the crime” may be no different than those that “involve[] the unnecessary and wanton infliction of pain,” and although it is likely that these categories are at least overlapping, the Court has engaged in somewhat different analyses in addressing each of these descriptions of excessive punishments. *See id.*; *supra* Parts IV.B.1, 2.

<sup>112</sup> 428 U.S. 153 (1976).

<sup>113</sup> *Id.* at 173, 183; *see also Rhodes*, 452 U.S. at 346 (“Among ‘unnecessary and wanton’ inflictions of pain are those that are ‘totally without penological justification.’”) (citing *Gregg*, 428 U.S. at 183).

<sup>114</sup> *See, e.g., Roper v. Simmons*, 543 U.S. 551, 571 (2005) (noting importance of examining “the penological justifications for the death penalty”).

<sup>115</sup> *Enmund v. Florida*, 458 U.S. 782, 798-801 (1982).

and, in each case, the Court determined that it did not.<sup>116</sup> Accordingly, the Court struck down the punishments in those cases.<sup>117</sup>

*a. Retribution*

The penological purpose of retribution comes in various forms. As Professor Andrew Ashworth has explained, retributivists can be divided into two camps: intent-based retributivists and harm-based retributivists.<sup>118</sup> Intent-based retributivists assert that an individual

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<sup>116</sup> See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2662-64 (2008); *Roper*, 543 U.S. at 571; *Atkins v. Virginia*, 536 U.S. 304, 319-21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 836-38 (1988).

<sup>117</sup> See *Graham v. Florida*, 130 S. Ct. 2011, 2028-29 (2010); *Kennedy*, 128 S. Ct. at 2662-64; *Roper*, 543 U.S. at 571; *Atkins*, 536 U.S. at 319-21; *Thompson*, 487 U.S. at 836-38; see also Simon, *supra* note 62, at 92 (“Two important philosophical goals the Court considers in informing its judgment are deterrence and retribution.”). In *Thompson*, the Court analyzed whether applying the death penalty to offenders under the age of sixteen measurably contributed to the social purposes of retribution and deterrence and concluded that it did not. See *Thompson*, 487 U.S. at 836-38. In *Atkins*, the Court again looked to the penological goals of retribution and deterrence and stated that “[u]nless the imposition of the death penalty on a mentally retarded person ‘measurably contributes to one or both of these goals, ‘it is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.’” *Atkins*, 536 U.S. at 319-21. In *Roper*, the Court once again identified “two distinct social purposes served by the death penalty” — retribution and deterrence. *Roper*, 543 U.S. at 571. Because these purposes failed to justify the punishment as applied to juvenile offenders, the Court determined that the punishment was unconstitutional in that circumstance. See *id.* at 574-75. In *Kennedy*, the Court stated that executing child rapists does not sufficiently serve the social purpose of retribution or deterrence and subsequently struck down the death penalty as applied to those offenders. *Kennedy*, 128 S. Ct. at 2662-64. The *Kennedy* Court departed somewhat from the Court’s previous articulations of the penological purposes of punishment, though, in stating that there are “three principal rationales: *rehabilitation*, deterrence, and retribution.” *Id.* at 2649 (citing *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment) (“The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”)) (emphasis added). Finally, in *Graham*, the Court acknowledged the penological goals of retribution, deterrence, rehabilitation, and also incarceration. See *Graham*, 130 S. Ct. at 2028-29. However, the *Graham* Court determined that even the goal of incapacitation failed to justify a juvenile’s sentence of life imprisonment without the possibility of parole. See *id.*

<sup>118</sup> See Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 735-36 (1987-88). Scholars sometimes refer to intent-based retributivists as subjectivists and harm-based retributivists as objectivists. See, e.g., Kevin Cole, *The Voodoo We Do: Harm, Impossibility, and the Reductionist Impulse*, 1994 J. COMTEMP. LEGAL ISSUES 31, 31-33 (stating that those who believe that “defendant[s] should be punished in accord with the harm [they] intended to cause” are subjectivists). As Professor Ashworth has

deserves punishment if he has a culpable state of mind, whereas harm-based retributivists assert that an individual deserves punishment only if he has caused a prohibited harm with a culpable state of mind.<sup>119</sup> Retributivists also disagree on whether the appropriate punishment should reflect the interests of society in general or rather the interests of victims.<sup>120</sup>

The Court's examination of retribution in the Punishments Clause context has focused primarily on culpability concerns and, thus, on an intent-based formulation of retribution.<sup>121</sup> For example, in *Enmund*,

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explained, the distinction between intent- and harm-based retributivists can be seen in how each group treats attempts. See Ashworth, *supra*, at 735-37. Generally, intent-based retributivists believe that criminal liability is justified for incomplete attempts because "[t]he actual outcomes of [criminals'] efforts should not make the difference between criminal liability and no liability at all . . ." *Id.* at 735-37. Under a traditional harm-based approach to retribution, however, there is no justification for punishing mere attempts because no harm has been caused. See *id.* at 735. Some harm-based retributivists challenge this understanding, though, and argue for an extended definition of harm, such as by asserting "that the manifestation of a firm intent to cause a substantive harm . . . gives rise to such fear and concern among citizens as to amount to a harm in itself . . ." *Id.* at 733-35.

<sup>119</sup> See Ashworth, *supra* note 118, at 735-36. Professor Robert Nozick, a harm-based retributivist, has reduced harm-based retributivism to a mathematical formula, suggesting that justified retribution equals the degree of culpability times the harm caused or risked ( $R = r \times H$ ). Adil Ahmad Haque, *Lawrence v. Texas and the Limits of the Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 21-22 (2007) (citing ROBERT NOZICK, ANARCHY, STATE, & UTOPIA 60 (1974)). Although harm-based retributivism suggests that a punishment is justified if the defendant was culpable and caused the harm, Professor Kenneth Simons has noted that, under certain permutations of harm-based retributivism, an enhanced punishment for the harm caused may be available even if the defendant acted without culpability with respect to the enhancing factor. See Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 254 n.46 (2000). For example, a defendant could be culpable for assault on a police officer even if the actor was not aware that the victim was a police officer, and "[m]any courts do permit enhancement based on the victim's status even absent a finding of culpability as to that element." See *id.* As Professor Simons has explained, though, it would not be "permissible to convert a non-criminal into a criminal act absent such culpability." *Id.*

<sup>120</sup> See generally Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31, 33-35, 40-45 (2008) (describing Blackstonian and victim-centric approaches to justifying punishment).

<sup>121</sup> Although this is the case when the constitutionality of the punishment is at issue, the Court has taken a harm-based approach to retribution in certain procedural-based Punishments Clause cases. For example, in *Payne v. Tennessee*, 501 U.S. 808 (1991) — a case in which the Court examined the admissibility of victim impact statements — the Court seemed to approach retribution from a more harm-based perspective. See *id.* at 825, 827; see also Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 426 (2003). It concluded that it is reasonable for a state to determine that a jury "should have before

the Court concentrated on the defendant's culpability for his own participation in a robbery, and not on his culpability as part of a group of offenders or the harms they caused by committing the robbery and shooting the victims.<sup>122</sup> The Court explained that "[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."<sup>123</sup> In other cases, the Court's culpability analysis has focused, not on the culpability of a particular offender, but on the culpability of a distinct class of offenders. For example, in *Thompson*, the Court examined the general capacity of persons under the age of sixteen to determine the generalized culpability of such offenders and the constitutionality of executing them under the Eighth Amendment.<sup>124</sup> The Court concluded that such adolescents are ordinarily less culpable

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it at the sentencing phase evidence of the specific harm caused by the defendant" so that it can meaningfully assess "the defendant's moral culpability and blameworthiness." *Payne*, 501 U.S. at 825. Further, most courts take into account the harm caused by the defendant when determining the proper punishment to be imposed. See, e.g., Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 105 (1993) (noting that "[h]arm-based retribution is the principle of the [Federal Sentencing] [G]uidelines"); cf. Nadler & Rose, *supra*, at 423 ("Empirical research on the psychology of justice supports an emerging consensus that people's punishment judgments are guided to a large degree by a harm-based retributive psychology."). But cf. Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 415-16 (2002) (arguing that some commentators' conclusion that sentencing guidelines are based on harm-based retribution are erroneous and that Federal Sentencing Guidelines are instead based on consequentialist theory of punishment).

<sup>122</sup> See *Enmund v. Florida*, 458 U.S. 782, 798, 800-01 (1982).

<sup>123</sup> *Id.* at 801. In the Court's 1987 case of *Tison v. Arizona*, 481 U.S. 137 (1987), the Court refined *Enmund's* holding to bar capital punishment in felony murder cases only when the offender was a minor participant in the offense and did not intend to kill or have "any culpable mental state." *Id.* at 149; see *supra* note 105. While there are straightforward harm-based retributivist arguments supporting the felony-murder rule, see Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 75 (1990) ("For the harm-based retributivist, defending the felony-murder rule poses few difficulties." (citing Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 362-63 (1985))), even intent-based retributivism can be said to support the felony-murder rule, see, e.g., Cole, *supra*, at 122-23 (suggesting that "strong" felony-murder rule might be justified under intent-based retributivist principles if underlying felonies may be punished just as harshly as murder under felony-murder rule); Kenneth W. Simons, *When is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1121-25 (1997) (suggesting that individual who commits predicate felony "should foresee, and often does foresee, significant risk that [predicate felony] will result in death" and thus is reckless, or at least negligent, "as to the risk of death").

<sup>124</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 834-38 (1988).

for their crimes than adults because, among other things, they are less able to evaluate the consequences of their actions, are more motivated by emotion and peer pressure than adults, and are less capable of controlling their conduct.<sup>125</sup> Further, such adolescents are less culpable for their crimes than adults because “offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth.”<sup>126</sup> Due to this general lesser culpability of offenders under the age of sixteen, the Court concluded that executing such individuals could not serve the penological purpose of retribution.<sup>127</sup> Likewise, in *Atkins*, the Court determined that mentally retarded individuals act on impulse, act as followers, and have diminished capacities to understand and process information, thus they are generally less culpable than offenders who are not mentally retarded.<sup>128</sup> Accordingly, the Court determined that executing mentally retarded offenders does not measurably contribute to retribution and is therefore unconstitutional.<sup>129</sup> Similarly addressing the culpability question in *Roper*, the Court examined how juveniles differ fundamentally from adults — they lack maturity, have an underdeveloped sense of responsibility, are susceptible to negative influences such as peer pressure, and have characters that are of an inchoate nature<sup>130</sup> — and determined that the social goal of retribution does not “provide[] adequate justification for imposing the death penalty on juvenile offenders,” because these characteristics render them less culpable.<sup>131</sup>

Justice Scalia, however, has suggested that the Court should instead embrace a harm-based vision of retribution. In his dissent in *Atkins*, Justice Scalia explained: “Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime . . . .”<sup>132</sup> Justice Scalia asserted that this is the reason why categorical rules regarding violations of the Punishments Clause are unworkable and why the appropriateness of punishments should be left to “the sentencer’s weighing of the circumstances (both degree of

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<sup>125</sup> See *id.* at 834-35.

<sup>126</sup> *Id.* at 834.

<sup>127</sup> See *id.* at 836-37.

<sup>128</sup> See *Atkins v. Virginia*, 536 U.S. 304, 318-21 (2002).

<sup>129</sup> See *id.* at 319.

<sup>130</sup> See *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

<sup>131</sup> See *id.* at 569-73.

<sup>132</sup> See *Atkins*, 536 U.S. at 350-51 (Scalia, J., dissenting).

[capacity] and depravity of crime) in the particular case.”<sup>133</sup> “Once the Court admits . . . ,” Justice Scalia argued, “that mental retardation does not render the offender morally *blameless*, there is no basis for saying that the death penalty is *never* appropriate retribution, no matter *how* heinous the crime.”<sup>134</sup>

In the recent *Kennedy* case, the Court’s retribution analysis indeed took somewhat of a harm-based retributivist turn. Instead of engaging in the typical culpability inquiry that focuses on the offender’s mental state like it had in previous cases,<sup>135</sup> the Court broadened its retribution analysis to examine the harm caused by the defendant. While most harm-based retribution analyses measure a defendant’s desert by either the harm the defendant has caused to society or the harm he has caused to the victim,<sup>136</sup> the *Kennedy* Court stated that retribution “reflects society’s and the victim’s interests in seeing that the offender is repaid for the hurt he caused.”<sup>137</sup> Accordingly, the Court embraced both of these potentially conflicting measurements of desert. Attempting to buttress this unconventional approach, the

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 351 (internal citations omitted).

<sup>135</sup> The Court vaguely referenced the offender’s mental state in taking into account the severity of the death penalty. In this context, the Court stated that “[t]he incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense.” *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2662 (2008).

<sup>136</sup> See generally MacLeod, *supra* note 120 (explaining that “[a] new fault line appears to have opened between those who maintain the historical view that criminal punishment promotes the common good and those who believe that criminal punishment should primarily or exclusively serve or vindicate the interests of individual victims”); see also Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1299-1300 (2006) (explaining that modern theories of retribution base offender’s desert on harms caused to either victim or society).

<sup>137</sup> *Kennedy*, 128 S. Ct. at 2662. In making this statement, the Court surprisingly cited the *Atkins* decision. See *id.* In *Atkins*, however, the Court seemed to focus instead primarily on the culpability of the offender. See generally *Atkins*, 536 U.S. at 318-20 (explaining that “deficiencies” of mentally retarded individuals “diminish their personal culpability”); *supra* text accompanying notes 128-129 (explaining that *Atkins* Court identified certain characteristics of mentally retarded individuals that render them less culpable than offenders who are not mentally retarded). The *Atkins* Court did state that the Court’s “jurisprudence ha[d] consistently confined the imposition of the death penalty to a narrow category of the most serious crimes,” *Atkins*, 536 U.S. at 319, but the Court then went on to focus its retribution analysis on the reduced capacities and thus culpabilities of mentally retarded offenders rather than on the harms caused in that case. See generally *id.* at 319-21 (examining general capacities and culpabilities of mentally retarded offenders).

Court stated that, in previously analyzing the retributive justification of capital punishment, it had examined whether the punishment “ha[d] the potential . . . to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner [was] so serious that the [punishment had to] be sought and imposed” and that this inquiry included “the question whether the [punishment] balance[d] the wrong to the victim.”<sup>138</sup> While this embrace of both the victim and society went beyond the traditional bounds of a retribution analysis, the Court went even further in broadening this analysis by examining not only the direct harm caused by the crime committed but also any harms caused to the victim through the criminal justice system.<sup>139</sup> The Court stated that retribution does not justify the punishment of death for child rapists because “[i]t is not at all evident that the child rape victim’s hurt is lessened when the law permits the death of the perpetrator,” and pursuing the death penalty requires the child to relive the offense because it requires her to testify beyond what would be required in a non-capital trial.<sup>140</sup> This surprising extension of the Court’s retribution analysis to less direct effects of the offender’s conduct marks the outer bounds of the Court’s examination of retribution thus far.

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<sup>138</sup> *Kennedy*, 128 S. Ct. at 2662 (considering whether death penalty “has the potential . . . to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed”) (citing *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), and *Roper v. Simmons*, 543 U.S. 551, 571 (2005)). The *Kennedy* Court’s classification of the harm caused to the victim by testifying as an element of the retribution analysis is questionable. Ordinarily, harm-based retributivists examine the harm directly caused by the crime to determine the proper punishment. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL chs. 3 & 4 (2009) (specifying only defendant’s role in offense, his attempts to obstruct administration of justice, his acceptance of responsibility, and other more direct harms as bases on which to adjust offender’s sentence); MINNESOTA SENTENCING GUIDELINES MANUAL §§ II.B, II.D (2009) (identifying grounds for departure from presumptive sentences based on factors such as defendant’s role in offense, defendant’s physical or mental impairment, victim’s vulnerability, and any particular cruelty inflicted on victim). The *Kennedy* Court’s extension of retribution to harms caused as a result of prosecuting the crime seems to embody a new breed of retributivism.

<sup>139</sup> *See Kennedy*, 128 S. Ct. at 2662.

<sup>140</sup> *Id.* The Court’s conclusion in this respect is somewhat ironic because it suggests that the greater the harm caused to the victim through the offender’s direct conduct, the lesser punishment the offender may receive because a greater punishment would cause even greater harm to the victim.

*b. Deterrence*

Like the theory of retribution, the punishment rationale of deterrence comes in two forms: general deterrence and specific deterrence.<sup>141</sup> General deterrence is the concept that punishing an offender will deter other would-be offenders from committing such crimes and, thus, reduce crime overall.<sup>142</sup> Specific deterrence is the notion that punishing an offender will deter that specific offender from committing crimes in the future.<sup>143</sup>

The Court's analysis of deterrence in the Punishments Clause context has focused primarily on general deterrence rather than specific deterrence. For example, in reaching its conclusion in *Enmund* that death is not the appropriate punishment for an offender who did not kill or intend to kill, the Court stated that the death penalty will not "measurably deter" such an offender.<sup>144</sup> It explained that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," because, "if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not 'enter into the cold calculus that precedes the decision to act.'"<sup>145</sup> In *Thompson*, the Court determined that the deterrence rationale failed to justify executing individuals who were under the age of sixteen when they committed their crimes because approximately ninety-eight percent of willful homicide offenders were over sixteen when they committed their crimes;<sup>146</sup> accordingly, making such offenders ineligible for the death penalty would "not diminish the deterrent value of capital punishment for the vast majority of potential offenders."<sup>147</sup> The Court further stated that imposing death would not substantially deter would-be offenders under the age of sixteen because they are unlikely to engage in the requisite cost-benefit calculus, and, considering the small number of people of that age who had been executed in the last century, those who would weigh the costs and benefits of crime likely would not be

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<sup>141</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (5th ed. 2009).

<sup>142</sup> See *id.*; see also Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 71 (2005) ("General deterrence seeks to discourage would-be offenders from committing further crimes by instilling a fear of receiving the penalty given to this offender.").

<sup>143</sup> See DRESSLER, *supra* note 141, at 15.

<sup>144</sup> *Enmund v. Florida*, 458 U.S. 782, 798-99 (1982).

<sup>145</sup> *Id.* at 799. *But cf. supra* notes 105 & 123 (explaining that Court narrowed *Enmund's* holding in its later case of *Tison v. Arizona*, 481 U.S. 137 (1987)).

<sup>146</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 837-38 (1988).

<sup>147</sup> *Id.* at 837.

deterred even with the possibility of death as a punishment.<sup>148</sup> Similarly, in *Atkins*, the Court stated that executing mentally retarded individuals does not measurably contribute to deterrence because mentally retarded individuals' diminished capacities render them less able to engage in the necessary cost-benefit analysis for the deterrence effect, and excluding the mentally retarded from the death penalty would not abate deterrence of those who are not mentally retarded.<sup>149</sup> In *Roper*, the Court looked at the same fundamental differences between juveniles and adults that it examined in its retribution analysis.<sup>150</sup> It explained that the social goal of deterrence does not "provide[] adequate justification for imposing the death penalty on juvenile offenders"<sup>151</sup> because, as in *Thompson*, death would not sufficiently deter juveniles who do not reason as well as adults and likely would not engage in the cost-benefit analysis necessary for effective deterrence.<sup>152</sup>

The Court's focus on general deterrence — i.e., whether potential offenders would be deterred from committing certain crimes — is somewhat surprising because specific deterrence generally provides a stronger justification for the types of punishments at issue in Punishments Clause cases.<sup>153</sup> For example, if an individual has been sentenced to death or life imprisonment without the possibility of parole, following through on the punishment virtually guarantees that

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<sup>148</sup> See *id.* at 837-38.

<sup>149</sup> *Atkins v. Virginia*, 536 U.S. 304, 318-20 (2002).

<sup>150</sup> See *supra* text accompanying note 130 (explaining that *Roper* Court identified adolescents' lack of maturity, underdeveloped sense of responsibility, susceptibility to negative influences, and inchoate characters as fundamental differences between adolescents and adults).

<sup>151</sup> *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

<sup>152</sup> See *id.* at 570-73 (stating, for example, that "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult'").

<sup>153</sup> The penological rationale of specific deterrence is often described to include incapacitation. See, e.g., Richard S. Gebelein, *Delaware Leads the Nation: Rehabilitation in a Law and Order Society; A System Responds to Punitive Rhetoric*, 7 DEL. L. REV. 1, 2 (2004) (stating that incapacitation "is the ultimate form of specific deterrence"); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 69 (2007) (explaining that incapacitation "can be conceived as an extreme form of specific deterrence insofar as, if successful, it obviates any recidivism concerns"). But cf. Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 128 (1996) (explaining that "[i]ncapacitation can be seen either as a distinct rationale of punishment or as a form of specific deterrence").

the individual will not commit future crimes<sup>154</sup> and thus readily serves the justification of specific deterrence.<sup>155</sup> Perhaps the Court's interest in general deterrence stems from the fact that specific deterrence is more easily served in other ways. For example, one might argue that life imprisonment serves the function of specific deterrence just as effectively as the punishment of death. As some commentators have pointed out, though, the punishment of life imprisonment is not as effective at reducing crime as one might initially think because prisoners often commit crimes while incarcerated.<sup>156</sup>

In *Kennedy*, the Court shifted its focus from general deterrence to specific deterrence and, as in its analysis of retribution, stretched the traditional bounds of the deterrence rationale.<sup>157</sup> The *Kennedy* Court stated that imposing the death penalty on child rapists would diminish, instead of serve, the deterrence justification for punishment because doing so could contribute to the non-reporting of child rape.<sup>158</sup> This is more of a specific deterrence rationale than a general

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<sup>154</sup> With the punishment of life imprisonment, the prisoner does have the opportunity to commit future crimes in prison. See Deaths in Custody Statistical Tables: State Prison Deaths, 2001-2006, <http://bjs.ojp.usdoj.gov/content/dcrp/tables/dcst06spt1.cfm> (last visited Dec. 10, 2009) (documenting that 299 state prisoners died as result of homicides during years 2001 through 2006). *But cf.* Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1076 (2008) (estimating that "in-prison violence constituted just under 0.5 percent of total reported crime" in 2000). Such prison crimes, however, are not usually figured into the analysis of whether a utilitarian rationale, such as specific deterrence, justifies the punishment. See Pritikin, *supra*, at 1052 (noting that whether imprisonment increases crime is "a question that is rarely addressed directly"). This naturally seems to be a weakness in such a justification for the punishment. See JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 56 (6th ed. 2008).

<sup>155</sup> See *supra* note 153 (noting that incapacitation is often described as form of specific deterrence). The fact that the harsh punishments of death and life without the possibility of parole will most likely always serve the punishment rationale of incapacitation might cause concern because, if the Court were to rely on the purpose of incapacitation in assessing the constitutionality of a punishment, the Eighth Amendment could essentially become a nullity in almost all modern day Punishments Clause challenges. Perhaps this is the reason that the Court has, for the most part, ignored incapacitation as a legitimate purpose of punishment and overlooked specific deterrence more generally. See *infra* text accompanying notes 293-298.

<sup>156</sup> See KAPLAN ET AL., *supra* note 154, at 56 ("Does incarceration actually reduce crime or merely distribute it? The assumption that incarceration incapacitates must be based on one of two premises. Either (1) crime does not occur in prison, or (2) prison crime simply does not count. That violence occurs in prison is widely acknowledged . . . .").

<sup>157</sup> See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661-63 (2008).

<sup>158</sup> *Id.* at 2663. In its discussion of deterrence, the *Kennedy* Court also stated that, "by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill

deterrence rationale because it is aimed, at least to some extent, at preventing future crimes by a particular offender. To the extent that this constitutes specific deterrence, though, it is somewhat askew: specific deterrence ordinarily focuses on a punishment's value in directly deterring future crimes by a particular offender rather than on the punishment's value in indirectly deterring the offender's illegal activities.<sup>159</sup> But such indirect deterrence is the most intuitive interpretation of the *Kennedy* Court's argument that the availability of capital punishment for the crime of child rape does not serve deterrence: the availability of the death penalty leads to a third party's behavior of failing to report the offender's conduct, which then leads to the offender's ability to continue engaging in the illegal activity. A perhaps less intuitive interpretation of the *Kennedy* Court's deterrence exposition is that the Court believes that the availability of the death penalty may cause the offender to discount the probability of detection, conviction, and punishment because third parties are less likely to report him due to the chance that he could be sentenced to death. Because the justification of deterrence assumes that a rational person would not commit a crime if the probability of detection, conviction, and punishment, times the severity of punishment, outweighs the benefit of committing the crime,<sup>160</sup> the offender's

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the victim." *Id.* at 2664. This reasoning for why imposing the death penalty is improper, however, would be better classified as a concern other than nondeterrence. See *infra* note 212 and accompanying text.

<sup>159</sup> See, e.g., WAYNE R. LAFAVE, *CRIMINAL LAW* 28 (4th ed. 2003) (explaining deterrence as theory under which "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate"); see also, e.g., Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 *GEO. L.J.* 1, 26 (2005) (stating that "the forcible castration of a sex offender by the state, even if not intended punitively, has a deterrent effect, as does incarceration for purposes of incapacitation or rehabilitation; both constitute means of 'deterrence'"); Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 *HARV. L. & POL'Y REV.* 173, 176 (2010) (asserting that "[g]eneral deterrence uses the offender's sentence as an example to dissuade others from engaging in similar conduct").

<sup>160</sup> See Paul H. Robinson, *The Legal Construction of Norms: Why Does the Criminal Law Care What the Layperson Thinks Is Just?*, 86 *VA. L. REV.* 1839, 1845-46 (2000) ("The effect of a deterrent threat is a product of both the severity of the threatened punishment and the likelihood of its imposition after a violation."). Under the traditional deterrence formula, deterrence will be achieved so long as the benefits to be gained by committing the crime are less than the probability of punishment times the severity of punishment. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 *DUKE L.J.* 1, 10 n.48 (1990) (explaining that "a rational person [will] discount the costs of the criminal sanction by the probability he will actually suffer that sanction in deciding whether to commit

perception of a diminished probability could decrease the deterrent effect of the punishment. However, without assigning values to the decrease in this probability and the increase in severity of punishment when imposing death, it is difficult to determine whether the overall deterrence level would increase or decrease by exposing the offender to a sentence of death instead of, for example, life without the possibility of parole. Moreover, this interpretation of the Court's position is less intuitive because the *Kennedy* Court's language emphasizes that the death penalty will affect the third party's decisionmaking, not the decisionmaking of the offender.<sup>161</sup> This less intuitive analysis, though, is more in line with the traditional approach of specific deterrence, because it does not rely on a punishment's indirect effects on an offender. Regardless of which interpretation of *Kennedy* is adopted, however, the *Kennedy* Court's analysis of deterrence stretches the bounds of a traditional deterrence analysis.

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the crime"); Frase, *supra* note 142, at 71; Robinson, *supra*, at 1845-46. As scholars have pointed out, though, additional factors — such as the swiftness with which the penalty is imposed; “the target group's perceptions of the severity, swiftness, and certainty of punishment”; “conditions which significantly diminish [the target group's] capacity to obey the law”; and “the extent to which these would-be offenders face competing pressures or incentives to commit crime” — complicate this formula somewhat. Frase, *supra* note 142, at 71. Moreover, it is questionable whether would-be offenders are rational decisionmakers in the first place, thus potentially undermining the entire enterprise of deterrence-based criminal legislation. See Dane Archer, *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991, 995 (1983) (noting that, especially in context of crimes warranting death penalty, there is some question about whether offenders act rationally); Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 914 (1996) (stating that “[t]he rational choice camp . . . begins with the assumption that people usually act in ways that maximize their own material well-being” and explaining that deterrence theory is fashioned from this assumption, “modified occasionally by empirical findings on certainty versus severity of punishment, risk aversion, information costs, decision bias, and the like”).

<sup>161</sup> See *Kennedy*, 128 S. Ct. at 2663-65. The *Kennedy* Court stated:

Although we know little about what differentiates those who report [instances of child rape] from those who do not report, one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member. The experience of the *amici* who work with child victims indicates that, when the punishment is death, both the victim and the victim's family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting. As a result, punishment by death may not result in more deterrence or more effective enforcement.

*Id.* at 2663-64 (citations omitted).

## 2. Grossly Disproportionate Punishments

The Court has been less precise in defining the bounds of its second category of punishment that fails to comport with human dignity — punishments “grossly out of proportion to the severity of the crime.”<sup>162</sup> Much of the Court’s analysis in this area relates to the death penalty and, in that sense, is inextricably linked to the Court’s “death is different” principle.<sup>163</sup> For example, in *Coker v. Georgia*,<sup>164</sup> the Court concluded that death was a grossly disproportionate sentence for the crime of rape<sup>165</sup> because rape does “not involv[e] the taking of life.”<sup>166</sup> Similarly, in its recent decision of *Kennedy*, the Court concluded that capital punishment was disproportionate to the crime of child rape because “no life was taken in the commission of the crime.”<sup>167</sup> The Court also suggested that the punishment was disproportionate because allowing such a punishment for this crime would greatly increase the number of circumstances in which capital punishment would be imposed.<sup>168</sup>

While the Court has historically spent little time on disproportionality analysis in the death penalty context because it traditionally relies on its “death is different” jurisprudence in this area, in *Graham*, the Court suggested that this distinction based on the punishment of death may no longer be so significant. In that case, the Court stated that there are two general types of disproportionality analyses: (1) those in which the Court “has used categorical rules to define Eighth Amendment standards,”<sup>169</sup> and (2) those in which “the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.”<sup>170</sup> The Court then went on to examine the objective indicia of contemporary values and the traditional independent judgment factors of retribution and deterrence when dealing with the punishment of life without parole.

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<sup>162</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *see also supra* text accompanying notes 110-111 (explaining that Court has stated that punishment must comport with “dignity of man,” meaning that it must not “involve[] the unnecessary and wanton infliction of pain” or be “grossly out of proportion to the severity of the crime”).

<sup>163</sup> *See supra* Part IV.A (outlining Court’s “death is different” principle).

<sup>164</sup> 433 U.S. 584 (1977).

<sup>165</sup> *Id.* at 592.

<sup>166</sup> *Id.* at 599.

<sup>167</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658-59 (2008). The *Kennedy* Court stated that, in terms of “crimes against individuals . . . the death penalty should not be expanded to instances where the victim’s life was not taken.” *Id.* at 2659.

<sup>168</sup> *See id.* at 2659.

<sup>169</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010).

<sup>170</sup> *Id.* at 2021.

The Court did not seriously engage with or analyze the broader concept of gross disproportionality.

Prior to *Graham*, though, the Court explored this concept of gross disproportionality in greater detail outside of the death penalty context. In its 1980 case of *Rummel v. Estelle*,<sup>171</sup> the Court found no Punishments Clause violation when the defendant was sentenced, under a state recidivist statute, to life imprisonment for obtaining \$120.75 by false pretenses.<sup>172</sup> The Court emphasized the difficulty of determining proportionality in such a circumstance, noted that other states could have similarly punished the defendant,<sup>173</sup> and emphasized the state's entitlement to discretion on such issues.<sup>174</sup> The Court also recognized that the limitation on grossly disproportionate punishments "has appeared most frequently in opinions dealing with the death penalty"<sup>175</sup> and explained that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."<sup>176</sup>

Just two years after the Court decided *Rummel*, it faced a similar issue in the case of *Hutto v. Davis*.<sup>177</sup> In that case, the Court rejected a defendant's assertion that his sentence of forty years' imprisonment and a \$20,000 fine was grossly disproportionate to his crime of possession with intent to distribute and distribution of marijuana.<sup>178</sup> Relying on *Rummel*, the Court reiterated that " 'successful challenges to the proportionality of particular sentences' should be 'exceedingly

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<sup>171</sup> 445 U.S. 263 (1980).

<sup>172</sup> *See id.* at 266, 276. Under the state recidivist statute, a felon with two prior felony convictions and sentences of imprisonment would receive "a mandatory life sentence, with possibility of parole" after his third conviction. *Id.* at 278 ("Thus, under Art. 63, a three-time felon receives a mandatory life sentence, with possibility of parole, only if commission and conviction of each succeeding felony followed conviction for the preceding one, and only if each prior conviction was followed by actual imprisonment.").

<sup>173</sup> *See id.* at 279. The Court acknowledged that *Rummel* may "have received more lenient treatment in almost any State other than Texas, West Virginia, or Washington," but it concluded that the distinctions were "subtle rather than gross." *Id.* The Court explained that, although "[a] number of States impose a mandatory life sentence upon conviction of four felonies rather than three," "[o]ther States require one or more of the felonies to be 'violent' to support a life sentence," and "[s]till other States leave the imposition of a life sentence after three felonies within the discretion of a judge or jury," these are difficult comparisons to make because they fail to take into account the particularities of each state's governing statute. *Id.* at 279-80.

<sup>174</sup> *See id.* at 284.

<sup>175</sup> *Id.* at 272.

<sup>176</sup> *Id.*

<sup>177</sup> 454 U.S. 370 (1982).

<sup>178</sup> *Id.* at 370, 375.

rare’ ” and advised that “courts should be reluctant to review legislatively mandated terms of imprisonment.”<sup>179</sup> The Court then reversed the lower court, which had concluded that the sentence was unconstitutional, and stated that the lower court had impermissibly “intru[ded] into the basic line-drawing process that is ‘properly within the province of legislatures.’ ”<sup>180</sup>

The very next year, in *Solem v. Helm*,<sup>181</sup> the Court, in unprecedented fashion, struck down a punishment of life imprisonment without the possibility of parole when the offender was convicted of uttering a “no account” check and being a habitual offender.<sup>182</sup> Although referencing the *Rummel* and *Hutto* decisions for the principle that “successful challenges to the proportionality of . . . sentences [not imposing death] will be exceedingly rare,”<sup>183</sup> the Court found this to be one of those rare cases because the punishment at issue was “the most severe punishment that the State could have imposed on any criminal for any crime”;<sup>184</sup> the jurisdiction punished only much more severe crimes (such as those of murder, first-degree arson, and kidnapping) so harshly;<sup>185</sup> and the defendant “could have received a life sentence without parole for his offense in only one other state.”<sup>186</sup>

Since *Solem*, the Court has not found another Punishments Clause violation on the ground of gross disproportionality when the punishment was not death. Correspondingly, in its 1991 case of *Harmelin v. Michigan*,<sup>187</sup> the Court narrowed the number of instances in which proportionality challenges to non-capital sentences could prevail.<sup>188</sup> The Court stated that its “cases creating and clarifying the

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<sup>179</sup> *Id.* at 374.

<sup>180</sup> *Id.*

<sup>181</sup> 463 U.S. 277 (1983).

<sup>182</sup> *See id.* at 296, 303. The *Solem* Court reached its conclusion that the punishment was unconstitutional by applying its own version of the proportionality test. It stated that “a court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” *Id.* at 292.

<sup>183</sup> *Id.* at 289-90 (emphasis omitted).

<sup>184</sup> *Id.* at 297.

<sup>185</sup> *See id.* at 298-99.

<sup>186</sup> *Id.* at 299. The *Solem* Court further stated that, “even under Nevada law” — the one other state in which such a punishment was authorized — it was not clear “that any defendant . . . whose prior offenses were so minor, actually ha[d] received the maximum penalty.” *Id.* at 299-300.

<sup>187</sup> 501 U.S. 957 (1991).

<sup>188</sup> In *Harmelin*, the Court determined that the defendant’s punishment of life

'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties."<sup>189</sup> "We have drawn the line of required individualized sentencing at capital cases," the Court said, "and see no basis for extending it further."<sup>190</sup>

This limitation on the gross disproportionality inquiry did not deter the Court from considering a similar case in 2003, however. In *Ewing v. California*,<sup>191</sup> five Justices determined that the punishment of twenty-five years to life under California's three strikes law for the crime of felony grand theft did not violate the Punishments Clause.<sup>192</sup> These five Justices splintered in their reasoning, however. The plurality opinion authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justice Kennedy reiterates the language first set forth in *Rummel* that, outside the capital punishment context, "successful challenges [on the ground of proportionality] have been exceedingly rare."<sup>193</sup> Obliquely emphasizing that the greater limitation on these cases suggested in *Harmelin* was no longer in existence, the plurality further stated that "the proportionality principle 'would come into play in [extreme cases].'"<sup>194</sup> Choosing to be guided instead by Justice Kennedy's concurrence in *Harmelin*, the plurality emphasized the state's province of sentencing<sup>195</sup> and concluded that the punishment "is not grossly disproportionate" to the offense.<sup>196</sup> In their concurrences, both Justice Scalia and Justice Thomas reiterated their position set forth in *Harmelin* that the Punishments Clause is not a "guarantee against disproportionate sentences."<sup>197</sup>

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imprisonment without the possibility of parole for the crime of possessing more than 650 grams of cocaine was not unconstitutionally cruel and unusual. *See id.* at 994-96.

<sup>189</sup> *Id.* at 995.

<sup>190</sup> *Id.* at 996. These statements suggesting that the proportionality analysis is relevant only in the context of death penalty cases appear in Part IV of the *Harmelin* opinion — the only part of the opinion in which a majority of the Justices joined.

<sup>191</sup> 538 U.S. 11 (2003) (plurality opinion).

<sup>192</sup> *See id.* at 30-31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

<sup>193</sup> *Id.* at 21.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 23-25.

<sup>196</sup> *Id.* at 30-31.

<sup>197</sup> *Id.* at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring) ("In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle."); *cf.* *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.").

### C. Competency

In addition to focusing on the “death is different” principle and on whether a punishment comports with human dignity, the Court has occasionally examined offenders’ competencies.<sup>198</sup> In *Atkins*, for example, while competency was not the only concern, the Court determined that, aside from retribution and deterrence rationales, there was an additional justification for excluding mentally retarded offenders from capital punishment:

The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty,” is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.<sup>199</sup>

The Court explained that mentally retarded individuals may be less capable of providing meaningful assistance to their attorneys, serve as poor witnesses, and have demeanors that “may create an unwarranted impression of lack of remorse for their crimes.”<sup>200</sup> The Court then concluded that “[m]entally retarded defendants in the aggregate face a special risk of wrongful execution.”<sup>201</sup> In light of these determinations, the Court stated that its “independent evaluation of the issue” led it to the conclusion that executing mentally retarded offenders violates the Punishments Clause.<sup>202</sup>

While the *Atkins* Court seemed to focus on a defendant’s competency for trial, the Court turned its attention to the offender’s competency for punishment in its 1986 case of *Ford v. Wainwright*.<sup>203</sup> In that case, the Court found it unconstitutional to execute an individual who was insane at the time of execution even though the individual had been sane at the time of the offense and at trial.<sup>204</sup> The Court stated that if an offender “becomes of nonsane memory,

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<sup>198</sup> *Black’s Law Dictionary* defines “competency” as “[t]he mental ability to understand problems and make decisions,” or “[a] criminal defendant’s ability to stand trial, measured by the capacity to understand the proceedings, to consult meaningfully with counsel, and to assist in the defense.” BLACK’S LAW DICTIONARY 302 (8th ed. 2009).

<sup>199</sup> *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (citation omitted).

<sup>200</sup> *Id.* at 320-21.

<sup>201</sup> *Id.* at 321.

<sup>202</sup> *Id.*

<sup>203</sup> 477 U.S. 399 (1986).

<sup>204</sup> *See id.* at 401, 409-10.

execution shall be stayed . . . [because,] had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.”<sup>205</sup> Further, “it is uncharitable to dispatch an offender ‘into another world, when he is not of a capacity to fit himself for it.’ ”<sup>206</sup> The Court also stated that requiring that an offender be competent for execution is necessary “to protect the condemned from fear and pain without comfort of understanding.”<sup>207</sup>

#### D. Other Systemic Concerns

Finally, in one of its most recent Punishments Clause cases — *Kennedy v. Louisiana*<sup>208</sup> — the Court broke with precedent and referred to various “serious systemic concerns” in forming its independent judgment.<sup>209</sup> For example, the *Kennedy* Court mentioned evidentiary concerns, stating that imposing the death penalty for the crime of child rape posed the “problem of unreliable, induced, and even imagined child testimony[, which] means there is a ‘special risk of wrongful execution.’ ”<sup>210</sup> According to the Court, “[t]his undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment.”<sup>211</sup> The Court also highlighted its concern for collateral crimes, stating that, “by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim.”<sup>212</sup> Further, the Court expressed its

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<sup>205</sup> *Id.* at 407 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 24-25).

<sup>206</sup> *Id.* (quoting Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman*, in 11 HOW. ST. TR. 474, 477 (1685)); see also *id.* at 409 (stating that, even in 1986, civilized societies felt natural abhorrence “at killing one who has no capacity to come to grips with his own conscience or deity”). The *Ford* Court also proffered some other plausible justifications for the rule: (1) “the execution of an insane person simply offends humanity,” *id.* at 407; (2) it “provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment,” *id.*; (3) “madness is its own punishment,” *id.*; (4) retribution “is not served by execution of an insane person, which has a ‘lesser value’ than that of the crime for which he is to be punished,” *id.* at 408; and (5) forbidding such punishments is necessary “to protect the dignity of society itself from the barbarity of exacting mindless vengeance,” *id.* at 410.

<sup>207</sup> *Id.* at 410.

<sup>208</sup> 128 S. Ct. 2641 (2008).

<sup>209</sup> *Id.* at 2663.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 2664. Although the Court included this reasoning in its discussion of deterrence, see *id.*, its logic does not follow the ordinary deterrence reasoning because it does not refer to discouraging would-be offenders from committing crimes similar

concern that allowing the death penalty for the crime of child rape would be inconsistent with the policy of reserving the death penalty for the worst offenders.<sup>213</sup> The Court explained that allowing the death penalty to serve as the punishment for child rape would validate a large number of executions and that it would be difficult to distinguish the worst child rapists from those less deserving of such a severe punishment.<sup>214</sup> Finally, the *Kennedy* Court stated that, while “[e]ach of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape[, t]aken in sum, . . . they demonstrate the serious negative consequences of making child rape a capital offense.”<sup>215</sup>

V. THE NEED FOR A MORE FOCUSED INDEPENDENT JUDGMENT  
INQUIRY

The Court’s inconsistency in the factors it focuses on in determining the constitutionality of a punishment is problematic. It has led to criticisms such as that the Court has transferred the power to define personal liberty and equality from the people to the judiciary,<sup>216</sup> that it risks judicial supremacy and doctrinal uncertainty,<sup>217</sup> and that “the

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to that being punished, *cf. supra* text accompanying notes 142 & 153 (discussing Court’s typical focus on general deterrence in Punishments Clause cases). Regardless, in concluding that imposing the death penalty in *Kennedy* could “remove a strong incentive for the rapist not to kill the victim,” *Kennedy*, 128 S. Ct. at 2664, the Court rejected the argument that “even if the death penalty results in a marginal increase in the incentive to kill, this is counterbalanced by a marginally increased deterrent to commit the crime at all,” because the Court determined that the uncertainty on this point makes the argument less compelling. *Id.*

<sup>213</sup> See *id.* at 2660-61; see also *supra* Part IV.A (describing Court’s “death is different” principle).

<sup>214</sup> See *Kennedy*, 128 S. Ct. at 2660-61. The Court stated that it would be “difficult to identify [aggravating factors or other] standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way.” *Id.* at 2660. The Court’s only distinction between using such factors in the murder context and in the child rape context was that a crime such as child rape “will overwhelm a decent person’s judgment,” so jurors’ imposition of the death penalty in these cases would be “freakish.” *Id.* at 2660-61. Aside from this rather unconvincing distinction, it is unclear exactly why the application of aggravating factors in the child rape context would be more difficult than in the context of murder.

<sup>215</sup> *Id.* at 2664.

<sup>216</sup> See Keyes, *supra* note 81, at 286.

<sup>217</sup> See Alford, *supra* note 82, at 17. Many commentators agree that the Court’s Eighth Amendment jurisprudence suffers from inconsistency and unpredictability. See, e.g., John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 75 (2010) (“It has become conventional

public-sentiment dog has wagged the tail of independent judicial judgment.”<sup>218</sup> Not only is the Court inconsistent, but its independent judgment analysis lacks focus. If the Court were to clarify what concept it is attempting to excavate in turning to its own judgment, and if it were to articulate specific factors relevant to this concept, then litigants, their attorneys, and state legislatures could better predict what punishments are acceptable before challenges to these punishments ascend to the level of Supreme Court examination.<sup>219</sup> The Court has employed such limiting constitutional factors in other contexts,<sup>220</sup> and similarly doing so in the Punishments Clause context would be beneficial and likely lead to a more predictable Eighth Amendment jurisprudence.

The Punishments Clause requires that a punishment be both cruel and unusual before it is prohibited.<sup>221</sup> The Court’s examination of state legislative action is a fair estimation of whether a punishment is unusual within the United States.<sup>222</sup> Cruelty, while more difficult to

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wisdom that Eighth Amendment proportionality jurisprudence is a mess.”); Stacy, *supra* note 86, at 476 (“The Court’s jurisprudence under the Eighth Amendment’s Cruel and Unusual Punishment Clause stands in disarray.”).

<sup>218</sup> Heffernan, *supra* note 25, at 1381.

<sup>219</sup> Moreover, if lower courts cannot easily predict Supreme Court outcomes in these cases, they may reach faulty conclusions, leaving many litigants with no remedy for unconstitutional punishments because the Supreme Court grants certiorari in only a relatively small number of cases each year. See SUSAN LOW BLOCH & THOMAS G. KRATTENMAKER, *SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES* 334 (1994) (explaining that Court grants certiorari in only approximately one to two percent of 6,000 cases in which parties petition for certiorari each year).

<sup>220</sup> See *supra* text accompanying notes 86-92 (discussing First Amendment, Equal Protection, and criminal procedure tests and standards).

<sup>221</sup> See Ryan, *Eighth Amendment*, *supra* note 7, at 604-15 (arguing that Punishments Clause prohibits only punishments that are both cruel and unusual); see also Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) (stating that, although “[s]evere, mandatory penalties may be cruel, . . . they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history,” and thus determining that imposition of mandatory sentence of life imprisonment without possibility of parole is not unconstitutional). *But see, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (suggesting that, historically, “the Court [has] simply examine[d] the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word ‘unusual’”).

<sup>222</sup> See Ryan, *Eighth Amendment*, *supra* note 7, at 615 (“While assessing state legislative action does not adequately evaluate cruelty, it does appear to be a relatively good measure of the unusualness component of the Clause. Unusualness, as measured in this manner, refers to the availability of a punishment instead of the actual implementation of a punishment.”).

assess independently of unusualness,<sup>223</sup> is perhaps what the Court is attempting to examine when it turns to its independent judgment.<sup>224</sup> If it is justified to conclude that the aim of the independent judgment inquiry is the assessment of cruelty, then it is appropriate to examine the meaning of the term “cruel” and then determine how that meaning can be translated into specific, identifiable factors that can shape and constrain the Court’s independent judgment. If such cruelty factors can be identified, then the independent judgment inquiry may be reined in such that concerns about the lack of standards and free-wheeling judicial discretion can be lessened while predictability and consistency can be improved.<sup>225</sup>

#### A. The Meaning of “Cruel”

It is difficult to determine exactly what the term “cruel” should be interpreted to mean. At the time the Eighth Amendment was drafted and ratified in 1791, the term “cruel” was understood to mean “[p]leased with hurting others; inhuman; hard-hearted; barbarous” or “[b]loody; mischievous; destructive.”<sup>226</sup> The term was understood to have a similar meaning when it was used in the 1688 English Bill of Rights<sup>227</sup> — the document from which the Eighth Amendment was

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<sup>223</sup> See *id.* at 617 (opining that assessing cruelty independent of unusualness “poses more difficulties” and suggesting some methods by which to independently assess cruelty).

<sup>224</sup> See *id.* at 597 (“The Court’s reflection on its own independent judgment may be where, in actuality, the Court independently assesses whether a practice is cruel.”). For further discussion of where in its Punishments Clause analysis the Court might be considering the concept of cruelty, see *id.* at 593-98.

<sup>225</sup> See *supra* text accompanying notes 216-218.

<sup>226</sup> 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773).

<sup>227</sup> ENG. BILL OF RIGHTS (1689) (“That excessive baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.”). Around 1688, “cruel” was most commonly understood to mean “[d]isposed to inflict suffering; indifferent to or taking pleasure in another’s pain or distress; destitute of kindness or compassion; merciless, pitiless, hard-hearted.” IV OXFORD ENGLISH DICTIONARY 78 (J.A. Simpson & E.S.C. Weiner eds., Clarendon Press 2d ed., 1989) (setting forth etymology for term); see also ABEL BOYER, THE ROYAL DICTIONARY ABRIDGED (2d ed. 1708) (defining term as “inhumane, fierce, hard, barbarous . . . grievous . . . [or] painful”); cf. AN ENGLISH EXPOSITOUR, OR COMPLEAT DICTIONARY: TEACHING THE INTERPRETATION OF THE HARDEST WORDS, AND MOST USEFULL TERMS OF ART, USED IN OUR LANGUAGE (1688) (defining “Exceeding Cruel” as “Truculent, Dire”). The notion that one is “[d]isposed to inflict suffering,” “destitute of kindness or compassion,” “merciless,” or “pitiless” corresponds well with the notion that one is “hard-hearted,” as defined by dictionaries circa 1791. See *infra* note 259 (noting definition of “hard-hearted”). “A less common, colloquial understanding of the term was that it meant ‘severe’ or ‘hard.’” Ryan, *Eighth Amendment*, *supra* note 7, at 602

derived.<sup>228</sup> Over two centuries later, dictionaries continue to define the term similarly today.<sup>229</sup>

When the U.S. Supreme Court had the opportunity to interpret the term in the mid- to late-nineteenth century, it referred to cruelty as including the infliction of torturous punishments, such as burning alive and beheading, and the infliction of punishments that involve a lingering death.<sup>230</sup> In more recent times, the Court has failed to distinguish between cruelty and unusualness in discussing the Punishments Clause; therefore it is difficult to determine exactly what constitutes cruelty, alone, under current Eighth Amendment jurisprudence.<sup>231</sup> In its recent case of *Baze v. Rees*,<sup>232</sup> however, the Court referred to some of its earlier, nineteenth century cases that focused on torturous punishments.<sup>233</sup> The Court then concluded that “[w]hat each of the forbidden punishments [in these cases] had in

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n.200 (citing IV OXFORD ENGLISH DICTIONARY, *supra*, at 78, and Anthony Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969)).

<sup>228</sup> See Anthony Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839, 840, 852-53 (1969).

<sup>229</sup> IV OXFORD ENGLISH DICTIONARY, *supra* note 227, at 78 (defining “cruel” as “[d]isposed to inflict suffering; indifferent to or taking pleasure in another’s pain or distress; destitute of kindness or compassion; merciless, pitiless, hard-hearted”). The modern-day definition of “cruel” seems to focus more on hard-heartedness, which relates to inflicting punishment without sympathy. See *id.* (including “destitute of kindness or compassion; merciless, pitiless . . .” within the definition of “cruel”); *infra* text accompanying note 259. While American definitions of the term appear to omit the “painful” component of the definition that at least one early English dictionary includes, see BOYER, *supra* note 227 (defining term “cruel” to include “painful”), American definitions arguably include painfulness in their concept of bloodiness, see *infra* text accompanying notes 247-251.

<sup>230</sup> See, e.g., *In re Kemmler*, 136 U.S. 436, 447 (1890) (stating that punishment of execution is not cruel because it does not “involve torture or a lingering death”); *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) (stating that punishments involving torture — such as when offender was publicly dissected for crime of murder; “was drawn or dragged to the place of execution” for crime of treason; was burned alive when crime was treason committed by female; and was “embowelled alive, beheaded, and quartered” for crime of high treason — constitute cruel punishments prohibited by Punishments Clause).

<sup>231</sup> See Ryan, *Eighth Amendment*, *supra* note 7, at 594-98 (explaining that Court’s evolving standards of decency approach to Punishments Clause questions focuses primarily on unusualness of punishment at issue).

<sup>232</sup> 553 U.S. 35 (2008).

<sup>233</sup> See *id.* at 48-49 (citing *Wilkerson*, 99 U.S. at 134-337, and *In re Kemmler*, 136 U.S. at 447, 449) (internal alterations omitted).

common was the deliberate infliction of pain for the sake of pain — ‘superadd[ing]’ pain to the . . . sentence through torture and the like.”<sup>234</sup>

In confronting Punishments Clause cases over the last two centuries, the Court has emphasized that the meaning of the Punishments Clause may change with time and thus embraced the notion of a “living Constitution.”<sup>235</sup> In its early Punishments Clause case of *Weems v. United States*,<sup>236</sup> for example, the Court stated:

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. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are . . . “designed to approach immortality as nearly as human institutions can approach it.” The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.<sup>237</sup>

In its subsequent case of *Trop v. Dulles*,<sup>238</sup> the Court more explicitly applied this notion of a “living Constitution” to the Punishments Clause, stating that the Clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>239</sup>

Despite the Court’s allowance for an evolving meaning of the Punishments Clause,<sup>240</sup> the meaning of the cruelty component of the Clause arguably has not changed. As the unvarying definitions of the term throughout time suggest,<sup>241</sup> the ordinary meaning of “cruel” has

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<sup>234</sup> *Id.* at 48.

<sup>235</sup> Although there are different variations on the meaning of the phrase “living Constitution,” see William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694-95 (1976), it generally refers to how the meaning of the Constitution has evolved to comport with changes in society and Americans’ values since the Constitution was drafted and ratified over two centuries ago. See Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 391 (1987).

<sup>236</sup> 217 U.S. 349 (1910).

<sup>237</sup> *Id.* at 373.

<sup>238</sup> 356 U.S. 86 (1958).

<sup>239</sup> *Id.* at 101.

<sup>240</sup> See *id.* at 100-01 (stating that scope of Clause “is not static”); *supra* text accompanying notes 236-239 (describing Court’s adoption of “living Constitution” interpretation in Punishments Clause context).

<sup>241</sup> See *supra* text accompanying notes 226-229.

remained constant as time has passed. The dictionary definition of the term — “[p]leased with hurting others; inhuman; hard-hearted; barbarous”; “[b]loody; mischievous; destructive”<sup>242</sup> — has elements in common with the Court’s historic understanding of the term — torturous, involving a lingering death, or entailing “the deliberate infliction of pain for the sake of pain.”<sup>243</sup> Both refer to punishment that is exceptionally brutal, and both refer to inflicting pain for a purpose other than punishment.

### B. Finding Cruelty

These common understandings of cruelty suggest that, in assessing its own judgment, the Court should be scrutinizing whether punishments are either exceptionally brutal or inflicted for a purpose other than punishment.<sup>244</sup> This first category of cruel punishments — those that are exceptionally brutal<sup>245</sup> — may include punishments that are inhuman, hard-hearted, barbarous, bloody, or destructive, or that involve a lingering death. While these descriptors may suggest some ease in assessing whether a punishment is cruel, such a determination inevitably involves some sort of judgment on the part of the Court. The second category of cruel punishments — those inflicted for a purpose other than punishment, including mischievous punishments — is trickier to define but seems capable of providing the Court with greater guidance other than just that it requires the use of careful judgment. At its core, this category appears to focus on the issue of motive.

#### 1. Brutal Punishments: Those That Are Inhuman, Hard-Hearted, Barbarous, Bloody, or Destructive, or That Involve a Lingering Death

Punishments that are inhuman, hard-hearted, barbarous, bloody, or destructive, or that involve a lingering death, comprise the first class of punishments that the history of the term “cruel” and the Court’s interpretation of the term prohibits. This broad and nebulous category

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<sup>242</sup> JOHNSON, *supra* note 226; *see also supra* text accompanying notes 226-229 (quoting dictionary definitions of term at time Eighth Amendment was drafted and ratified and at time term was used in English Bill of Rights).

<sup>243</sup> *Baze v. Rees*, 553 U.S. 35, 48 (2008); *see also supra* text accompanying notes 230-234 (explaining how Court has examined cruelty of punishments over years).

<sup>244</sup> *See supra* text accompanying Part V.A (examining meaning of term “cruel”).

<sup>245</sup> *See supra* text accompanying notes 241-243 (explaining that one class of cruel punishments includes punishments that are exceptionally brutal).

of punishments seems not to be of a character that can easily be whittled down to more basic elements or a more predictable formula. Most of the descriptors characterizing this first class of cruel punishments, though, tend to settle around the concept of the nature or quality of the punishment. Yet some of these descriptors creep toward the second category of cruel punishments because they focus less on the particular punishment at issue and more on external features such as the punisher as an individual.

The first subset of this class of punishments focuses on the nature or quality of the punishment inflicted. Punishments involving a lingering death are, of course, punishments that are drawn out, perhaps painfully so, and for which death is the ultimate intended result.<sup>246</sup> Bloody punishments are those involving an inordinate amount of bloodshed.<sup>247</sup> While a bloody punishment is not as clearly related to pain as is a punishment involving a lingering death, the concern about bloody punishments may have originally been related to the distaste for excessive pain.<sup>248</sup> Long before technology allowed executions to be effected by lethal injection, the punishment of death was imposed by methods that were both extremely bloody and painful. For example, in the seventeenth century, executions were often effected by drawing and quartering, during which the offender was dragged to his place of death, hung until he was nearly dead, then disemboweled and emasculated.<sup>249</sup> After that, the offender's entrails would be burned in front of him and, finally, his body would be cut into quarters.<sup>250</sup> Today, the bloody nature of a punishment is probably more detached from the notion of pain and is likely a fairly nugatory category, considering that the most heinous punishments today need not involve the spillage of a single drop of blood.<sup>251</sup>

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<sup>246</sup> See VIII OXFORD ENGLISH DICTIONARY, *supra* note 227, at 990 (defining "lingering" as, "esp. of disease, suffering, or death: Slow, painfully protracted").

<sup>247</sup> See II OXFORD ENGLISH DICTIONARY, *supra* note 227, at 308 (defining "bloody" as "[a]ttended with much bloodshed and slaughter" or "[a]ddicted to bloodshed, blood-thirsty, cruel"); JOHNSON, *supra* note 226 (defining "bloody" as "[s]tained with blood," "[c]ruel; murderous").

<sup>248</sup> Cf. BOYER, *supra* note 227 (including meaning "painful" within definition of "cruel").

<sup>249</sup> See ROBERT H. LOEB, JR., CRIME AND CAPITAL PUNISHMENT 18 (1978).

<sup>250</sup> See *id.*

<sup>251</sup> See, e.g., Chris Fisher, *From the Guillotine to Lethal Injection: Evolution of Execution*, 21 CHI B. ASS'N, Sept. 2007, at 40, 42 (contrasting "nightmarish mental picture" associated with use of guillotine — with its "massive, razor-sharp blade coming down, the sound of the impact, and the bloody end" — with "the sterile, cool room, the needle, and the seemingly serene outcome that is the expected outcome of lethal injection").

Perhaps more tenuously related to what one ordinarily considers the nature or quality of a punishment, inhuman punishments, by definition, include those that are not inflicted, or at least not properly inflicted, on humans.<sup>252</sup> In reality, this seems not to be much of a limitation on punishment in terms of cruelty. Today, it is difficult to think of types of punishments that are imposed on animals but not humans,<sup>253</sup> aside from the fact that animals are not ordinarily accorded the same due process rights as humans.<sup>254</sup> Instead, the “inhumanness” of punishments more closely relates to the unusualness of a punishment — the additional requirement before a punishment

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<sup>252</sup> See VII OXFORD ENGLISH DICTIONARY, *supra* note 227, at 973 (defining “inhuman” as “[n]ot having the qualities proper or natural to a human being; esp. destitute of natural kindness or pity; brutal, unfeeling, cruel”); JOHNSON, *supra* note 226 (defining “inhuman” as “[b]arbarous; savage; cruel; uncompassionate”). To the extent that “inhuman” means “destitute of natural kindness or pity,” see VII OXFORD ENGLISH DICTIONARY, *supra* note 227, at 973, this definition can be grouped into the “hard-hearted” aspect of cruelty, see *infra* text accompanying note 259.

<sup>253</sup> Litigants have argued, however, that some punishments that have been deemed too torturous to impose on animals have been imposed on humans. See *Baze v. Rees*, 553 U.S. 35, 56-58 (2008) (explaining that petitioners argued that single-drug cocktail should be required in lethal injection procedures). In *Baze v. Rees*, for example, the petitioners argued that Kentucky’s three-drug lethal injection protocol constituted cruel and unusual punishment and that it should be replaced with a single-drug protocol that “is used routinely by veterinarians in putting animals to sleep.” *Id.* at 52-58. In addition to the potassium chloride used by veterinarians, Kentucky’s protocol includes using sodium thiopental, a sedative meant to induce unconsciousness in the defendant, and pancuronium bromide, a paralytic used to suppress involuntary physical movements during unconsciousness. See *id.* at 53-58. The petitioners argued that the difficulty of properly administering sodium thiopental, paired with pancuronium bromide’s ability to mask this improper administration, led to an intolerable risk that the defendant would suffer extreme pain during execution. See *id.* at 53-59. “If pancuronium is too cruel for animals, the argument [went], then it must be too cruel for the condemned inmate.” *Id.* at 58.

<sup>254</sup> But see Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 629 (2004) (explaining that, historically, animals were sometimes put on trial and accorded rights we ordinarily reserve for humans, such as the right to counsel); Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97 (2003) (providing historical account of animal trials and executions). Professor Butler has explained that, historically, animals have been put on trial. See Butler, *supra*, at 627, 629. For example, wild pigs have been tried for having killed children, and insects have been tried for spreading disease and eating crops. *Id.* The animals on trial “were treated like human defendants. They were officially summoned to answer the charges and, pending trial, placed in human jails. Defense counsel was appointed. At trial, prosecutors presented evidence against the animals.” *Id.* The animals who were found guilty were punished, although the punishments “were either meaningless or unenforceable — for example, the pests would be ordered to stop eating the crops.” *Id.*

violates the Punishments Clause<sup>255</sup> — as it references punishments that are not ordinarily inflicted on humans. In the same vein as inhuman punishments, barbarous punishments are those that are uncivilized,<sup>256</sup> and thus not ordinarily inflicted in a civilized society. Even more abstract, destructive punishments could be said to include not only those that destroy the body,<sup>257</sup> but also those that destroy some philosophical sense of oneself.<sup>258</sup> And finally, turning to a punishment descriptor that focuses on the punisher's state of mind, hard-hearted punishments are those that are inflicted without sympathy for the offender.<sup>259</sup> While these types of punishments do not rise to the level of motive, by focusing on a feature of the punisher, they come closer to the second category of cruel punishments: those inflicted for a purpose other than punishment.

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<sup>255</sup> See generally Ryan, *Eighth Amendment*, *supra* note 7 (arguing that punishment must be both cruel and unusual before it is prohibited by Punishments Clause).

<sup>256</sup> See I OXFORD ENGLISH DICTIONARY, *supra* note 227, at 946 (defining “barbarous” as “[u]ncultured, uncivilized, unpolished; rude, rough, wild, savage”; or “[t]he usual opposite of *civilized*”); JOHNSON, *supra* note 226 (defining “barbarous” as “[a] stranger to civility; savage; uncivilized,” or “cruel; inhuman”).

<sup>257</sup> See IV OXFORD ENGLISH DICTIONARY, *supra* note 227, at 539 (defining “destructive” as “[h]aving the quality of destroying; tending to destroy, put an end to, or completely spoil; pernicious, deadly, annihilative”); JOHNSON, *supra* note 226 (defining “destructive” as “[t]hat which destroys; wasteful; causing ruin and devastation”). That “destructive” punishments include those that are deadly could provide fodder to abolitionists' arguments that the death penalty is unconstitutional. See *id.* An impediment to this argument, though, is that the Punishments Clause prohibits only punishments that are both cruel and unusual, and the death penalty is certainly not unusual in the United States. See Ryan, *Eighth Amendment*, *supra* note 7, at 604-15 (arguing that punishment must be both cruel and unusual before it is prohibited by Punishments Clause). *But cf.* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1781-82 (1970) (arguing that death penalty is unconstitutional even though majority of states authorize it).

<sup>258</sup> See IV OXFORD ENGLISH DICTIONARY, *supra* note 227, at 538 (defining “destroy” as “[t]o pull down or undo”; “[t]o ruin (men), to undo in worldly estate”; to “reduce into a useless form”; “[t]o put out of existence”); see also, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (concluding that Eighth Amendment bars denationalization as punishment because it “destroys for the individual the political existence that was centuries in the development” and “strips the citizen of his status in the national and international political community”).

<sup>259</sup> See VI OXFORD ENGLISH DICTIONARY, *supra* note 227, at 1111 (defining “hard-hearted” as “[h]aving a hard heart; incapable of being moved to pity or tenderness; unfeeling; unmerciful”); JOHNSON, *supra* note 226 (defining “hard-hearted” as “[c]ruel; inexorable; merciless; pitiless).

## 2. Punishments Inflicted for a Purpose Other than Punishment

Reference to sanctions that are inflicted for a purpose other than punishment harkens back to the Court's statement in *Gregg v. Georgia*<sup>260</sup> that a punishment should not "involve[] the unnecessary and wanton infliction of pain"<sup>261</sup> and should thus not be "totally without penological justification."<sup>262</sup> This focus on the penological justification for a punishment introduces the issue of motive — the reason why the punishment was inflicted. The concept of motive is also at the core of "mischievous" punishments,<sup>263</sup> which include those inflicted for an improper intent.<sup>264</sup> While the Supreme Court has not directly emphasized the importance of motive in analyzing cruelty under the Punishments Clause, the Court has suggested that motive is relevant in certain Punishments Clause contexts, such as in examining whether prison officials have violated the Punishments Clause by using excessive force against prisoners.<sup>265</sup> As the Court stated in

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<sup>260</sup> 428 U.S. 153 (1976).

<sup>261</sup> *Id.* at 173; *see also* *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) ("Today the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime.") (citations omitted).

<sup>262</sup> *Rhodes*, 452 U.S. at 346 (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), and *Gregg*, 428 U.S. at 173, 183). *But cf.* *Ryan*, *Eighth Amendment*, *supra* note 7, at 604-15 (arguing that punishment must be both cruel and unusual before Punishments Clause prohibits it). The notion of sanctions inflicted for a purpose other than punishment also relates to what *Gregg* described as punishments "grossly out of proportion to the severity of the crime." *Gregg*, 428 U.S. at 173; *see also supra* text accompanying note 111. The Court has provided much less guidance, however, as to this type of prohibited punishment. *See supra* Part IV.B.2.

<sup>263</sup> Again, "mischievous" is one descriptor of the term "cruel." *See supra* text accompanying note 226.

<sup>264</sup> *See* IX OXFORD ENGLISH DICTIONARY, *supra* note 227, at 853 (defining "mischievous" as "[p]roducing . . . mischief or harm; inflicting damage or injury; having a harmful influence or intent"); JOHNSON, *supra* note 226 (defining "mischievous" as "[h]armful; hurtful; destructive; noxious; pernicious . . . [s]piteful; malicious"). Mischievous punishments might also include those effecting negative results. *See* IX OXFORD ENGLISH DICTIONARY, *supra* note 227, at 853; JOHNSON, *supra* note 226. One might argue, then, that such punishments are similar to inhuman, barbarous, and destructive punishments, which are discussed *supra* text accompanying notes 252-258.

<sup>265</sup> *See, e.g., Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (concluding that appropriate standard in determining whether defendant's Eighth Amendment rights have been violated when prison authorities use force to quell prison disturbance is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm"); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (stating that "deliberate indifference" is appropriate standard to apply in determining whether defendant's Eighth Amendment rights have been

*Hudson v. McMillian*,<sup>266</sup> for example, to succeed on such a claim, the claimant must establish that the prison officials applied force “maliciously and sadistically to cause harm.”<sup>267</sup> Outside the context of excessive use of force, however, the Court has been reluctant to require evidence of malicious motive before concluding that a punishment is unconstitutional. For example, the Court has held that there need be evidence of only “deliberate indifference” toward a prisoner’s well-being before the Court will find that conditions of incarceration constitute cruel and unusual punishment.<sup>268</sup> Such “deliberate indifference,” the Court has said, involves recklessly disregarding a “substantial risk of serious harm.”<sup>269</sup> Further, the Court seems not to have examined motive, or any mental element at all,<sup>270</sup> to

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violated because prison officials failed to attend his serious medical needs).

<sup>266</sup> 503 U.S. 1 (1992).

<sup>267</sup> *Id.* at 7 (citing *Whitley*, 475 U.S. at 320-21). Not all of the Supreme Court Justices have agreed that the Court should examine subjective motivation in determining whether a punishment violates the Punishments Clause. In *Estelle v. Gamble*, 429 U.S. 97 (1976), for example, Justice Stevens stated:

I believe the Court improperly attaches significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted. Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it. Whether the conditions in Andersonville[ — an infamous Confederacy Civil War prison at which hundreds of Union soldiers died of starvation and disease — ]were the product of design, negligence, or mere poverty, they were cruel and inhuman.

*Id.* at 116 (Stevens, J., dissenting). While Justice Stevens suggested that examining a punisher’s subjective motivation is improper in determining whether there has been a violation of the Punishments Clause, he may have instead meant that it is improper to consider other mental components, such as intent, in this inquiry, because his argument in *Estelle* was with the Court’s use of the “deliberate indifference” standard. *See id.*; *see also infra* text accompanying notes 268-269.

<sup>268</sup> *Estelle*, 429 U.S. at 104 (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.’”) (citations omitted).

<sup>269</sup> *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994) (stating that “deliberate indifference” is “something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result” and that it is “fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk”).

<sup>270</sup> Professor Jerome Hall has stated that “[m]oral culpability, *i.e.*, personal guilt, includes both *mens rea* and motivation.” Jerome Hall, *Mens Rea and Personal Guilt*, in *FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW* 215 (Herbert Morris, ed. 1961).

determine whether a particular method of punishment that a court metes out is unconstitutionally cruel and unusual.<sup>271</sup> Instead, in this context, the Court has resorted to its examination of the “evolving standards of decency that mark the progress of a maturing society,” which involves primarily a survey of state legislative action and application of the Court’s own judgment.<sup>272</sup>

Despite the Court’s examination of motive in only limited circumstances in the sphere of Punishments Clause analysis, as the Court explained in *Graham v. Connor*,<sup>273</sup> the term “cruel,” at least in one sense,<sup>274</sup> “clearly suggest[s] some inquiry into subjective state of mind.”<sup>275</sup> Yet motive is difficult to establish,<sup>276</sup> and claimants would be in a difficult position if they were required to establish improper motive anytime they wanted to allege a violation of the Punishments Clause.<sup>277</sup> Further, closely examining any improper motives on the

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<sup>271</sup> See generally, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (determining that imposing capital punishment for crime of child rape is unconstitutionally cruel and unusual but not examining motive in reaching this conclusion); *Baze v. Rees*, 553 U.S. 35 (2008) (determining that punishment of lethal injection is not unconstitutionally cruel and unusual, but not examining motive in reaching this conclusion).

<sup>272</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); see also *supra*, text accompanying note 16.

<sup>273</sup> 490 U.S. 386 (1989). In *Graham*, the petitioner had brought a 42 U.S.C. § 1983 claim based on police officers’ alleged use of excessive force during an investigatory stop. See *id.* at 390. The Supreme Court clarified that, although “subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment,” such subjective motivations are irrelevant to the Fourth Amendment inquiry. See *id.* at 397-98.

<sup>274</sup> As previously mentioned, “cruel” could also mean exceptionally brutal, which does not necessarily entail an inquiry into one’s subjective state of mind. See *supra* Part V.B.1.

<sup>275</sup> *Graham*, 490 U.S. at 398.

<sup>276</sup> See David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 97 (2006) (explaining that Professor Elena Kagan, in examining First Amendment law, has noted that “impermissible governmental motives are notoriously difficult for litigants to prove”); Christopher E. Smith, *The Roles of Justice John Paul Stevens in Criminal Justice Cases*, 39 SUFFOLK U. L. REV. 719, 732 (2006) (noting that subjective “deliberate indifference” standard makes “it more difficult for prisoners to succeed [on their claims] because of the requirement that they provide proof of the prison officials’ state of mind, and not just proof about the nature and conditions of confinement”).

<sup>277</sup> See Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners’ Rights*, 11 B.U. PUB. INT. L.J. 73, 84-86 (2001) (arguing that, “[b]y shifting the Court’s focus from an objective assessment of conditions to a subjective test of prison officials’ motives, Justice Scalia[’s opinion in *Wilson v. Seiter*, 501 U.S. 294 (1991),] made it significantly more difficult for prisoners to establish

part of judges or juries in imposing punishments could undermine public confidence in the criminal justice system<sup>278</sup> and thus possibly inspire additional individuals to deviate from the requirements of the law.<sup>279</sup> In contrast, examining the motivations of individual prison officials — the practice taken up by courts examining excessive force claims — poses fewer concerns of undermining the entire system because such individuals' potentially improper motives are not as easily seen as major fractures in the foundation of our justice system.<sup>280</sup> These drawbacks of requiring improper motive may be

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that prison conditions — no matter how terrible — violated the Eighth Amendment”).

<sup>278</sup> See, e.g., *In re Terry*, 394 N.E.2d 94, 96 (Ind. 1979) (“Unwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public’s confidence in an impartial adjudicatory process.”); *Ky. Bar Ass’n v. Heleringer*, 602 S.W.2d 165, 166-69 (Ky. 1980) (publicly reprimanding attorney for making statements that “undermine[d] public confidence in the integrity of the judicial process and tended to bring the bench and bar into disrepute”); MODEL CODE OF JUDICIAL CONDUCT RULE 1.2, cmt. 1 (2007) (“Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.”); Sandra Day O’Connor, *Commentary Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT’L L. 1, 5-6 (2003) (explaining that “[m]aintaining the public’s confidence in the impartiality and fairness of the judiciary is . . . indispensable in upholding the Rule of Law” and that, if judiciary has suspect motives in ruling on cases, “society’s confidence in the legal system and its respect for the Rule of Law will crumble”); Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1637-38 (2007) (“[P]ublic confidence in the judiciary relies, at least in part, on maintaining the symbols associated with the judicial role . . .”).

<sup>279</sup> See David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 790 (1993) (stating that “the appearance of justice will affect public perception of the system’s legitimacy”; that “[a] system consistently seen as unjust will eventually lose the allegiance of its citizens”; and that, “[i]f people perceive the courts as less than fair decision makers, the moral force courts depend on to ensure compliance with decisions they make diminishes”); see also O’Connor, *supra* note 278, at 5-6 (explaining that “the Rule of Law will crumble” if public’s confidence in judiciary is undermined).

<sup>280</sup> See MODEL RULES OF PROF’L CONDUCT R. 8.2(a) (2010) (prohibiting lawyers from making false statements about judge’s qualifications or integrity, or that of “adjudicatory officer” but failing to prohibit making false statements about integrity of prison officials); see also Reichman, *supra* note 278, at 1637-38 (“[P]ublic confidence in the judiciary relies, at least in part, on maintaining the symbols associated with the judicial role . . .”); *supra* note 278 and accompanying text. *But cf.* Abraham Abramovsky & Steven J. Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275, 278-79 (1979) (noting that State Department officials have emphasized “that successful drug enforcement is dependent on guaranteeing prisoners their rights, because without ‘public confidence in just treatment, law enforcement becomes difficult, and even ultimately impossible’”);

responsible for leading the Court to rely instead on examining punishment rationales in determining whether, in its own independent judgment, a punishment is unconstitutional.<sup>281</sup> In turning to the purposes of punishment, the Court seems to indirectly examine motive, because punishments that do not serve such a legitimate purpose must then be inflicted for some reason other than punishment. In that sense, such punishments are excessive<sup>282</sup> and unconstitutional.<sup>283</sup> This raises the question, then, which the Supreme Court Justices have spiritedly debated, of which penological purposes are relevant in assessing the cruelty<sup>284</sup> of a punishment.

*a. Additional Rationales for Punishment*

While the Court has traditionally focused on the justifications of retribution and deterrence in its Eighth Amendment jurisprudence,

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Michael Ross Fowler & Julie Marie Bunck, *Narcotics Trafficking, Central American Prisons, and the Law*, 25 SUFFOLK TRANSNAT'L L. REV. 433, 485 (2002) ("Public confidence in any reformed criminal justice system would be seriously eroded if inmates were able to corrupt prison officials, to enjoy luxuries while incarcerated, and to escape from confinement at will.").

<sup>281</sup> See *supra* Part IV.B.1 and text accompanying note 114.

<sup>282</sup> The Supreme Court Justices, as well as scholars, have argued for decades about whether a punishment is unconstitutionally cruel and unusual because it is excessive. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 986 (questioning whether constitutional proportionality principle really exists and asserting that if it does, "the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values"); *id.* at 1013 (White, J., dissenting) ("Not only is it undeniable that our cases have construed the Eighth Amendment to embody a proportionality component, but it is also evident that none of the Court's cases suggest that such a construction is impermissible."); Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 49 (2008) (asserting that "the majority of the Court has long agreed that . . . the Cruel and Unusual Punishments Clause limits excessiveness despite the absence of that word in the constitutional text"); Youngjae Lee, *Judicial Regulation of Excessive Punishments Through the Eighth Amendment* 18 FED. SENT'G REP. 4 (2006), available at 2006 WL 2433743 (arguing that "[t]he usual criticism that proportionality is an unworkable ideal is overstated").

<sup>283</sup> See *supra* text accompanying notes 110-111, 244, 262. As I have discussed elsewhere, the Punishments Clause contemplates prohibiting only punishments that are both cruel and unusual. See Ryan, *Eighth Amendment*, *supra* note 7, at 604-15. However, the Supreme Court has, on occasion, suggested that a punishment must be only cruel to be prohibited by the Eighth Amendment. See *id.* at 582. While such a position is entirely inconsistent with the text of the Punishments Clause, see *id.* at 605, 614-15, where the Supreme Court has taken such a position, this question of cruelty is converted into the entire question of the constitutionality of a punishment.

<sup>284</sup> See *supra* text accompanying notes 221-225.

other accepted penological justifications for punishment exist.<sup>285</sup> For example, for the majority of the twentieth century, punishment theorists extolled the virtues of rehabilitation,<sup>286</sup> and state sentencing policies reflected confidence in this rationale for punishment.<sup>287</sup> Support for rehabilitation has since waned,<sup>288</sup> but other rationales for punishment have emerged. For example, more recently, punishment theorists have been drawn to the rationale of restorative justice, which differs from retribution and deterrence by focusing on “promot[ing] healing, repairing harm, caring, and rebuilding relationships among

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<sup>285</sup> In his dissent in *Atkins*, Justice Scalia argued that the Court’s consideration of the penological purposes of retribution and deterrence ignores the penological justification that state and federal governments most commonly rely on today: incapacitation. See *Atkins v. Virginia*, 536 U.S. 304, 350 (2002) (Scalia, J., dissenting); *infra* note 299 and accompanying text.

<sup>286</sup> See Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 184 (1994) (stating that rehabilitation was viewed as primary purpose of punishment for much of twentieth century); see also Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 845-46 n.6 (2002) (explaining that retribution reemerged and replaced other purposes of punishment, such as rehabilitation, around early 1970s).

<sup>287</sup> See Roger K. Warren, *The Most Promising Way Forward: Incorporating Evidence-Based Practice into State Sentencing and Corrections Policies*, 20 FED. SENT’G REP. 322, 322 (2008) (explaining that, “[f]or most of the twentieth century . . . the ‘rehabilitative ideal’ dominated state sentencing and corrections policies); see also Nagel & Johnson, *supra* note 286, at 184 & n.15 (explaining that “[t]he influence of the rehabilitative ideal is evinced by the adoption, throughout [the twentieth] century, of a number of criminal justice reforms” such as “the juvenile court, the indeterminate sentence, systems of probation and parole, the youth authority, and the promise (if not the reality) of therapeutic programs in prisons, juvenile institutions, and mental hospitals”). As Judge Roger K. Warren has explained:

For most of the twentieth century — up until the 1970s — state sentencing and corrections policies reflected deep skepticism about the propriety of punishment and disparaged retributive notions of justice. The policies were based instead on the “rehabilitative ideal,” an optimistic belief that deviant behavior could be cured or “corrected” and offenders “reformed” through application of emerging scientific knowledge in the fields of medicine and psychology.

Warren, *supra*, at 322.

<sup>288</sup> See Nagel & Johnson, *supra* note 286, at 191 (noting that “[t]he Sentencing Reform Act embodies Congress’ rejection of traditional penal rehabilitationism [sic]”); Warren, *supra* note 287, at 322 (explaining that, as “the violent crime rate in America tripled,” support for rehabilitation and concomitant indeterminate sentencing fell: “[s]ocial scientists, government officials, and the general public had grown cynical about whether rehabilitation could ever really be successful in reducing criminal behavior”).

the victim, the offender, and the community.”<sup>289</sup> Based on these principles, numerous communities have adopted restorative justice practices such as victim-offender mediation and sentencing circles.<sup>290</sup> Some communities have also embraced alternative rationales for punishment, ranging from compensation to social solidarity.<sup>291</sup>

Taking small steps in recognizing additional justifications for punishment, the *Kennedy* Court identified rehabilitation as one of “three principal rationales” for punishment,<sup>292</sup> and the *Graham* Court referenced both rehabilitation and incapacitation as punishment rationales.<sup>293</sup> Aside from this, however, the Court has largely

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<sup>289</sup> Leena Kurki, *Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235, 237 (2000); see also Donald R. Mason, *Sentencing Policy and Procedure as Applied to Cyber Crimes: A Call for Reconsideration and Dialogue*, 76 *MISS. L.J.* 903, 905 (2007) (listing restorative justice as one of many rationales of punishment); see also Gwen Robinson & Joanna Shapland, *Reducing Recidivism*, 48 *BRIT. J. CRIMINOLOGY* 337, 337 (2008) (explaining that restorative justice “differs from other justice strategies . . . in that it is ‘concerned with much more than simply what is done to or with offenders’”). For a good account of restorative justice, see generally Kurki, *supra* (detailing rise of restorative justice rationale and related programs, along with similar community justice rationale and related programs).

<sup>290</sup> See Kurki, *supra* note 289, at 268-84.

<sup>291</sup> See, e.g., Susan Ayres, *Helene Cixous’s the Perjured City: Nonprosecution Alternatives to Collective Violence*, 9 *N.Y. CITY L. REV.* 1, 14 (2005) (citing WAYNE R. LAFAVE ET AL., 1 *SUBSTANTIVE CRIMINAL LAW* § 1.5 (2d ed. 2003)) (asserting that criminal justice rationales include compensation, restorative justice, and social solidarity); Gordon Bazemore, *The “Community” in Community Justice: Issues, Themes, and Questions for the New Neighborhood Sanctioning Models*, 19 *JUST. SYS. J.* 193, 193 (1997) (explaining how communities use various alternatives to traditional sentencing, such as “family group conferences,” which are “aimed at ensuring that offenders face up to community disapproval of their behavior, that an agreement is developed for repairing the damage to victim and community, and that community members recognize the need for reintegrating the offender once he or she has made amends”); Morris Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 *OXFORD J. LEGAL STUD.* 57, 67-68 (2008) (explaining that Canada’s Criminal Code recognizes six fundamental purposes of sentencing: denunciation, deterrence, incapacitation, rehabilitation, “to provide reparations for harm done to victims or to the community,” and “to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community”); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 *COLUM. L. REV.* 1190, 1209 (2005) (“[P]unishment goals include expressive and communicative functions, such as defining and reinforcing important societal norms, persuading the offender of his wrongdoing, and promoting repentance.”).

<sup>292</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (stating that “punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution”) (emphasis added).

<sup>293</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2028-30 (2010) (“With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate — retribution, deterrence,

overlooked some of the main justifications for punishment. In *Kennedy*, the Court failed to examine the rehabilitation rationale for punishment despite referencing rehabilitation as one of the main punishment rationales.<sup>294</sup> Perhaps this is understandable, however, because one could hardly argue that the death penalty — the punishment at issue in that case — serves a rehabilitative function. Similarly, even though the *Graham* Court acknowledged the legitimacy of rehabilitation and incapacitation as justifications for punishment,<sup>295</sup> it gave little weight to these rationales.<sup>296</sup> It instead stated that “[t]he concept of rehabilitation is imprecise” and that it could not justify the punishment at issue in *Graham* — life without the possibility of parole.<sup>297</sup> The *Graham* Court also found incapacitation — one of the primary justifications for punishment among state legislatures<sup>298</sup> — “inadequate to justify” the punishment.<sup>299</sup>

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incapacitation, and rehabilitation — provides an adequate justification.”).

<sup>294</sup> See *Kennedy*, 128 S. Ct. at 2649, 2658-64.

<sup>295</sup> See *Graham*, 130 S. Ct. at 2028.

<sup>296</sup> See *id.* at 2053-54 (Thomas, J., dissenting) (stating that, “[b]y definition, [life without parole] serve[s] the goal of incapacitation by ensuring that juvenile offenders who commit [serious crimes] no longer threaten their communities . . . [y]et the Court finds this goal ‘inadequate’ to justify the life-without-parole sentences here,” and that, although “[t]he Court acknowledges that such sentences will deter future juvenile offenders, at least to some degree, [it] rejects that penological goal, not as illegitimate, but as insufficient”).

<sup>297</sup> *Id.* at 2029-30.

<sup>298</sup> See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 464-68 (1997); see also Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 714 n.373 (2004) (“Today, one of the main justifications for punishment is incapacitation . . .”).

<sup>299</sup> *Graham*, 130 S. Ct. at 2029; see also *Atkins v. Virginia*, 536 U.S. 304, 350 (2002) (Scalia, J., dissenting) (“The Court conveniently ignores a third ‘social purpose’ of the death penalty — ‘incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.’”); *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976) (“Another purpose that has been discussed is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.”). *But see California v. Ramos*, 463 U.S. 992, 1023 (1983) (Marshall, J., dissenting) (“That the death penalty cannot be justified by considerations of incapacitation was implicitly acknowledged in *Gregg*, where the joint opinion . . . relied entirely on retribution and deterrence as possible justifications for the death penalty, and mentioned incapacitation only in passing as ‘[a]nother purpose that has been discussed.’”) (citation omitted); see also *Baze v. Rees*, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring) (“While incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death

*b. The Incompleteness of Retribution and Deterrence*

Overlooking punishment rationales other than retribution and deterrence, the Court has suggested that a punishment is constitutional so long as it serves either a retributive or a deterrent function.<sup>300</sup> The Court has repeatedly stated that “unless the [punishment imposed] ‘measurably contributes to one or both of these goals, it is . . . unconstitutional.’”<sup>301</sup> Yet, as scholars have often observed, no single penological purpose can single-handedly justify punishment.<sup>302</sup> For example, if retribution, alone, were viewed as a

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penalty.”). While incapacitation is a form of deterrence, which the Court readily examines in forming its independent judgment in Punishments Clause cases, it constitutes specific deterrence, rather than general deterrence, which the Court, aside from its recent *Kennedy* opinion, has frequently overlooked. *See supra* text accompanying notes 144-161.

<sup>300</sup> *See, e.g., Atkins*, 536 U.S. at 319 (explaining that *Gregg* identified retribution and deterrence “as the social purposes served by the death penalty” and concluded that, “[u]nless the imposition of the death penalty on a mentally retarded person ‘measurably contributes to one or both of these goals, ‘it is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment”); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (explaining that *Gregg* Court “observed that ‘[the] death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders’” and concluding that, “[u]nless the death penalty when applied to those in *Enmund*’s position measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment”). The Court has not been absolutely clear that either purpose will suffice for justifying a punishment, however. In *Kennedy*, for example, the Court stated that “*Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.” *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661 (2008). This statement, read in isolation and without the benefit of other Punishments Clause cases, could be interpreted to mean that a punishment must serve both a retributive and a deterrent function to be constitutional.

<sup>301</sup> *See Atkins*, 536 U.S. at 319; *Enmund*, 458 U.S. at 798.

<sup>302</sup> *See* GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 415, 418 (Oxford Univ. Press 2000) (“Both consequentialist and retributive rationalia of punishment bear serious flaws. . . . [the realization of which has] generated numerous efforts to combine these distinct rationalia in an eclectic justification for imposing sanctions in the name both of justice and of social protection.”); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 3 (Oxford Univ. Press 1968) (asserting that “a plurality of different values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment [because] different principles . . . are relevant at different points in any morally acceptable account of punishment”); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 60 (Stanford Univ. Press 1968) (“All that I have been concerned to show is that any unitary theory of punishment is inadequate . . .”).

sufficient justification for punishment, then the very foundation of our criminal justice system is questionable because it permits conviction and punishment based not on a certainty of guilt but instead on proof beyond a reasonable doubt that a defendant is guilty.<sup>303</sup> This allows for some error in convictions and, indeed, there is evidence that individuals have been wrongly convicted, imprisoned, and even put to death.<sup>304</sup> In this sense, individuals may be, and indeed are, punished when they do not deserve it, thus retributivism could be described as a failure in terms of justifying punishment in the American system. Similarly, there are difficulties in viewing deterrence, alone, as a sufficient justification for punishment. As a number of scholars have noted, deterrence, taken to its outer limits, justifies punishing innocent individuals in the interest of society, and this is unjust and undesirable.<sup>305</sup>

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<sup>303</sup> See *In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1632-33 (1992) (explaining that, “unless the retributivist rejects all possible systems of legal punishment, . . . she is endorsing a system that she knows will condemn and punish innocent people” because “any actual criminal justice system is inherently fallible [and] will inevitably inflict punishment on some people who are actually innocent and thus do not deserve it”).

<sup>304</sup> See Dolinko, *supra* note 303, at 1632-22; see also, e.g., Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 72-73 (1987) (cataloguing twenty-three people whom authors conclude were innocent yet executed by State). See generally David Gran, *Trial by Fire*, NEW YORKER, Sept. 7, 2009 (suggesting that innocent man, Cameron Todd Willingham, was wrongfully convicted and executed in 2004 even though significant scientific evidence had surfaced suggesting that he was innocent).

<sup>305</sup> See, e.g., H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 249, 253-54 (1965) (stating that “[w]e may sometimes best deter others by punishing, by framing, an innocent man who is generally believed to be guilty, or by adopting rough and ready trial procedures, as is done by army courts martial in the heat of battle in respect of deserters . . .” and determining that, “[i]f the greatest good or the greatest happiness of the greatest number is the foundation of the morality and justice of punishment, there can be no guarantee that some such injustices may not be dictated by it”). Moreover, there is a concern that attempts at deterrence are ineffective because criminal actors ordinarily do not contemplate apprehension and punishment in determining whether to commit crimes. See, e.g., JAMES Q. WILSON, THINKING ABOUT CRIME 117-21 (rev. ed. 1983) (describing practical problems with theory of deterrence, including that, as “some scholars contend[,] . . . a large fraction of crime is committed by persons who are so impulsive, irrational, or abnormal that even if there were no delay, uncertainty, or ignorance attached to the consequences of criminality, we would still have a lot of crime”); cf. Lous Siedman, *Soldiers, Martyrs, and Criminal Law: Utilitarianism and the Problem of Crime Control*, 94 YALE L.J. 315,

As a result of the deficiencies of any single justification for punishment and the absurd conclusions reached by relying on any single rationale, most scholars contend that punishment should be limited by a combination of punishment rationales — most commonly, by both retributive and deterrent concerns.<sup>306</sup> While such “mixed” views of penological justification take many forms,<sup>307</sup> one particularly popular mixed theory, often referred to as “limiting retributivism,” suggests that retributive concerns set upper and lower limits on punishment but that, within those parameters, utilitarian considerations such as deterrence should determine the appropriate punishment.<sup>308</sup> Perhaps, despite its rhetoric, the Court has reached a

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331-34 (1984) (arguing that increased certainty of arrest and conviction is more effective in deterring would-be criminals than more severe punishments).

<sup>306</sup> See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1245-46 (2001) (“[M]ost modern writers (especially legal policy analysts) who support retributive conceptions of fairness do not view them as absolute; instead, they espouse mixed views that combine concerns about fairness and concerns about individuals’ well-being.”); see also Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 668 n.401 (1998) (“At the end of the day, moreover, the best conclusion is that our system of criminal liability is a ‘mixed’ regime in which courts and legislatures draw on both retributive and utilitarian principles to justify criminal punishment.”); John Bronsteen, *Retribution’s Role*, 84 IND. L.J. 1129, 1129 (2009) (proposing mixed theory of punishment “in which retributive considerations determine who may be punished and also set the upper boundary of morally permissible punishment” and in which “utilitarian considerations direct how much punishment the state will choose to inflict on the offender beneath that upper boundary”); Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 225 (2003) (“A number of leading scholars have attempted to escape the apparent stalemate between utilitarianism and retributivism by offering ‘mixed’ or ‘hybrid’ theories of punishment.”); cf. Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow’s Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 1021 n.217 (1994) (“The allure of the mixed theory stems from the problems posed by either the purely utilitarian theory or the purely retributive theory.”).

<sup>307</sup> Kaplow & Shavell, *supra* note 306, at 1246.

<sup>308</sup> See *id.* at 1246-47 (“[O]ne could view retributive theory as providing a constraint on the use of punishment to pursue other objectives, notably the promotion of individuals’ well-being.”); Paul Roberts, *Comparative Criminal Justice Goes Global*, 28 OXFORD J. LEGAL STUD. 369, 379 (2008) (stating that Hart and Packer “posited a consequentialist (‘utilitarian’) overriding objective subject to deontological, ‘retributive’ constraints, including the moral culpability of the accused and the proportionality of punishment (which Hart usefully summarized as ‘retribution in distribution’)”); see also Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1050 (1978) (“There is a popular ‘mixed’ approach to the justification of punishment, most often associated with H.L.A. Hart and Herbert Packer, but which was originally adumbrated by John Rawls, holding that punishment, as a general practice, may be justified teleologically, but that the application of punishment to specific individuals

similar conclusion; it seems that the Court consistently views retribution and deterrence together, in that if it finds that a punishment serves a retributive function, then it determines that it serves a deterrent function as well.<sup>309</sup> Similarly, if the Court determines that a punishment fails to serve a retributive function, it also concludes that the punishment fails to serve a deterrent function.<sup>310</sup> However, despite the fact that a mixed theory of punishment appears to be the prevailing view,<sup>311</sup> as some commentators have explained, it is impossible for a punishment to simultaneously serve both retributive and deterrent functions.<sup>312</sup> Retribution requires that an offender receive a punishment

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may be justified deontologically.”).

<sup>309</sup> See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661-64 (2008) (stating that “[t]he goal of retribution . . . does not justify the harshness of the death penalty” as applied to child rapists and then concluding that death penalty, as applied in this context, diminishes deterrent goal of punishment); *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005) (asserting that executing juvenile offenders does not serve retributive purpose, acknowledging that “it is unclear whether the death penalty has a significant or even measurable [value],” and ultimately concluding that neither “retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders”). Although the Court views retribution and deterrence together, it certainly has not structured this analysis as one of limiting retributivism.

<sup>310</sup> While the Court has not explicitly stated that retribution and notions of excessiveness drive its analysis, the Court seems to focus more on retribution than deterrence, especially in the capital context. For example, the Court has occasionally stated that retribution is the primary purpose justifying the death penalty, see *Spaziano v. Florida*, 468 U.S. 447, 461 (1984), and it has questioned the legitimacy of the deterrence rationale in justifying the penalty, see *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976) (“Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive.”), *quoted in Kennedy*, 128 S. Ct. at 2662; see also *Baze v. Rees*, 553 U.S. 35, 79 & n.13 (Stevens, J., concurring) (stating that “[t]he legitimacy of deterrence as an acceptable justification for the death penalty is . . . questionable, at best,” but noting that “there has been a recent surge in scholarship asserting the deterrent effect of the death penalty”).

<sup>311</sup> See Frase, *supra* note 142, at 78 (suggesting that number of judges, legislatures, scholars, and practitioners have adopted theory of limiting retributivism); *cf. supra* note 309 (explaining that Supreme Court has not clearly adopted theory of limiting retributivism in Eighth Amendment context).

<sup>312</sup> See Alan H. Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42, 48 (1979) (“The problem is that while the mixed theory can avoid punishment of the innocent, it is doubtful that it can avoid excessive punishment of the guilty if it is to have sufficient deterrent effect to make the social costs worthwhile.”); see also Radin, *supra* note 308, at 1050 (“[I]f each person may be punished only insofar as she deserves it, but the general aim of punishment is utilitarian deterrence, then under the mixed approach only those ‘deserving’ people whose punishment serves social purposes should be punished. To this extent, a retributivist would say people are still being used as a means, not ends.”).

proportionate to his offense.<sup>313</sup> Deterrence, however, requires that offenders receive punishments that will impose greater costs on them than the benefits they will receive if their crimes are left unpunished. Only when this is the case will punishment have a deterrent effect because rational would-be offenders discount the potential punishments they will receive based on the chances that they will be apprehended, prosecuted, and convicted, and also based on the fact that any punishments they receive will be imposed sometime in the future.<sup>314</sup> Therefore, under a deterrence rationale, the punishment must exceed that which is allowed under a retribution rationale.<sup>315</sup>

These observations about the incompatibility of various punishment rationales suggest that there is something even more complex than limiting retributivism that describes Americans' feelings about punishment. Perhaps the Court has attempted to capture this complexity in its review of concerns other than retribution and deterrence, such as its survey of competency, evidence, collateral crimes, and wrongful execution. While it is laudable that the Court has obliquely attempted to make a more nuanced examination of punishment justifications, exploring these other factors is not especially fruitful because they are largely unrelated to the cruelty inquiry.

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<sup>313</sup> See Kaplow & Shavell, *supra* note 306, at 1234 (stating that retributivists believe "that the magnitude of punishment should fit the crime, which is to say that punishment should be proportional to the gravity of the offense"); see also Goldman, *supra* note 312, at 45-46 ("If a person can be said to deserve only so much punishment and no more, then any excess appears to be as objectionable as an equivalent harm imposed upon an innocent person."); *supra* text accompanying notes 118-120.

<sup>314</sup> See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953-54 (2003) (explaining that effective deterrence requires that would-be offender perceive costs of criminal conduct to exceed its benefits and that low probability of punishment and delay in imposing punishment erode deterrent effect); see also Goldman, *supra* note 312, at 48 (explaining that, "[i]n our society the chances of apprehension and punishment for almost every class of crime are well under fifty percent" and that, "[g]iven these odds a person pursuing what he considers his maximum prospective benefit may not be deterred by the threat of an imposition of punishment equivalent to the violation of the rights of the potential victim").

<sup>315</sup> See Goldman, *supra* note 312, at 48-49. Another criticism of this leading mixed theory of punishment is that it implies "that 'deserving' people whose punishment would not contribute to deterrence (if there are any) ought not to be punished." Radin, *supra* note 308, at 1050-51.

### 3. Concerns Aside from Retribution and Deterrence

While the Court has neglected mainstream penological purposes such as incapacitation and rehabilitation, it has readily considered other factors in forming its own independent judgment on whether a punishment violates the Punishments Clause. This constitutes an acknowledgement that retribution and deterrence, alone, are insufficient considerations in evaluating the cruelty component of the Punishments Clause,<sup>316</sup> but these other factors have questionable relevance to the cruelty inquiry. More specifically, it is difficult to determine how competency issues, evidentiary concerns, the possible commission of collateral crimes, and the risk of wrongful execution relate to whether a punishment serves a legitimate penological purpose or whether it is exceptionally brutal. In *Atkins*, the Court was concerned about mentally retarded individuals' abilities to make persuasive showings of mitigation, effectively assist their attorneys, testify persuasively, and demonstrate remorse.<sup>317</sup> While, as the *Atkins* Court explained, these concerns may relate to a risk of wrongful execution, and while wrongful execution is certainly unjust,<sup>318</sup> these concerns, in and of themselves, are unrelated to whether a punishment is rooted in a legitimate penological purpose or whether it is especially brutal in nature. The Court's concerns in *Ford* — that an offender is unable to understand why he is being punished and that an offender is unable to repent and, thus, make himself "fit" for execution<sup>319</sup> — are similarly irrelevant to the cruelty inquiry in that the punishment, itself, is not brutal, and it was not alleged to be inflicted for a purpose other than punishment. The *Kennedy* Court expressed concern about unreliable child testimony.<sup>320</sup> Again, while convicting someone on false testimony is undoubtedly unjust, the testimony, itself, does not render the punishment ultimately imposed as necessarily cruel. The *Kennedy* Court's concern about collateral

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<sup>316</sup> See *supra* Part V.B.2.b.

<sup>317</sup> See *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002); see also *supra* text accompanying notes 199-201.

<sup>318</sup> According to the Oxford English Dictionary, "just" means "righteous, equitable, rightful[;] . . . [t]hat does what is morally right, righteous." VIII OXFORD ENGLISH DICTIONARY, *supra* note 227, at 323. In contrast, the Dictionary defines "cruel" as "[d]isposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress; destitute of kindness or compassion; merciless, pitiless, hard-hearted." IV OXFORD ENGLISH DICTIONARY, *supra* note 227, at 78.

<sup>319</sup> See *Ford v. Wainwright*, 477 U.S. 399, 407-08 (1986); see also *supra* text accompanying notes 205-207.

<sup>320</sup> See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008).

crimes<sup>321</sup> is similarly unrelated to the cruelty inquiry. Although providing the same punishments for child rape and murder “may remove a strong incentive for the rapist not to kill the victim,”<sup>322</sup> it does not render the punishment for child rape, itself, cruel. It relates to cruelty only to the extent that it relates to the penological purpose of deterrence — the incentive to not commit *another* crime.<sup>323</sup> As Justice Alito argued in his dissent in *Kennedy*, policy arguments based on concerns such as evidentiary issues and collateral crimes “are simply not pertinent to the question whether the death penalty is ‘cruel . . .’ punishment.”<sup>324</sup>

#### 4. Repetitive Inquiries of Independent Judgment Factors

Not only are the Court’s concerns of competency, evidence, collateral crimes, and wrongful execution for the most part irrelevant to the cruelty inquiry, but, to the extent that they are relevant, these concerns may have already been adequately addressed throughout the guilt-innocence and sentencing phases of trial, which are subject to review by appellate courts, often before a defendant could even raise a Punishments Clause issue.<sup>325</sup> To this extent, addressing these concerns again in the Punishments Clause analysis is redundant.

Most of the concerns about offender competency that the Court raised in both the *Atkins* and *Ford* cases<sup>326</sup> are taken into account in

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<sup>321</sup> See *supra* text accompanying note 212.

<sup>322</sup> *Kennedy*, 128 S. Ct. at 2664.

<sup>323</sup> See *supra* text accompanying notes 158-161 (explaining that assessing whether imposing particular punishment could cause offender to commit collateral crime does not fall within traditional bounds of deterrence analysis).

<sup>324</sup> *Kennedy*, 128 S. Ct. at 2673 (Alito, J., dissenting) (“Although the Court has much to say on the issue [of its own judgment], most of the Court’s discussion is not pertinent to the Eighth Amendment question at hand.”). Justice Alito’s dissent — which Chief Justice Roberts, Justice Scalia, and Justice Thomas joined — actually declares that these policy arguments are not relevant “to the question whether the death penalty is ‘cruel and unusual’ punishment.” *Id.* (emphasis added). The Court’s understanding of “cruel and unusual,” however, often equates with what this Article refers to as simply “cruel.” See *supra* text accompanying notes 221-225; cf. Ryan, *Eighth Amendment*, *supra* note 7, at 569, 571 (explaining how, since latter half of twentieth century, Court’s reference to “cruel and unusual” punishments often means simply “cruel” punishments).

<sup>325</sup> See *infra* text accompanying notes 327-353; see also, e.g., *United States v. Jones*, 336 F.3d 245, 256 (3d Cir. 2003) (explaining that appellate courts “review factual findings regarding competency for clear error”).

<sup>326</sup> See *supra* text accompanying notes 199-207 (summarizing competency issues that Court discussed in *Atkins* and *Ford*, including risks that incompetent defendant will offer false confessions, be unable to effectively assist his attorney, and be unable

courts' examinations of defendant competency to stand trial. This pretrial assessment of competency addresses whether a defendant is capable of assisting his attorney and thus capable of aiding in demonstrating mitigating factors to the judge and jury.<sup>327</sup> As the Court in *Dusky v. United States*<sup>328</sup> stated, a defendant is competent to stand trial when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has a "rational as well as factual understanding of the proceedings against him."<sup>329</sup> This test of competence is aimed at some of the very concerns that the *Atkins* Court highlighted, including ensuring that a defendant is capable of providing meaningful assistance to his attorney in presenting his defense.<sup>330</sup> If a court finds that the defendant lacks such competence, he will not be prosecuted in the first place.<sup>331</sup> Perhaps unwittingly highlighting the redundant nature of the competency inquiry at the Punishments Clause stage is commentator Evan Schultz's observation that "the constitutional wrong isn't merely that juries sentence [mentally retarded individuals] to death — it's that we've put [such individuals] on trial in the first place."<sup>332</sup> It is possible

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to understand why he is being punished).

<sup>327</sup> See *Dusky v. United States*, 362 U.S. 402, 402 (1960).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* Courts have added greater context to this *Dusky* standard by interpreting it to "require that a defendant be able to identify and convey relevant information to counsel, appreciate his status as a defendant in a criminal prosecution, and understand the charges, the purpose of the criminal process, and the purpose of the adversary system, including the role played by defense counsel." E. Lea Johnston, *Setting the Standard: A Critique of Bonnie's Competency Standard and the Potential of Problem-Solving Theory for Self-Representation at Trial*, 43 UC DAVIS L. REV. 1605, 1618-19 (2010). In addition to establishing competency to stand trial, a defendant who seeks to enter a guilty plea and waive his right to counsel must demonstrate competency by, at a minimum, the same standard. See *Godinez v. Moran*, 509 U.S. 389, 398-401 (1993); *cf. Indiana v. Edwards*, 128 S. Ct. 2379, 2387-88 (2008) (holding that state may impose heightened competency standard as prerequisite to allowing defendants to proceed pro se). As the Supreme Court has explained, though, competency is not the only requirement for a valid guilty plea and waiver of counsel. See *Godinez*, 509 U.S. at 400-01. A defendant's plea and waiver must also be "knowing and voluntary," and, in this sense, there is a heightened standard; "but it is not a heightened standard of *competence*." *Id.*; *cf. Edwards*, 128 S. Ct. at 2385-88 (holding that state may impose heightened competency standard for proceeding pro se).

<sup>330</sup> See *supra* text accompanying notes 199-202.

<sup>331</sup> See *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) (holding that Due Process Clause prohibits prosecution of incompetent defendant).

<sup>332</sup> Evan P. Schultz, *Mice, Men and Us: Surveys Say to Stop Killing the Mentally Retarded. What Will They Say Next?*, 169 N.J. L.J. 380, 380 (2002) (expressing outrage that, although "we're civilized enough not to kill people too mentally incapacitated to understand what they were doing, . . . we're still willing to throw those people in

that this pretrial assessment is incapable of addressing all of the concerns the Court expressed in *Atkins* and *Ford*, however. While the *Dusky* analysis does not specifically examine whether the defendant is at an enhanced risk of making false confessions or whether he will make a poor witness and perhaps create “an unwarranted impression of lack of remorse,”<sup>333</sup> in reality, the individual characteristics that create these risks are the same characteristics that courts examine in determining whether a defendant will be able to provide meaningful assistance to his attorney under the *Dusky* analysis.<sup>334</sup> But the Court’s concern, which it expressed in *Ford* — that the offender may have become incompetent between trial and the time when his sentence was to be imposed<sup>335</sup> — is not sufficiently addressed under the pretrial competency inquiry. While there has been little explication as to why courts should be concerned about an offender understanding his punishment and the reasons for his punishment,<sup>336</sup> if it is a valid

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prison for what they did”).

<sup>333</sup> *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002); see also *supra* text accompanying note 200.

<sup>334</sup> See Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 260 (2007) (explaining that juveniles are “less competent trial defendants [because they] tend to be more compliant and suggestible during police interrogations, two traits which are risk factors for false confessions”); Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 78 n.178 (2006) (noting that incompetent defendants “may not, for example, fully appreciate their legal situation, maintain motivation and attention when interacting with counsel, or be able to testify effectively or make sound judgments about their defense options”). *But see Atkins*, 536 U.S. at 318 (noting that “[m]entally retarded persons frequently . . . are competent to stand trial”); *Competency of Criminal Defendants to Waive Assistance of Counsel at Trial*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 9, 11 (2008) (explaining that individuals found competent to stand trial “may be impaired in significant ways that bear on that person’s ability to competently, knowingly, and intelligently make choices affecting the conduct of his or her trial” (citing *Atkins*, 536 U.S. at 318)). Moreover, the concern of false confessions is also at least partially addressed by a court’s inquiry into whether a defendant’s confession is voluntary under the Fifth and Fourteenth amendments. See *Townsend v. Sain*, 372 U.S. 293, 307 (1963) (explaining that defendant’s confession is involuntary, and thus inadmissible, if it was “not ‘the product of a rational intellect and a free will’” (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960))), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

<sup>335</sup> See *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

<sup>336</sup> Although the *Panetti v. Quarterman* Court draws on the *Ford* Court’s concern of executing an individual who fails to comprehend the reasons for his punishment, see 551 U.S. 930, 956-60 (2007), the *Panetti* majority provides no further explanation for why this is concerning other than that imposing death will not be effective in communicating to the condemned individual the seriousness of his offense if he does not have a rational understanding of the reasons for his punishment, see *id.* at 958-59.

constitutional concern,<sup>337</sup> then it is not adequately addressed during the guilt-innocence or sentencing phases of trial. However, again, this concern is irrelevant to the cruelty of the punishment itself, as it does not relate to the motive for which the punishment is imposed or the brutal nature or quality of that punishment.

Evidentiary concerns, such as those discussed in *Kennedy v. Louisiana*, are also adequately addressed during the guilt-innocence phase of trial. Under both the Federal Rules of Evidence and state evidentiary codes, evidence that is highly prejudicial, such as “unreliable . . . child testimony,”<sup>338</sup> “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury . . . .”<sup>339</sup> Moreover, juries and judges have both the ability and the discretion to determine whether a witness’s testimony is credible.<sup>340</sup> As is the case with most evidentiary issues, the trial judge and the jury are in the best positions to determine the reliability of witness testimony<sup>341</sup> — not the U.S. Supreme Court and certainly not as a categorical rule as the Court suggested in *Kennedy*.<sup>342</sup> As Justice Alito has noted, “the Eighth Amendment provides a poor vehicle for addressing problems regarding the admissibility or reliability of evidence, and problems presented by the testimony of

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<sup>337</sup> Of course, the *Ford* and *Panetti* Courts have determined that this is a constitutional concern. See *Panetti*, 551 U.S. at 954-60; *Ford*, 477 U.S. at 406-10.

<sup>338</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008).

<sup>339</sup> FED. R. EVID. 403; see e.g., CAL. EVID. CODE § 352 (1995) (“The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice . . . or of misleading the jury.”); TEX. R. EVID. 403 (1998) (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury . . .”).

<sup>340</sup> See *United States v. Boyce*, 564 F.3d 911, 916 (8th Cir. 2009) (“The finder of fact may accept the parts of a witness’s testimony that it finds credible while rejecting any portion it finds implausible or unreliable.”); *United States v. Heredia*, 483 F.3d 913, 923 n.14 (9th Cir. 2007) (noting that “juries are not bound to believe or disbelieve all of a witness’s testimony” and that “jury may conclude a witness is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third”).

<sup>341</sup> See *United States v. Risken*, 869 F.2d 1098, 1100 (8th Cir. 1989) (“The district court is in the best position to observe the demeanor of the witnesses and to assess credibility, and such factual findings shall not be set aside unless clearly erroneous.”); see also *United States v. Dumas*, 207 F.3d 11, 16 (1st Cir. 2000) (noting that “the district court is usually in a much better position to judge the credibility of the witnesses”).

<sup>342</sup> See *Kennedy*, 128 S. Ct. at 2664-65.

child victims are not unique to capital cases” or present in every child rape case.<sup>343</sup>

The Court’s concern about offenders committing collateral crimes is also not only irrelevant to the concept of cruelty,<sup>344</sup> but it is sufficiently addressed outside of the Eighth Amendment context. If an offender commits additional crimes, the government will have the opportunity to prosecute the offender for these new offenses (of course providing that there is sufficient evidence).<sup>345</sup> Further, at least in theory, federal and state criminal legislation, along with their sentencing policies and guidelines, sufficiently deter criminal behavior such that deterring would-be offenders by also adjusting their punishments for collateral crimes seems unnecessary. Addressing this behavior twice — first through the criminal statute governing the conduct at issue and second through altering the Punishments Clause analysis of penalties associated with related crimes — is redundant.

One of the main concerns that seems to underlie the Court’s reliance on factors other than retribution and deterrence is the possibility of wrongful execution.<sup>346</sup> While wrongful execution is certainly a pressing concern,<sup>347</sup> the Punishments Clause does not seem to be the proper vehicle through which such claims should be adjudicated.<sup>348</sup> In

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<sup>343</sup> *Id.* at 2674-75 (Alito, J., dissenting).

<sup>344</sup> *See supra* Part V.B.3.

<sup>345</sup> *See, e.g.,* *United States v. Goodwin*, 457 U.S. 368, 380 (1982) (“[J]ust as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of a trial, a prosecutor may file additional charges . . . .”); *Lopez v. State*, 139 P.3d 445, 453-54 (Wyo. 2006) (“Charging decisions rest within the discretion of the prosecutor. . . . The public’s demand for prosecution for . . . additional crimes may figure into the prosecutor’s assessment . . . .”).

<sup>346</sup> *See, e.g., Kennedy*, 128 S. Ct. at 2663 (“The problem of unreliable, induced, and even imagined child testimony means there is a ‘special risk of wrongful execution’ in some child rape cases.”); *Atkins v. Louisiana*, 536 U.S. 304, 321 (2002) (“Mentally retarded defendants in the aggregate face a special risk of wrongful execution.”); *see also supra* Part IV.D (noting Court’s concern with wrongful execution in its Punishments Clause analysis).

<sup>347</sup> The public’s concern with wrongful execution was reflected, for example, when, in 2003, Illinois Governor George Ryan commuted all of the death sentences in the state due to a concern of wrongful execution. *See* Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1 (“Condemning the capital punishment system as fundamentally flawed and unfair, Gov. George Ryan commuted all Illinois death sentences [on January 12, 2003] to prison terms of life or less, the largest such emptying of death row in history.”); *see also* Gran, *supra* note 304 (suggesting that Cameron Todd Willingham, individual executed in Texas in 2004, was actually innocent).

<sup>348</sup> *See* *Herrera v. Collins*, 506 U.S. 390, 405-07 (1993) (concluding that claim of actual innocence is not cognizable under Eighth Amendment, at least not on federal habeas review); *see also* *People v. Washington*, 665 N.E.2d 1330, 1333 (Ill. 1996)

his dissent in *Atkins*, Justice Scalia suggests that this concern of wrongful execution would be better taken up in a due process claim.<sup>349</sup> Other scholars and courts agree with this position. For example, courts such as the Illinois Supreme Court and the Nebraska Supreme Court have determined that procedural and substantive due process — whether under the U.S. Constitution or the applicable state constitution — are the proper means by which to assert claims for actual innocence.<sup>350</sup> Similarly, Professor Ursula Bentele has argued that “[s]ubstantive due process analysis is a particularly appropriate prism through which to focus” when dealing with issues of wrongful execution.<sup>351</sup> Other courts have suggested that a free-standing actual innocence claim may be the proper vehicle.<sup>352</sup> Regardless, aside from incidentally considering the wrongful execution issue in the context of

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(explaining that *Herrera* Court concluded that “[a] claim of innocence itself simply was not . . . cognizable under the [E]ighth [A]mendment”).

<sup>349</sup> See *Atkins*, 536 U.S. at 352 (Scalia, J., dissenting) (“If th[e] . . . claim [that mentally retarded offenders ‘face a special risk of wrongful execution’] has any substance to it (which I doubt) it might support a due process claim in all criminal prosecutions of the mentally retarded; but it is hard to see how it has anything to do with an *Eighth Amendment* claim.”). Justice Scalia also criticized the majority’s concern that there is a special risk of wrongful execution when the defendant is mentally retarded because “a similar ‘special risk’ could be said to exist for just plain stupid people, inarticulate people, even ugly people.” *Id.*

<sup>350</sup> See *State v. Lotter*, 771 N.W.2d 551, 564 (Neb. 2009) (citing *In re Bell*, 170 P.3d 153 (Cal. 2007), and *Washington*, 665 N.E.2d 1330, and stating that, “[s]ince *Herrera*, some state courts have held that deprivation of life or liberty, in the face of persuasive evidence of the person’s actual innocence, violates fundamental concepts of either procedural or substantive due process of law”); *Washington*, 665 N.E.2d at 1336 (stating that it would be “fundamentally unfair” to ignore such procedural due process claim and that “[i]mprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process”).

<sup>351</sup> Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359, 1366 (2004).

<sup>352</sup> See, e.g., *In re Davis*, 565 F.3d 810, 817 (11th Cir. 2009) (noting that Eleventh Circuit has “recognized the possibility of freestanding actual innocence claims”); *Jackson v. Calderon*, 211 F.3d 1148, 1164-65 (9th Cir. 2000) (noting that “a majority of the Justices in *Herrera* would have supported a claim of free-standing actual innocence” and assuming *arguendo* “that a free-standing claim of innocence may be maintained in [certain] circumstances”); *In re Bell*, 170 P.3d 153, 157 (Cal. 2007) (recognizing actual innocence claim based on newly discovered evidence); cf. *Herrera*, 506 U.S. at 417 (suggesting that “a truly persuasive demonstration of ‘actual innocence’ made after trial [could] render the execution of a defendant unconstitutional”). While a free-standing claim of actual innocence may be bound up with Eighth Amendment protections, it will likely most often differ from the typical Eighth Amendment claim in that it will probably not allege that a particular punishment is unconstitutional but instead that *any* punishment is unconstitutional. See *Herrera*, 506 U.S. at 398.

Punishments Clause analysis, the Supreme Court has determined that wrongful execution is not an Eighth Amendment concern.<sup>353</sup>

##### 5. Supplementing the Cruelty Inquiry

Considering that a number of factors that the Court has intermittently relied on are irrelevant to the concept of cruelty and that examining them in the Punishments Clause context is redundant with other legal determinations, it makes some sense that the Court most reliably turns to the penological purposes of retribution and deterrence in its independent judgment analysis.<sup>354</sup> However, because retribution and deterrence appear to serve as only proxies for motive<sup>355</sup> — a concept more at the heart of the meaning of cruelty<sup>356</sup> — the Court should not ignore evidence of improper motivation where it exists. Instead, motive, as one of the primary aspects of cruelty, should be central to the Court's formation of its own judgment. Because oftentimes such evidence will be absent, however, if a punishment fails to serve a proper penological purpose, it should similarly be deemed cruel. The Court's current examination of penological purpose is too simplistic, though. The Court ought to take into account the failures of each purpose of punishment, recognize that most punishment theorists adopt a mixed view of punishment rationales, and acknowledge the limitations of even such mixed views.<sup>357</sup> Recognizing that the various theories of punishment are all insufficient suggests that the Court should be free to take into account other factors it deems appropriate in determining whether a punishment is cruel. Certainly, other factors may help fill the gaps left by the limitations of punishment theory; however, these other factors must also be related to the concept of cruelty. Moreover, because predictability is important, relying on other factors haphazardly, as the Court has done, is of little use.

In supplementing punishment theory, the Court might turn to the other class of prohibited punishments provided by the definition of cruel and thus examine whether a punishment is inhuman, hard-hearted, barbarous, bloody, or destructive, or whether it involves a lingering death. While some of these descriptors are similar to the

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<sup>353</sup> See *Herrera*, 506 U.S. at 405-07 (concluding that claim of actual innocence under Eighth Amendment is not ground for federal habeas corpus relief).

<sup>354</sup> See *supra* text accompanying notes 114, 285 and Part IV.B.1.

<sup>355</sup> See *supra* Part V.B.2.

<sup>356</sup> See *supra* Part V.B.2.

<sup>357</sup> See *supra* text accompanying notes 302-308, 311-315.

issue of motive because they center around, for example, the punisher's state of mind, most of these descriptors focus on the nature or quality of the punishment.<sup>358</sup> Whether a punishment is bloody or involves a lingering death, for example, are circumstances the Court would be justified in relying on in determining whether a punishment is cruel. One might also argue that whether a punishment involves an excessive amount of pain — either physical or emotional — is relevant in that it relates to the nature or quality of the punishment and thus is a factor worthy of consideration.<sup>359</sup>

#### CONCLUSION

While the Court currently resorts to its independent judgment in determining the constitutionality of a punishment under the Punishments Clause, the Court's judgment in this area has led to an inconsistent and unpredictable jurisprudence because the Court has been imprecise in forming its judgment. Perhaps as a result of the Court's inconsistency and the attendant unpredictability of the Court's use of independent judgment, such judgment has garnered considerable criticism. Yet, the Court's use of its own judgment in other constitutional contexts has been met with less resistance. The increased criticism in the Punishments Clause context is likely due to the fact that the Court's judgment is virtually unlimited in this area. The Court has failed to identify the focus of its judgment, and it has relied on factors as wide-ranging as the reliability of evidence likely to be presented in a specific type of case and the possible effect that the punishment could have on the commission of collateral crimes. To increase consistency and predictability, the Court should rein in its independent judgment by focusing that judgment on the concept of cruelty. While the Court's current focus on retribution and deterrence reaches some aspects of the cruelty concept, it does not fully explore it. Further, the Court's reliance on other considerations, such as the offender's competency and evidentiary concerns, are unrelated to the meaning of cruelty. Instead, a careful examination of cruelty will scrutinize the motive of the punisher and the nature and quality of the punishment. Better circumscribing the contours of the Court's independent judgment through this focus on cruelty will allow litigants, their attorneys, and lower courts to determine more accurately which punishments may be properly imposed.

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<sup>358</sup> See *supra* Part V.B.1.

<sup>359</sup> See *supra* text accompanying notes 246-251.