THE EIGHTH AMENDMENT RECONSIDERED: A FRAMEWORK FOR ANALYZING THE EXCESSIVENESS PROHIBITION

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Although it is widely accepted that the Eighth Amendment operates as a broad prohibition against excessive criminal sanctions, neither the courts nor the academic community have presented a unified account of what excessiveness means in the Eighth Amendment context. This absence of any larger theory of the Amendment has produced an increasingly disjointed body of case law, and left the legal community without a method of analyzing excessiveness claims as they arise. The purpose of this Note is to lay the initial groundwork for such a theory. This Note argues that the reason why no comprehensive theory of the Eighth Amendment has been developed is because courts and scholars have not framed their discussion in terms of the two theoretical questions raised by the Amendment's sweeping prohibition of "excessive" criminal sanctions: (1) what substantive standard of decision should determine the outcomes of specific cases, and (2) what standard of review should courts apply when examining sentencing schemes enacted by the legislative branches? In examining these questions, this Note makes two important insights about the nature of the Eighth Amendment: first, that the substantive standard of decision governing the excessiveness prohibition is necessarily tied to an underlying theory of punishment that provides the normative baseline needed for the excessiveness inquiry; and second, that the appropriate standard of review for a criminal sanction adopted by the legislative branches ultimately must be derived from a theory of judicial review that defines the appropriate role of the courts in a democratic society. By structuring the inquiry in this way, this Note contends that it becomes possible to see the competing policy preferences that are implicated by the selection of one standard over another, and thereby forces us to undertake the difficult task of deciding which of these social values should inform interpretation of the Eighth Amendment.

INTRODUCTION

The Eighth Amendment to the United States Constitution has been interpreted by the Supreme Court as a broad prohibition of all "excessive" criminal sanctions,[1] a view that enjoys substantial textual

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[1] *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1190 (2005) ("[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions."); Atkins v.

and historical support[2] and remains largely undisputed within the legal community.[3] Despite this widely accepted understanding, however, neither the courts nor the academic community have clearly defined the meaning of "excessiveness," nor have they developed consistent standards of review for legislative judgments on sentencing policy. The Supreme Court's case law in this area, as even the Court itself admits, "ha[s] not been a model of clarity,"[4] and rarely has addressed the fundamental question of what social values the Eighth Amendment should serve within the American legal system. Similarly, the massive academic literature on this subject has been largely confined to discussions of crime and punishment generally, with little

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Virginia, 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits 'excessive' sanctions."); Solem v. Helm, 463 U.S. 277, 284 (1983) ("The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.").

2 By its own terms, the Eighth Amendment limits the power of the state to impose sanctions on alleged and convicted criminal offenders by requiring that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This language was drawn verbatim from the English Bill of Rights, and it appears the American Framers interpreted this language as a prohibition against excessive and "barbarous" punishments. *See* Furman v. Georgia, 408 U.S. 238, 316–21 (1972) (per curiam) (Marshall, J., concurring); Joseph E. Browdy & Robert J. Saltzman, Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 846–50 (1961). There is, however, evidence that the Framers may have misinterpreted the original English view. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969) (arguing that drafters of English Bill of Rights intended to prohibit punishments not authorized by statute and reiterate existing policy against disproportionate punishments). Although early case law on this issue was divided, the Court eventually accepted the more expansive view of the Amendment. *See, e.g.*, Weems v. United States, 217 U.S. 349, 365–77 (1910) (concluding that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense"); O'Neil v. Vermont, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting) ("The inhibition is directed, not only against [torture and other barbarous punishments], but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged.").

3 Originalist jurists have rejected this view, arguing instead that the Framers could not have intended for the general language of the Eighth Amendment to restrict historically accepted modes of punishment, see Harmelin v. Michigan, 501 U.S. 957, 975–83 (1991) (joint opinion) (Scalia, J.), such as the death penalty. *See also* McGautha v. California, 402 U.S. 183, 226 (1971) (Black, J., concurring) (asserting interpretive inconceivablity that Eighth Amendment's forbiddance of "cruel and unusual punishment" can be read as outlawing capital punishment, in light of Framers' intent and cultural context). *But see* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1030–32 (1978) (noting that this argument fails to explain why Framers chose to prohibit general moral concept of cruelty instead of specifically enumerated list of prohibited punishments). Despite these originalist objections, this Note accepts the prevailing view that the Eighth Amendment broadly prohibits all excessive punishment, and accordingly proceeds on that basis.

4 Lockyer v. Andrade, 538 U.S. 63, 72 (2003). Although the Court was specifically referring to its "terms of years" prison sentencing cases, doctrinal confusion has not been limited solely to this area of the Court's jurisprudence. *See infra* Part I.

consideration of how different theories of punishment might be applicable to the Eighth Amendment context.[5] Indeed, throughout almost all of the relevant case law and academic literature, there has been a general failure to develop any larger theory of the Eighth Amendment—one that answers the question of what substantive values the amendment should promote and which doctrinal means are best suited to promote them. This has left current doctrine unmoored from any theoretical underpinnings and promoted an increasingly disjointed and incoherent body of case law.

While some of this confusion can be attributed to the Eighth Amendment's somewhat convoluted historical development,[6] the more fundamental cause is that courts and scholars have not framed their discussion in terms of the two theoretical questions raised by the Amendment's sweeping prohibition of "excessive" criminal sanctions, specifically: (1) what substantive standard of decision should determine the outcomes of specific cases, and (2) what standard of review should courts apply when examining sentencing schemes enacted by

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[5] *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 686–87 (2005) (noting that there have been few attempts in academic literature to bring together "punishment theory, constitutional theory, and the philosophical understandings of desert").

[6] *See* Granucci, *supra* note 2, at 839–44 (outlining development of Eighth Amendment in early United States). The Eighth Amendment received very little judicial attention until the last half of the twentieth century, and was addressed by the Supreme Court in only nine cases prior to its incorporation against the states in *Robinson v. California*, 370 U.S. 660 (1962). Radin, *supra* note 3, at 997 n.28 (citing cases). This relative dearth of case law is further complicated by the fact that most of the analysis in these decisions is entirely conclusory. *See, e.g.*, *O'Neil*, 144 U.S. at 340 (Field, J., dissenting) (rejecting hypothetical punishment of "six thousand one hundred and forty stripes" (whippings) because "the judgment of mankind would be that the punishment was not only an unusual but a cruel one, and a cry of horror would rise from every civilized and Christian community of the country against it"). The Court's first attempt to create a workable standard for the excessiveness inquiry did not occur until the 1958 decision in *Trop v. Dulles*, 356 U.S. 86 (1958), where the Court articulated in dicta the now-prevailing "evolving standards of decency" doctrine. Although the Court has since taken an increasingly aggressive role in regulating criminal sanctions, many of these decisions have been marked by strong analytical divisions on the Court, and a relatively large number also lack a majority opinion. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003) (majority finding that severe mandatory sentences are not per se violation of Eighth Amendment, but split over whether Amendment contains proporotionality requirement for noncapital cases); *Harmelin*, 501 U.S. 957 (three-Justice plurality holding that noncapital sentence in question was not "grossly disproportionate" to crime, and therefore not unconstitutional, with concurring Justices finding that Eighth Amendment contains no proportionality requirement in noncapital cases); Gregg v. Georgia, 428 U.S. 153 (1976) (plurality finding that carefully-drafted death penality statute can avoid arbitrariness concerns at issue in *Furman*); *Furman*, 408 U.S. 238 (five separate concurrences in and four separate dissents from per curiam opinion holding that imposition of death penalty on defendants violated Eighth and Fourteenth Amendments). The most recent case handed down by the Court shows these analytical divisions are still present. *See Roper*, 125 S. Ct. at 1183.

the legislative branches?[7] Any coherent approach to the Eighth Amendment must answer these two questions, and because we have largely failed to address them, current doctrine has been nibbling around the edges of (or perhaps simply avoiding) the difficult and unavoidable policy choices that are implicated by the excessiveness prohibition.

The purpose of this Note is to explore the implications of these two questions and make clear what is at stake in Eighth Amendment cases so that future scholars might confront more directly the real theoretical issues underlying the excessiveness prohibition. Specifically, this Note offers two insights about the nature of the Eighth Amendment: first, that the substantive standard of decision governing the excessiveness prohibition is necessarily tied to an underlying theory of punishment that provides the normative baseline needed for the excessiveness inquiry; and second, that the appropriate standard of review for a criminal sanction adopted by the legislative branches ultimately must be derived from a theory of judicial review that defines the appropriate role of the courts in a democratic society.

The first of these questions concerns the substantive standard of decision governing the excessiveness inquiry. This Note argues that any excessiveness inquiry under the Eighth Amendment necessarily requires a theory of punishment to be chosen that will serve as a point of reference for the inquiry. Because excessiveness is a concept of degree, determining its content requires a baseline standard of "appropriateness" that will anchor the analysis and allow for a comparison to be made between the challenged punishment and the theoretically "ideal" punishment. This Note further seeks to show that the more theories of punishment the Court uses as a baseline for the excessiveness inquiry, the more ineffectual the Eighth Amendment will become.

The second question concerns the appropriate standard of review that courts should apply when reviewing excessiveness claims. As is true of other areas of constitutional law, the selection of any standard of review in the Eighth Amendment context is primarily a question of what the respective roles of the legislature and the judiciary should be in defining the amount of punishment that is appropriate for different types of crimes. For this reason, the standard of review governing

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[7] *See* Radin, *supra* note 3, at 991 (suggesting that these two ways of thinking about standards shape Eighth Amendment analysis). *See generally* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (arguing that in face of institutional imperatives and disagreement over constitutional interpretation, gap often develops between Constitution's substantive principles and Court doctrine crafted to implement them).

Eighth Amendment claims is bound up in the larger debate about whether the judiciary should function as a majoritarian or countermajoritarian social institution, and this question is animated by the same considerations of insitutional competence and judicial legitimacy that inform all theories of judicial review.

Framing the excessiveness inquiry around these two core issues will allow us to take an important step forward in our understanding of the Eighth Amendment because it will move the judicial inquiry toward an examination of the underlying values and policy considerations informing the selection of one substantive standard or standard of review over another. The problem we face today is that despite the Eighth Amendment's central importance in the regulation of criminal sanctions, we still do not know "the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price."[8] This has not only left Eighth Amendment doctrine in its current state of confusion, but also has left the Supreme Court open to criticism that it is employing different standards solely for the purpose of implementing its own preferred policy outcomes.[9]

The goal of this Note is not to make an argument in favor of any one approach to the Eighth Amendment, but rather to structure and promote future debate on this issue by laying the theoretical groundwork needed for a more comprehensive theory. With this in mind, it should be emphasized at the outset that this Note does not attempt to present its own substantive account of the Eighth Amendment. There are many approaches to the excessiveness prohibition that would present a coherent account of what the Eighth Amendment seeks to accomplish. What differs between them is the *competing values* they seek to advance, and it is ultimately with an eye to this issue that this Note will proceed.

This Note is organized in two parts. Part I provides a broad overview of the deficiencies in current Eighth Amendment doctrine to underscore why a new analytical approach is needed. Part II then explores the implications of the two questions discussed above, focusing first on the theoretical issues raised by the selection of a sub-

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[8] Oliver Wendell Holmes, The Path of the Law, Address Delivered at Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 476 (1897).

[9] *See, e.g.*, *Roper*, 125 S. Ct. at 1221–22 (Scalia, J., dissenting) ("[T]he real force driving today's decision is not the actions of four state legislatures, but the Court's own judgment . . . ." (citations omitted)); Atkins v. Virginia, 536 U.S. 304, 337–38 (2002) (Scalia, J., dissenting) (asserting that death-is-different jurisprudence rests "upon nothing but the personal views of [the Court's] Members"); *id.* at 322 (Rehnquist, J., dissenting) (agreeing with Scalia's assessment).

stantive standard of decision and turning next to the issues raised by the selection of a standard of review.

I
THE DEFICIENCIES OF CURRENT EIGHTH AMENDMENT JURISPRUDENCE

Readers new to this subject might be skeptical about the need for so fundamental a re-evaluation of Eighth Amendment jurisprudence. To those more familiar with the case law and the surrounding academic literature, however, this need will seem more clear—indeed, following the Court's most recent decision in *Roper v. Simmons*,[10] Professor Robert Weisberg called the Supreme Court's jurisprudence in this area "intellectually embarrassing."[11] Many of these doctrinal inconsistencies are not immediately obvious on an initial reading of the cases, however, and to the unwary observer, the method of analysis currently being utilized by the Court might appear quite reasonable. To understand the problems with Eighth Amendment jurisprudence, then, we must begin by peeling back the layers of current doctrine to see its underlying deficiencies. Since this will require us to consider two different realms of Eighth Amendment law, the analysis that follows has been structured around the two questions set out in the Introduction, focusing first on the substantive standard of decision and then on the standard of judicial review.

A. The Substantive Standard (Or Rather, the Lack Thereof)

The first problem raised by current Eighth Amendment jurisprudence is that multiple substantive standards are being used by the Court to govern the excessiveness inquiry, and the outcomes demanded by these various standards are frequently incompatible with one another. On the one hand, there appears to be a broad consensus on the Court that the majoritarian standard embodied in the "evolving standards of decency" doctrine should be used to determine whether a particular punishment is excessive.[12] As its name implies,

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[10] 125 S. Ct. 1183.

[11] Robert Weisberg, *Cruel And Unusual Jurisprudence*, N.Y. TIMES, Mar. 4, 2005, at A21.

[12] The evolving standards of decency doctrine traces its origins to *Trop v. Dulles*, 356 U.S. 86 (1958), in which a plurality of the Supreme Court concluded in dicta that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. This proposition was later explicitly invoked by all of the members of the Court except Justices White and Stewart in *Furman v. Georgia*, 408 U.S. 238 (1972). *See id.* at 242 (Douglas, J., concurring); *id.* at 269–70 (Brennan, J., concurring); *id.* at 327 (Marshall, J., concurring); *id.* at 383 (Burger, C.J., dissenting) (joined by Blackmun, Powell, and Rehnquist, JJ.). There now appears to be

the evolving standards of decency doctrine requires courts to analyze prevailing community standards in order to determine whether a particular punishment conforms with established or developing social norms. The goal of this inquiry is to determine whether a "national consensus"[13] has developed in moral opposition to the criminal sanction at issue, such that it is clear that "society has set its face against it."[14] When this occurs, the sanction is declared unconstitutional because it is excessive when viewed in light of society's current moral values. The evolving standards of decency doctrine thus represents a majoritarian approach to the Eighth Amendment because its measure of excessiveness depends on prevailing social norms for its content. A pure application of this approach would limit the scope of the judicial inquiry to the question of whether a national political majority had formed in opposition to a particular punishment, without independent

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little question that the evolving standards of decency doctrine serves as the touchstone of modern Eighth Amendment cases. *See, e.g.*, *Atkins*, 536 U.S. at 311–12; Penry v. Lynaugh, 492 U.S. 302, 330–31 (1989); Stanford v. Kentucky, 492 U.S. 361, 369 (1989); Thompson v. Oklahoma, 487 U.S. 815, 821 (1988); McCleskey v. Kemp, 481 U.S. 279, 300 (1987); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Gregg v. Georgia, 428 U.S. 153, 172–73 (1976); Estelle v. Gamble, 429 U.S. 97, 102 (1976). This proposition has not been accepted by originalist members of the present Court, however, who have advocated a historical approach to the Amendment. *E.g.*, Harmelin v. Michigan, 501 U.S. 957, 966–85 (1991) (opinion of Scalia, J.); Ewing v. California, 538 U.S. 11, 31 (2003) (opinion of Scalia, J.).

[13] *Stanford*, 492 U.S. at 371. To determine whether such a national consensus exists, the Court has adopted a putatively objective approach, *see* Rummel v. Estelle, 445 U.S. 263, 274 (1980) ("'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.'" (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion))), and relied predominantly on the normative judgments expressed in state legislative enactments. *See Penry*, 492 U.S. at 331 ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."). This approach typically involves an analysis of the percentage of states that have prohibited a particular punishment followed by a determination of whether this percentage reflects a sufficiently national consensus to warrant prohibition under the Eighth Amendment. *See, e.g.*, *Stanford*, 492 U.S. at 370–77 (opinion of Scalia, J.); *id.* at 383–87 (Brennan, J., dissenting). More recently, the Court also has held that while the number of states rejecting the use of a particular sanction is an important part of this analysis, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 315. This has given the Court an added degree of flexibility, allowing it to invalidate punishments not only in cases where the states are already in unanimous or nearly unanimous agreement, *see, e.g.*, Ford v. Wainwright, 477 U.S. 399, 408–10 (1986) (finding unanimous state opposition to execution of mentally insane); *Coker*, 433 U.S. at 593–96 (finding near unanimous opposition to use of capital punishment against convicted rapists), but also in cases where the majority of states still authorize the sanction in question, *see Atkins*, 536 U.S. at 314–16 (finding execution of mentally retarded unconstitutional even though only 18 states had prohibited practice through legislation and 19 still permitted it).

[14] *Stanford*, 492 U.S. at 378.

inquiry by the Court as to the objective appropriateness of that punishment.[15]

At the same time, however, the Court has employed other substantive standards in deciding its cases, which have required the Court to engage in precisely the type of independent judicial analysis that the majoritarian approach to the Eighth Amendment would forbid. In both its death penalty and "terms of years" prison sentencing cases, for example, the Court has adopted a proportionality principle that requires the severity of punishment to reflect in some measure the seriousness of the crime committed.[16] In essence, the proportionality principle defines excessiveness in relation to the seriousness of the crime itself and prohibits the punishment imposed from causing more injury than the underlying crime. As critics of the proportionality principle have convincingly argued, however, this approach is "inherently . . . tied to the penological goal of retribution,"[17] and accordingly the focus of the judicial inquiry must be on the question of what a criminal offender "deserves" as an appropriate punishment for his crime.[18] But in the absence of some objective ranking of the relative seriousness of a given set of crimes and punishments,[19] this inquiry ultimately calls upon judges to make subjective determinations about whether they believe that the punishment imposed is commensurate with the crime committed.[20] Consequently, whereas the majoritarian standard establishes a baseline for the excessiveness inquiry with respect to what a majority of the national population considers an appropriate punishment, a pure application of the retributive standard

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[15] *Id.* at 378–80. However, in general, the Court has not taken the evolving standards of decency doctrine to such an extreme. *See Coker*, 433 U.S. at 597 ("[T]he attitude of state legislatures and sentencing juries do not wholly determine this controversy, for 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 . . . .").

[16] *See, e.g.*, *Roper*, 125 S. Ct. at 1190 (applying proportionality analysis to imposition of death penalty upon juvenile offenders); *Ewing*, 538 U.S. at 23–24 (applying proportionality analysis to imposition of twenty-five-years-to-life prison sentence for repeat offender convicted of stealing golf clubs valued at $1200).

[17] *Ewing*, 538 U.S. at 31 (Scalia, J., concurring); *see also* Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 59–64 (2000) (reviewing all major theories of punishment and concluding that only retributivism can adequately support proportionality principle).

[18] For the classic formulation of this view, see generally IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS (James W. Ellington trans., Hackett Publishing Co. 1981) (1785).

[19] Currently, the Court has failed to offer clear guidance as to when a punishment should be considered proportional to a particular crime. *See* Lee, *supra* note 5, at 695–98 (arguing that Court uses its proportionality analysis in different and sometimes conflicting ways).

[20] *See* Harmelin v. Michigan, 501 U.S. 957, 988–89 (1991) (opinion of Scalia, J.).

establishes a baseline with respect to what a majority of the Supreme Court considers an appropriate punishment.

Finally, in its two most recent death penalty cases, the Court engaged in a deterrence-based analysis with respect to mentally retarded and juvenile offenders, and it held in both cases that the death penalty was excessive because it did not measurably contribute to the deterrence of criminal behavior by those particular classes of individuals.[21] By using these considerations of deterrence as a rationale for its decision, the Court implicitly employed a utilitarian approach to the excessiveness inquiry, in which a punishment is considered excessive only if the social costs of its imposition outweigh the corresponding social benefits of greater deterrence of crime.[22] Although never explicitly invoked by the Court, we can still draw this conclusion because deterrence is only relevant to a utilitarian analysis of the expected social benefits of a particular punishment and has no apparent bearing on either a majoritarian or retributive analysis. The more important point, however, is that this type of utilitarian approach to the Eighth Amendment would define excessiveness in terms of maximizing social welfare, and therefore would set the maximum permissible level of punishment at the point where the expected social costs of a particular sanction were equal to its expected social benefits. Thus, like retributivism, and again in contrast to the majoritarian approach, a pure application of utilitarianism in the Eighth Amendment context would require the Court to engage in an independent analysis of sentencing policy, this time by requiring it to undertake its own investigation of the expected social costs and benefits of a particular punishment and allowing it to supplant contrary findings and conclusions made by the legislative branch.[23]

If it is not already clear at this point, the basic problem with this doctrinal structure is that the social ends served by these various standards are frequently incompatible with one another. As discussed

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[21] *See Roper*, 125 S. Ct. at 1196 (juveniles); *Atkins*, 536 U.S. at 319–20 (mentally retarded); *see also* Gregg v. Georgia, 428 U.S. 153, 184–86 (1976) (discussing deterrent value of death penalty generally).

[22] For classic formulations of utilitarianism, see generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (London, E. Wilson 1823) (1789), and JOHN STUART MILL, UTILITARIANISM (Samuel Gorovitz ed., Bobbs-Merrill Co. 1971) (1863).

[23] Some members of the Court have concluded that the legislature is in a better position to make such determinations:

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Gregg, 428 U.S. at 186 (opinion of Stewart, J.).

above, the retributive approach to the Eighth Amendment demands that the severity of a punishment reflect the seriousness of the crime committed, in order to ensure that punishments are equitably imposed and the criminal offender is not punished more severely than he "deserves" to be. In contrast, the utilitarian approach to the Eighth Amendment authorizes any punishment that advances the goal of maximizing social welfare, even if this means that seemingly minor crimes must be punished quite severely. Both of these approaches, furthermore, are often at odds with the majoritarian premise animating the evolving standards of decency doctrine, which authorizes any punishment accepted by a national political majority regardless of its social inefficiency or individual inequity. As such, current doctrine, which at various times utilizes all of these theoretical approaches to define excessiveness, asks courts to advance simultaneously the competing goals of efficiency, equity, and adherence to the will of national political majorities without providing a method of resolving concrete cases when these competing ends conflict. The recent decision of *Ewing v. California*, in which the Court upheld a twenty-five-years-to-life prison sentence imposed upon a repeat offender who stole three golf clubs valued at $1200, presents a clear illustration of this problem.[24] While the outcome of this case might be defensible under a majoritarian approach,[25] it is highly questionable whether so severe a punishment could be justified under either the retributive or utilitarian approach, given the relatively minor nature of the offense, the relatively severe nature of the punishment, and the unlikelihood that the social benefits of such a sentence would be sufficient to outweigh its substantial social costs.[26] In light of this problem, the question is how cases like *Ewing* should be decided when the competing ends of

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[24] Ewing v. California, 538 U.S. 11 (2003).

[25] This was arguably one of the justifications relied upon by Justice O'Connor in her controlling concurring opinion, although her argument is more strongly framed in terms of an incapacitation rationale:

> Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety. Though three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding.

Id. at 24.

[26] *Compare id.* at 29-31(holding that sentence of twenty-five-years-to-life was not "grossly disproportionate" and therefore not violative of Eighth Amendment), *with* United States v. Jackson, 835 F.2d 1195, 1198–1200 (7th Cir. 1987) (Posner, J., concurring) (discussing armed bank robbery case with facts more serious than those presented in *Ewing* and concluding that life sentence could not be justified on either deterrence or retributive grounds).

these different approaches are in conflict, a subject that is taken up in Part II.A below.

Before proceeding further, there is one last doctrinal point about the substantive standard that should be considered. A line of thought originating in Justice Kennedy's concurring opinion in *Harmelin v. Michigan*[27] and most recently expressed in Justice O'Connor's concurring opinion in *Ewing*, maintains that there is no need to resolve the conflict between competing substantive standards because "the Constitution 'does not mandate adoption of any one penological theory.'"[28] Rather, broad deference should be extended to the legislatures in selecting sentencing rationales, to be overturned by courts in only the most extreme cases.[29] There are two ways in which this position can be interpreted, and because it appears to be an increasingly prominent feature of the Court's jurisprudence, both readings warrant special attention.

The first reading of this view is as an endorsement of the majoritarian approach, since the majoritarian approach defines excessiveness solely in relation to public opinion and is therefore "neutral" with respect to competing philosophical justifications for punishment. If this is the case, then the above-quoted language presents no special problems, although it is somewhat misleading to the extent that it suggests that the majoritarian approach is itself neutral and does not advance a particular set of social values (namely, the values associated with majoritarian decisionmaking).[30] The second reading is that the excessiveness prohibition permits the use of multiple baselines and therefore imposes only a thin restraint upon sentencing policy, such that a punishment will be upheld so long as it satisfies *at least* one theory of punishment. This "multiple baselines" approach to the Eighth Amendment is an important alternative to consider, but since

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[27] Harmelin v. Michigan, 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring).

[28] *Ewing*, 538 U.S. at 25 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring)) (O'Connor, J., concurring).

[29] *Id.*

[30] Specifically, the majoritarian approach rests upon a fundamental value judgment about the primacy of majority rule, and a belief that the choice between competing social ends is an essentially arbitrary one that should be left primarily (if not exclusively) to the political process. The similarly "neutral" historical approach, which still retains currency among some jurists, *see Harmelin v. Michigan*, 501 U.S. at 966–85 (opinion of Scalia, J.) (arguing that historical record shows that Eighth Amendment did not impose proportionality requirement and restricted only certain modes of punishment), is equally majoritarian—and equally value-laden—to the extent that it reflects the views of the American political majority when the Eighth Amendment was adopted in 1791. Thus, when the Court says that the Eighth Amendment is grounded either in historical precedent or society's evolving standards of decency, it is implicitly adopting the values underlying the majoritarian theory of punishment and making a normative judgment of the highest order.

it relates to the manner in which conflicts between the various approaches to the Eighth Amendment might be resolved, it is addressed in Part II.A below.

Finally, it is important to note that these issues have not been resolved by the academic literature, much of which has only implicitly addressed the competing social values advanced by these different conceptions of the Eighth Amendment. Most of the early literature, for example, readily accepted that the Amendment's purpose was to further some notion of "humanity" and "decency" in the treatment of prisoners,[31] a pleasant-sounding idea that resonated with earlier statements by the Supreme Court that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[32] The problem, of course, is that concepts like humanity and dignity provide no real standard against which the alleged excessiveness of a punishment can be measured. Indeed, invoking these concepts merely restates the underlying substantive problem, because having a requirement that a punishment promote decency or respect dignity is functionally equivalent to a requirement that it should be "appropriate" and not excessive. The argument that the Eighth Amendment should promote dignity is therefore as unhelpful as saying that the Free Speech Clause should promote speech.

Another significant difficulty in the literature is that scholars sometimes conflate different theories of punishment, which tends to obscure the conflict between the social values that each theory attempts to advance. One area in which this problem is most evident is in the academic discussion of the "proportionality" requirement. Although most scholars seem to accept that a proportionality requirement exists under current law,[33] there is a great deal of disagreement

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[31] Browdy & Saltzman, *supra* note 2, at 850–51; *see also* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784–85 (1970) (stating that Eighth Amendment "commands that standards of dignity and fairness . . . must also apply . . . to those convicted of crimes"); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 635 (1966) ("Fundamentally, the provision rests upon considerations of human decency."); James S. Campbell, Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 999–1000 (1964) (agreeing that basic concept underlying Eighth Amendment is dignity).

[32] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[33] *See, e.g.*, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 588–97 (2005) (outlining three different theories of proportionality appropriate for Eighth Amendment analysis); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 883–903 (2004) (observing no reliable objective basis for Supreme Court's assessments of Eighth Amendment proportionality); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 149–95 (1995) (arguing that

as to what this concept actually means. The traditional view, which has been advocated recently by several scholars, is that proportionality should be viewed in light of the considerations of equity that animate the retributive theory of punishment.[34] A few noted scholars, however, have attempted to expand the proportionality principle to include utilitarian theories of the Eighth Amendment as well.[35]

To use a recent example, Professor Richard Frase has argued for the use of two additional non-retributive proportionality principles in the Eighth Amendment context: an "ends proportionality" principle requiring the use of utilitarian cost-benefit analysis, and a "means proportionality" principle requiring that "among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred."[36] Both principles derive from the utilitarian goal of maximizing social welfare—the former by requiring social benefits to outweigh social costs, and the latter by requiring the most socially efficient method of punishment to be used if multiple punishment options are available. The problem here is that both principles advance the goal of efficiency, whereas traditional retributive proportionality addresses the goal of equity. By classifying both retributive and utilitarian methods of analysis under the same broad heading of "proportionality," this approach ignores the points of conflict between the two methods and obscures the real tradeoff between efficiency and equity that is at stake when choosing between a retributive or utilitarian approach to the Eighth Amendment.

As is true of the Supreme Court's case law, then, the academic literature is often unhelpful because different approaches to the

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double jeopardy clause of Fifth Amendment in concert with Eighth Amendment requires a proportionality analysis of all penalties—criminal or civil—arising from same act); Lee, *supra* note 5, at 679 n.16 (noting Supreme Court's recognition of proportionality guarantee of Eighth Amendment dates from 1910); Parr, *supra* note 17, at 59–64 (asserting lack of historical and textual support for Supreme Court's proportionality jurisprudence and proposing symmetrical principle based on retribution theory to bar sentences that are lenient as well as too harsh); Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 853–55 (1972) (claiming that proportionality principle was central to Framers' understanding of Eighth Amendment and that principle continues to apply today).

[34] *See* Lee, *supra* note 5, at 704–08 (presenting retributivism under Eighth Amendment as "side constraint" on institution of punishment); Parr, *supra* note 17, at 59–64 (discussing different justifications for proportionality and concluding that only retribution theory is appropriate basis).

[35] *See* Frase, *supra* note 33, at 592–97 (cataloguing theories of utilitarian "nonretributive proportionality" and focusing on distinction between "ends proportionality" and "means proportionality"); Wheeler, *supra* note 33, at 847–54 (arguing that as presented by Bentham, utilitarianism implies rules of proportionality that limit punishment and that this rule underlies Eighth Amendment).

[36] Frase, *supra* note 33, at 593–95.

Eighth Amendment are advocated without reference to the underlying social values that each approach advances. This absence appears to be the source of much of the confusion afflicting the substantive standard of the Eighth Amendment today. Just as the choice between a "free market of ideas" or "self-realization" model of the Free Speech Clause will yield different doctrinal structures because of the very different values that these models seek to advance, so will the choice between a utilitarian, retributive, or majoritarian model of the Eighth Amendment have a similar effect.

B. The Three-Tier System of Judicial Review

The second problem with current doctrine is the three-tier system of judicial review that the Court has developed around specific categories of punishment, which determines the level of scrutiny that a court reviewing an excessive claim must apply to a punishment adopted by the legislature. Generally speaking, the application of different levels of scrutiny in other constitutional contexts is grounded in concerns about the proper role of the courts in a democratic system, and therefore draws upon particular theories of judicial review that dictate the circumstances in which courts should overturn the decisions of the politically accountable branches of government. The problem we face today is that the Court's current approach to the Eighth Amendment has been framed within neither the logic nor the language of the primary theories of judicial review.

While a number of different taxonomies have been advanced to structure the case law in this area,[37] for our purposes it is only necessary to consider three categories about which there appears to be widespread agreement: the per se prohibition of certain inherently cruel methods of punishment (e.g., torture and quartering);[38] the "super due process"[39] and (de facto) strict disproportionality[40]

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[37] *See, e.g.*, Lee, *supra* note 5, at 678–79 (recognizing four categories of cases: de facto cruel and unusual punishments, disproportionate punishments, super due process, and administrative cases); Radin, *supra* note 3, at 992–96 (proposing five categories: means of punishment, proportionality, power to criminalize, nonjudicial discretion, and procedural due process).

[38] These prohibitions are typically discussed in dicta. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101–03 (1958) (discussing why denationalization is barred by Eighth Amendment and noting that physical mistreatment and torture are barred); Weems v. United States, 217 U.S. 349, 377–78 (1910) (discussing quartering, hanging in chains, castration, and pillorying); *In re* Kemmler, 136 U.S. 436, 446 (1890) (discussing burning at stake, crucifiction, breaking on wheel).

[39] *See generally* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (discussing implications of super due process for executions, cruel processes, and relationship between respect for persons and limits on punishment).

requirements for imposition of the death penalty; and the gross disproportionality standard for all other penalties, including fines[41] and imprisonment.[42]

The practical effects of these varying levels of scrutiny can be substantial. The clearest example of these effects can be found in the different standards of review that are applied to death sentences as opposed to prison sentences. Current doctrine has created a situation in which nonviolent offenses like cocaine possession or obtaining $120.75 by false pretenses can be punished by mandatory life imprisonment, while the far more serious crimes of rape, felony-murder, and even non-aggravated murder cannot be punished by death.[43] Thus, despite the fact that life imprisonment and death are the two most severe punishments authorized by law and are similar in the enormous degree to which they infringe upon an individual's interests, the level of scrutiny applied to each is dramatically different.[44] At the same time, those methods of punishment that have been deemed "inher-

[40] The Court purports to apply the "gross disproportionality" test across both its death penalty and terms-of-years cases, *see, e.g.*, Rummel v. Estelle, 445 U.S. 263, 271–72 (1980) (noting Court has stated Eighth Amendment bars sentences that are "grossly disproportionate to the severity of the crime"), but an examination of the relevant case law convincingly demonstrates that this is not the case. Specifically, while the Court has prohibited the use of the death penalty for virtually all crimes except aggravated murder, *see, e.g.*, Enmund v. Florida, 458 U.S. 782, 797–98 (1982) (felony murder); Godfrey v. Georgia, 446 U.S. 420, 432–33 (1980) (non-aggravated murder); Coker v. Georgia, 433 U.S. 584, 592 (1977) (rape), it has permitted the imposition of life imprisonment for a wide range of offenses, including relatively minor property crimes committed by repeat offenders. *See, e.g.*, *Ewing*, 538 U.S. at 11, 30–31 (prison sentence of twenty-five-years-to-life for repeat offender not grossly disproportionate to crime of stealing three golf clubs); Harmelin v. Michigan, 501 U.S. 957, 1008–09 (1991) (Kennedy, J., concurring in part, concurring in judgment) (life prison sentence without possibility of parole not grossly disproportionate to crime of possessing 650 grams of cocaine); *Rummel*, 445 U.S. at 274 (rejecting defendant's claim that mandatory life imprisonment for repeat offender was grossly disproportionate to crime of obtaining $120.75 by false pretenses and expressing great reluctance to overturn legislative sentencing schemes). This disparity between the Court's treatment of death penalty cases and its treatment of life imprisonment cases is difficult to explain unless a strict proportionality standard is in fact being used in the death penalty context.

[41] *See* United States v. Bajakajian, 524 U.S. 321, 336 (1998) (rejecting requirement of strict proportionality between amount of punitive forfeiture and seriousness of crime in favor of gross disproportionality standard).

[42] *See Harmelin*, 501 U.S. at 997–1001 (Kennedy, J., concurring in part, concurring in judgment) (reviewing cases and distilling principle that Eighth Amendment does not require strict proportionality and forbids only sentences grossly disproportionate to crime); *Ewing*, 538 U.S. at 23–24 (opinion of O'Connor, J.) (following proportionality principles described in Justice Kennedy's concurrence in *Harmelin*).

[43] *See supra* note 40 (citing cases).

[44] *See Rummel*, 445 U.S. at 274 ("[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.").

ently cruel" cannot be imposed for any crime at all, despite the fact that in some cases they actually might do less substantive injury to the offender than a sentence of death or life imprisonment. The question, then, is what it is about these three classes of punishments that warrants different degrees of judicial deference to the legislature.

The Court has suggested that qualitative differences between these types of punishment justify different levels of scrutiny. In the death penalty context, specifically, it has stated that higher scrutiny is warranted because death "is unique in its severity and irrevocability"[45] and raises greater concerns about the "reliability" of legislative judgments.[46] The problem is that these proffered justifications cannot adequately explain the Court's current three-tier system of judicial review.

First, while irrevocability might be relevant to the due process question of whether additional safeguards are needed before a particular sanction may be imposed (to reduce the risk that the wrong person is punished), it has no logical bearing on the question of why certain punishments should be scrutinized more closely for excessiveness than others. This is because the fact of irrevocability, standing alone, does not make it either more or less likely that a punishment is excessive. If parking fines were made irrevocable, for example, this would not be a sufficient basis to conclude that there was any additional risk that those fines were excessive. Similarly, a life prison sentence is not less likely to be excessive simply because it is revocable. The real issue here appears to be the severity of a punishment, not whether it is irrevocable. Because we tend to associate irrevocability with severity (as in the case of torture or the death penalty), we have made the mistaken inference that an irrevocable punishment is therefore more likely to be excessive. By definition, however, any punish-

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[45] Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion). The Court has also stated:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Rummel, 445 U.S. at 272 (Stewart, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972)); *accord* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).

[46] *See Woodson*, 428 U.S. at 305 ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

ment that has been fully carried out by the state is irrevocable,[47] and the contrary argument that "most people intuitively recognize a distinction between the irrevocability of everything and the irrevocability of death or mutilation"[48] ultimately rests on the bare fact that some methods of punishment cannot be fully imposed all at once (e.g., prison) or can be adequately compensated if imposed erroneously (e.g., fines).

The severity and reliability arguments offer more plausible bases upon which different levels of judicial scrutiny could be justified, but again, neither can fully explain the Court's present doctrine. The severity approach seems to require that the more seriously a sanction will infringe on an individual's life, liberty, or property interests, the more seriously it should be examined by the courts for excessiveness. Functionally, this approach has a great deal of merit, because as criminal sanctions increase in severity, there is a greater risk that those sanctions are in fact excessive. As such, since minor sanctions pose less risk of being excessive, they are entitled to less scrutiny than more serious punishments. In addition, this approach can explain much of the Court's current jurisprudence, although there are some areas of inconsistency: Most notably, prison sentences are subject to a low level of review regardless of their length,[49] and the "ultimate punishment" of death is subject to less scrutiny than torture and other per se unconstitutional punishments. If severity were the sole criterion by which differing levels of review were justified, a more seamless progression would be necessary.

There also seems to be merit to the Court's argument that the judiciary should apply higher scrutiny to certain types of crimes in order to ensure the reliability of legislative judgments with respect to sentencing policy. Here, the concern seems to be that certain offenses are more likely to create a failure in the political process than others, and that such failures will increase the risk that an excessive punishment will be imposed. For example, it might be the case that there is a

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[47] *See* Radin, *supra* note 3, at 1022 n.132 ("[E]ven one day in prison is irrevocable in the sense that all past events and their resultant effects on human beings are irrevocable.").

[48] *Id.* Since all punishments are necessarily irrevocable once imposed, what presumably distinguishes death and mutilation from other types of punishment is that the state cannot fully compensate the wrongly punished person if an erroneous conviction is discovered after the fact. Still, there is also a very real sense in which imprisonment, and especially lengthy imprisonment, is similarly incompensable once imposed. As such, even assuming we accept the incompensability argument as a justification for extending greater deference to legislative judgments, we are still left with the question of why lengthy prison sentences are not entitled to greater judicial oversight than, for example, monetary sanctions.

[49] *See, e.g.*, *Rummel*, 445 U.S. at 274 (suggesting that Court should defer to legislature as to propriety of length of prison sentences for crimes classifiable as felonies).

greater need for judicial scrutiny in the context of a murder statute than in the context of a traffic ordinance, because potential murderers would be locked out of the legislative process in a way that speeding motorists would not. The only difficulty with this position is that it is not consistent with the Court's current practice, and a strong empirical case has not yet been presented that a legislature's judgment will be more or less reliable depending on the class of offenders at issue.[50] Since would-be criminal offenders generally are unlikely to fare well in the legislative process, it could be argued that the risk of a failure in the legislative process is not particularly great.

The larger issue underlying these two specific rationales for heightened scrutiny is how power should be allocated between the legislature and the judiciary in the sentencing policy context. Since the Eighth Amendment gives the judiciary the power to select the basis upon which a punishment will be deemed appropriate (i.e., not excessive), it also allows the courts to exercise substantial control over the sentencing policy adopted by the legislature. The question of what standard of review courts should apply in the Eighth Amendment context is therefore bound up in the larger debate about the legitimacy of judicial review generally, and whether the courts should function as a majoritarian or countermajoritarian social institution in our system of government. In fact, the reason why the severity and reliability rationales for increased judicial scrutiny appear so successful is because each can be derived from one of the primary theories of judicial review. The severity argument is consistent with the fundamental rights theory of judicial review, which maintains that courts should exercise increasingly greater degrees of judicial scrutiny as individual rights are increasingly infringed upon by the state. The legislative reliability argument, in contrast, is consistent with political process theory, which maintains that judicial oversight of legislative decisionmaking is warranted only when there is reason to believe that the legislative process itself has failed.

It follows that selecting a standard of review to govern Eighth Amendment claims first requires us to choose a particular theory of judicial review that will establish the basis upon which greater or lesser judicial scrutiny is warranted. Moreover, the consequences of this choice are significant because whether judicial review is structured to achieve majoritarian or countermajoritarian ends will alter not only the nature of the judicial inquiry but also the classes of criminal offenders entitled to heightened scrutiny.

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[50] A basic outline of such an argument has been presented in Part II.B. *See infra* notes 85-90 and accompanying text.

Interestingly, very little of the academic literature has directly addressed the standard of review applicable to the Eighth Amendment. Indeed, it appears that no scholars have attempted to develop the political process approach, most likely because the Court's current doctrine is more consistent with the fundamental rights approach in practice. The most comprehensive analysis of what level of scrutiny courts should apply to Eighth Amendment cases was undertaken by Professor Margaret Jane Radin, who argued that the selection of a standard of review should be viewed as a question of allocating the risk of an erroneous judgment on the government or the offender.[51] Given that courts can never decide all cases correctly, Professor Radin maintained that the risk of an erroroneous decision should be allocated to the party that would suffer the lowest expected costs from such an error, measured in terms of the likelihood of error and the gravity of the harm that would flow from it.[52] The party to whom this burden was allocated then would be required to persuade a court that the sentence imposed was either excessive or appropriate.[53] The critical flaw in Radin's analysis, however, is that it is not premised on a theory of what role the judiciary should play vis-à-vis the legislature—specifically, whether the judiciary should serve as a majoritarian or countermajoritarian social institution. As such, while her approach may indeed lead to fewer erroneous judgments, it fails to address the key democratic concerns surrounding the selection of a standard of review in the Eighth Amendment context.

Given this, the Court is once again placed in the position of offering an explanation of why different levels of judicial scrutiny are warranted in different Eighth Amendment contexts. As will be discussed in Part II.B, any coherent answer to this question ultimately will rest on a particular view of what role the courts should play in a democratic society—that is, on which theory of judicial review is appropriate—and will require the courts to engage the larger debate over the relative social value of promoting majority rule or maintaining an independent, countermajoritarian judiciary.

II

A Basic Framework for the Eighth Amendment

Having sketched out these basic theoretical problems with the doctrinal structure currently employed by the Supreme Court, I will now attempt to develop the two questions outlined in the

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51 Radin, *supra* note 3, at 1017–30.

52 *Id.* at 1019.

53 *Id.* at 1027–28.

Introduction. The first of these questions concerns the need for a substantive standard of decision to determine the outcomes of cases, and the second concerns the standard of review that courts will initially employ to determine whether they should engage in any substantive inquiry at all. As the following discussion will make clear, all of these choices are inherently value-laden, and as such, the correct debate over the Eighth Amendment is about which of these competing values should inform the judicial inquiry.

A. The Need for a Baseline Standard of "Appropriateness"

As briefly outlined in the Introduction, the primary theoretical problem raised by the excessiveness prohibition is the determination of what constitutes an "appropriate" punishment. Again, this is because excessiveness is a concept of degree that requires a comparison to be made between the challenged punishment and a normative baseline that will define the "ideal" punishment and thereby serve as a point of reference for the excessiveness inquiry. For this reason, it is impossible for us to define a particular punishment as excessive until we have first selected the standard against which its purported excessiveness will be measured. In the absence of such a baseline, the idea of excessiveness simply has no content.

To demonstrate, consider a hypothetical statute in which the crime of jaywalking is made punishable by death. Presumably, the vast majority of people would consider this an excessive punishment in light of the crime. But notice that this conclusion is correct only if a prior normative judgment has been made as to what the appropriate punishment for jaywalking should be. Although we undoubtedly would have a strong intuitive objection to the imposition of the most severe punishment in response to such a minor offense, there is nothing *inherent* to the death penalty that makes it an excessive punishment for the crime of jaywalking. Rather, its excessiveness is dependent on the fact that a lesser punishment seems more appropriate. For the same reason, even a $20 fine could be considered "excessive" if a $10 fine was determined to be the "appropriate" punishment. The relative nature of the excessiveness concept thus creates a baseline problem: Because every excessiveness inquiry is necessarily tied to an appropriateness inquiry, the substantive prohibitions of the Eighth Amendment cannot be separated from the underlying theory of punishment that establishes the appropriate sanction for a particular crime.

For this reason, the baseline problem has been an aspect of all of the Supreme Court's Eighth Amendment cases, although it has not

always been explicit in the Court's analysis. Indeed, the Court frequently has employed a number of different baselines to reach its decisions, often simultaneously relying on several to reach its conclusions. The difficulty, then, is not that the Court has failed to rely upon baselines to reach its decisions, but rather that it has not addressed the fundamental normative question of *which* baseline(s) it should be using. To make this clear, consider the following cases.

In *Atkins v. Virginia*,[54] the Supreme Court ruled that the imposition of the death penalty upon mentally retarded offenders violated the Eighth Amendment. In doing so, the Court overturned its previous holding in *Penry v. Lynaugh*,[55] decided only thirteen years earlier, which held that such executions were constitutionally permissible. To reach its contrary conclusion in *Atkins*, the Court relied on the majoritarian standard embodied in the evolving standards of decency doctrine, which sets the baseline in accordance with the sentencing policy preferences of national political majorities. In applying this standard, the Court noted that eighteen of the thirty-eight states that still used the death penalty had prohibited the practice, that all but two of these jurisdictions had done so in response to the Court's decision in *Penry*, and that the practice was rare even in those jurisdictions that still permitted it.[56] In addition, the Court examined opinion polls, the views of highly respected professional organizations, and prevailing international standards, and found a strong consensus against the execution of the mentally retarded.[57] On this basis, the Court concluded that there was a prevailing national moral consensus in opposition to the use of the death penalty on the mentally retarded, and accordingly found the practice excessive.[58]

In contrast, in *Coker v. Georgia*[59] and *Enmund v. Florida*,[60] the Court ruled, respectively, that imposition of the death penalty for rape

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[54] 536 U.S. 304 (2002).

[55] 492 U.S. 302, 340 (1989).

[56] *Atkins*, 536 U.S. at 314–16.

[57] *Id.* at 316–17 n.21.

[58] Some readers might object to my characterization of *Atkins* as having been decided solely on the basis of the evolving standards of decency doctrine, given that the Court also considered the deterrence and retributive models in its analysis. *Id.* at 318–20. While it is true that the Court engaged in these secondary inquiries, however, it must be remembered that *Atkins* was decided only thirteen years after *Penry*, and there is no reason to believe that the deterrence or retributive arguments proffered by the Court would have changed significantly (if at all) over this time period. Utilitarian and retributive analysis therefore cannot explain the change in the Court's direction between *Penry* and *Atkins*, unless the *Penry* Court simply "got it wrong," which is not what the *Atkins* Court seems to be claiming.

[59] 433 U.S. 584 (1977).

[60] 458 U.S. 782 (1982).

or felony murder would be grossly disproportionate to the seriousness of the crime and therefore excessive. In both cases, the Court's decision turned on the retributive theory of punishment, even though the same result could have been reached in both cases under the evolving standards of decency doctrine. In *Coker*, the Court began by conducting the majoritarian analysis required by the evolving standards of decency doctrine, but then concluded 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"[61] and proceeded to rule that while rape was a serious crime, "in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder."[62] Similarly, the Court in *Enmund* conducted both a majoritarian and a deterrence theory analysis, but ultimately rested its decision on the fact that the death sentence would not correspond to the "personal responsibility and moral guilt" of the offender, and therefore would not "measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[63]

In *Ewing v. California*,[64] the Court appears to have relied on an incapacitation theory when it upheld the validity of California's "three strikes and you're out" laws, which impose lengthy mandatory prison sentences on offenders who are convicted of three felonies. In reaching its conclusion, the Court first noted the deference typically granted to legislative judgments and then concluded:

> Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety.[65]

Thus, "[w]hen the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime."[66] Relying on this rationale, the Court concluded that Ewing's twenty-five-years-to-life prison sentence for the theft of $1200 worth of golf clubs was appropriate.

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61 *Coker*, 433 U.S. at 597.

62 *Id.* at 598.

63 *Enmund*, 458 U.S. at 801.

64 538 U.S. 11 (2003).

65 *Id.* at 24.

66 *Id.* at 25; *see also id.* at 31–32 (Scalia, J., concurring) (agreeing with plurality's claims that California's public safety interest justified Ewing's sentence).

In other cases, however, the baseline has been merely an implicit part of the Court's decisions. In *Robinson v. California*,[67] the Court invalidated a ninety-day prison sentence for the crime of being addicted to narcotics (as opposed to possessing or distributing them) on the grounds that addiction was a physical ailment and that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[68] This is not a self-evidently true proposition, however. As a theoretical matter, it is entirely conceivable that society might desire to criminalize "public sickness," perhaps as part of a strict liability regime intended to reduce the social costs of illness in the workplace. Setting aside the merits of such a law, the important point is that by refusing to allow criminal sanctions to be imposed for such physical conditions, the Court implicitly adopted a particular theory of crime and punishment—an understanding of which acts or physical conditions the state may forbid and the means by which it may seek to forbid them. Although it is unclear what this theory of punishment was (a strong argument could be made on either retributive or utilitarian grounds), in applying it the Court concluded that Robinson's addiction was a condition for which no sanction could ever be appropriate.

The foregoing examples are meant to demonstrate that the substantive content of the excessiveness prohibition must be tied to a particular theory of punishment that establishes the appropriate level of punishment for a particular crime, and that for this reason the courts have necessarily relied on such baselines when rendering their decisions. They are also presented to encourage consideration of how the above cases might have been decided under different baselines—as discussed earlier, it is highly questionable whether the the "three strikes" sentencing scheme upheld in *Ewing* would have survived under either the utilitarian or retributive approach.[69]

With these examples in mind, it should be clear that the selection of any baseline standard of appropriateness will alter the scope of the Eighth Amendment. The question now is how courts should decide concrete cases when these different ends conflict. Perhaps the easiest way to get a sense of this is to consider again the substantive values underlying the three primary theories that have been discussed in the case law: majoritarianism, utilitarianism (deterrence), and retributivism. The majoritarian standard defines excessiveness with respect to public opinion, which means that the legitimacy of a particular crim-

[67] 370 U.S. 660 (1962).

[68] *Id.* at 667.

[69] *See supra* note 26 and accompanying text.

inal sanction is ultimately tied to the question of its national popularity. For this reason, the majoritarian definition of excessive punishments effectively translates into a prohibition of unpopular punishments. The utilitarian standard underlying deterrence theory, in contrast, is concerned with whether the proposed punishment is socially efficient. Adopting this standard therefore would result only in the prohibition of inefficiently severe punishments, the social benefits of which are outweighed by the social costs. Finally, the retributive definition of excessiveness requires proportionality between the severity of the punishment and the seriousness of the crime, and thereby operates to prohibit inequitable punishment.

As previously discussed in Part I.A, the problem is that these social values are often incompatible with one another and therefore impossible to achieve simultaneously. Thus, the choice of a particular theory of punishment to serve as the baseline for the excessiveness inquiry requires a fundamental normative judgment to be made about the functional purpose of the Eighth Amendment: Does it exist to prohibit criminal sanctions that are unpopular, inefficient, or inequitable? If it exists to fulfill more than one of these objectives, which should take priority over the others, and to what degree?

These are difficult normative questions, and ones that the more moderate members of the Court seem to have avoided in the fines and prison sentencing contexts by defining a criminal sanction as appropriate so long as it can satisfy at least one of the baseline standards that can be derived from the various theories of punishment[70] (as expressed by the proposition that "the Constitution 'does not mandate adoption of any one penological theory'"[71]). This more flexible approach is another possible solution to the baseline problem, in which multiple theories of punishment would be used as baselines for the excessiveness inquiry. Under such an approach, in cases in which all of the recognized theories of punishment are in agreement as to the excessiveness or appropriateness of a given punishment, the case would be decided according to the shared view. In cases in which the theories are in disagreement, the outcome would turn on whether the

[70] *See Ewing*, 538 U.S. at 25 (declaring that any variety of justifications may play role in state sentencing schemes and Court should generally defer to such policy choices). In the death penalty context, the Court has considered theories of punishment—deterrence, retribution, and incapacitation of dangerous criminals. *See* Gregg v. Georgia, 428 U.S. 153, 183–87 (1976) (discussing appeals to retribution and deterrence in death penalty cases); *id.* at 183 n.28 (citing appeal to incapacitation of dangerous criminals in death penalty cases); *see also id.* at 233 (Marhsall, J. dissenting) ("The two purposes that sustain the death penalty as nonexcessive in the Court's view are general deterrence and retribution.").

[71] *Ewing*, 538 U.S. at 25 (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (Kennedy, J., concurring)).

state or the convicted defendant was allocated the burden of proving that the punishment was excessive or not. Although this burden could be allocated to either party, given the Court's highly deferential posture towards the legislature in cases like *Ewing*,[72] it seems most likely that this burden would fall upon the defendant.

The allure of this approach is that it appears to obviate the need for the Supreme Court to decide which theory of punishment should inform the excessiveness inquiry. Some of this supposed advantage is overstated, however, because it still will be necessary for the Court to decide which theories of punishment should be recognized in the first place. As such, while the Court may not be forced to choose whether the "true" purpose of the Eighth Amendment is to promote social efficiency, majority rule, or some other social value, it will have to decide whether these values should be part of the decisionmaking calculus at all. Therefore, the only real advantage of the multiple baseline approach is that it would allow the Supreme Court to remain relatively neutral with respect to the competing theories of punishment.

There is a substantial price to pay for this indecision, however, and this price most likely will be borne by criminal defendants. From a litigation standpoint, the problem with the multiple baselines approach is that it increases the number of theories that must be satisfied before an excessiveness claim will be successful. Thus, assuming the burden of proof is placed on criminal defendants, such defendants will be required to prove that their punishments are excessive under each of the approaches recognized by the Court.[73] Indeed, even if we were to limit the scope of our analysis to the majoritarian, utilitarian, and retributive baselines discussed above, criminal offenders would face the tremendous burden of showing that their punishments were simultaneously inefficient, inequitable, and unpopular. With each new theory that must be satisfied, the reach of the excessiveness prohibition becomes increasingly narrow. As a result, this gives the multiple baseline approach the potential to limit dramatically the substantive scope of the Eighth Amendment, and in practice could strip so much substantive content from the excessiveness inquiry that it effectively would make the Eighth Amendment an empty constitutional guarantee.

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[72] *See* 538 U.S. at 24–25.

[73] If the burden were placed on the government, of course, a criminal defendant would only need to prove that his punishment was excessive under any one of the recognized theories, while the government would need to show that the punishment was appropriate under all of them.

Such a result is especially problematic given the fact that there is always *some* theory of punishment that can justify imposing a particular sanction for a particular crime. If we accept deterrence as a legitimate penological goal,[74] for example, but do not tether it to the considerations of social cost that restrain utilitarianism, then almost any punishment might be deemed appropriate, because increasing a punishment's severity will increase would-be offenders' expected cost of crime and thereby marginally reduce the number of crimes committed.[75] The multiple baselines solution, then, actually does not take us very far: The Court is still required to choose which theories of punishment will serve as the baseline for the excessiveness inquiry, and each new theory that is added will further limit the reach of the prohibition.

Recognition of these basic propositions brings us to the heart of the matter. Since at least one baseline must be chosen to give substantive content to the excessiveness prohibition, and since every baseline advances different social values, the ultimate question we are left with is *which* social values the Eighth Amendment should advance. Should it operate to restrain local political majorities that would authorize sentencing schemes far more severe than those that would be accepted by a national political majority (a majoritarian standard)? Should it operate to ensure that the legislative process does not authorize inefficiently severe sanctions (a utilitarian standard)? Or should it instead restrain majority rule and the pursuit of social efficiency by placing equitable limits on the allocation of criminal sanctions to particular classes of criminal offenders (a retributive standard)? And if multiple baselines are chosen, how many theories of punishment are we prepared to require a defendant to prove unsatisfied before his punishment will be deemed excessive?

Regardless of how one answers these questions, what remains true is that selecting a substantive standard (or standards) is fundamentally a debate about the competing social values that animate particular theories of punishment. As is true of all of the other substantive provisions in the Bill of Rights, we first must decide what functional purpose the Eighth Amendment should serve, and then structure our jurisprudence to achieve these social values.

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[74] *See, e.g.*, *Ewing*, 538 U.S. at 25 ("Recidivism has long been recognized as a legitimate basis for increased punishment."); Atkins v. Virginia, 536 U.S. 304, 319–20 (2002) (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976)) (recognizing deterrence as one rationale for capital sentencing).

[75] *See* Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964) ("There is nothing irrational about boiling people in oil; a slow and painful death may be thought more of a deterrent to crime than a quick and painless one.")

B. The Need for a Theory of Judicial Review

Choosing which substantive standard should inform the excessiveness inquiry is only the first part of the analytical framework discussed here. In order to operationalize this prohibition, the Court also must select a standard of review that will establish the circumstances under which lower courts should undertake to examine the appropriateness of a particular punishment in the first place. Put another way, the Court must decide how much scrutiny the judiciary should apply to a legislature's judgment about what is an appropriate punishment for a particular crime, as expressed in the sentencing schemes that are adopted. Since this is fundamentally a question of the proper allocation of power in our system of government, it should be approached on these terms.

There appears to be some confusion as to what the choice of a standard of review entails, however, and much of this can be attributed to a conflation of the separate inquiries required by the substantive standard and the standard of review. Because of this, I will begin my analysis by separating these two issues, and then move on to an examination of how traditional standards of review can be applied to the Eighth Amendment context.

1. The Proper Allocation of Decisionmaking Power in the Eighth Amendment Context: Which Branch of Government Should Select the Substantive Standard?

One of the more noticeable problems with prevailing doctrine in the Eighth Amendment context is that the issue of which branch of government should be allowed to choose the substantive standard is often conflated with the question of how much deference courts should give to sentencing schemes that are adopted by the legislature. While both of these questions relate to the proper allocation of power in our system of government, it is critically important to distinguish between them because the desire to extend substantial deference to sentencing schemes adopted by the legislature can be achieved even when the Supreme Court requires those statutory schemes to be predicated on a particular theory or theories of punishment. In one of the Court's more recent opinions on this subject, however, this possibility seems to have been overlooked.

In her controlling concurring opinion in *Ewing v. California*, Justice O'Connor declared that "[s]electing . . . sentencing rationales is generally a policy choice to be made by state legislatures, not federal

courts,"[76] and that this allocation of decisionmaking power was justified on the basis of a "[longstanding] tradition of deferring to state legislatures in making and implementing such important policy decisions."[77] If one takes this statement at face value, it appears to address the question of which branch of government should be empowered to select the substantive standard, and not the question of how much deference courts should give to the sentencing schemes adopted by the legislative branches. It therefore would appear that Justice O'Connor is advocating for a diffuse, state-centered approach to the Eighth Amendment. This interpretation cannot be correct, however, because a decentralized approach raises significant theoretical problems that the Court has not addressed and that, moreover, cannot be reconciled with the Court's own jurisprudence.

First, as a textual matter, the fact that the excessiveness prohibition was specifically placed in the Constitution allows a strong case to be made that the decision over which social values this prohibition embodies is one that has been committed to the judiciary.[78] This is the structure used for other social values that have been elevated to constitutional status, such as the free speech concerns protected by the First Amendment and the privacy concerns protected by the Fourth, the substantive content of which are currently within the exclusive province of the Court.[79] Indeed, the fact that the Court has been quite active in these other constitutional areas suggests that the Court would err if it treated the Eighth Amendment differently.

Second, allowing the legislative branches to define the relevant baseline would by definition give them control over the substantive content of the excessiveness prohibition. Accordingly, whether the excessiveness prohibition reflected the values of majority rule, efficiency, equity, or some other social value would be a matter for state legislatures or Congress to decide. While this would keep the judicial branch out of the business of choosing among the competing values that could give content to the Eighth Amendment, it also would allow different jurisdictions to choose different baselines (or allow a single jurisdiction to employ multiple baselines over time). This eventually would produce a constitutional patchwork that would force the Court to reject a certain punishment as excessive according to the baseline of

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[76] *Ewing*, 538 U.S. at 25.

[77] *Id.* at 24.

[78] *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9–11 (1979) (claiming presence of specific prohibitions in text of Constitution indicates courts are responsible for giving meaning to values implicit in those provisions).

[79] *Id.* at 11.

one jurisdiction but accept it as appropriate under the baseline of another.

At a minimum, then, allocation of decisionmaking authority to the legislative branches with respect to the underlying baseline would leave the Eighth Amendment with different substantive content in different jurisdictions, which is contrary to the nationalizing purposes of the Constitution and at odds with the Court's own jurisprudence. Indeed, the Court's continued use of the evolving standards of decency doctrine to strike down inconsistent state legislative judgments is clearly contrary to such a decentralized, state-centered vision of the Eighth Amendment.[80]

For this reason, while a decentralized approach may prevent courts from imposing their own values on the political process, such a system also would create a fragmented body of Eighth Amendment law. Given that this is inconsistent with the Court's current practice, the most likely explanation for the Court's highly deferential language is that the Court has inadvertently conflated the question of which institution is empowered to select the underlying baseline with the question of how much deference courts should give to a sentencing regime developed around the baseline that is chosen.

2. *How Much Deference Should Be Given to the Legislature?: A Return to Traditional Theories of Judicial Review*

To aid our examination of the application of the standard of review in the Eighth Amendment context, it is useful to reframe current doctrine using the traditional language of judicial scrutiny. This will allow us to speak in the more familiar categories of rational basis review, intermediate and strict scrutiny, and per se unconstitutionality, and thereby bring the language of judicial review under the Eighth Amendment more in line with the language used in other areas of constitutional law. Rearticulated in this way, current doctrine can be roughly stated as follows: fines and punishments are subject to low-level rational basis review, the death penalty is subject to intermediate scrutiny, and "inherently cruel" punishments are per se unconstitutional. By framing current doctrine around these familiar categories, we can begin to move the Eighth Amendment analytically closer to other areas of constitutional law and thereby get a better sense of

[80] *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183 (2005) (striking down state legislation authorizing imposition of death penalty on juvenile offenders as contrary to moral values of prevailing national political majority); Atkins v. Virginia, 536 U.S. 305 (2002) (striking down state legislation authorizing execution of mentally retarded offenders).

what the courts actually do when they hear an Eighth Amendment claim.

Having taken this step, we now can turn to the more significant issue of identifying how different theories of judicial review can be utilized in the Eighth Amendment context. Although there are a number of different theories of judicial review,[81] this Note will focus only on the two theories most widely discussed within the academic literature. The first of these is fundamental rights theory, which empowers courts to protect individual rights by authorizing them to exercise increasingly greater degrees of judicial scrutiny as these rights are increasingly infringed upon by the state. The second approach is the political process theory approach first articulated by the Supreme Court in *Carolene Products* footnote four[82] and later expanded upon by John Hart Ely,[83] which instructs the judiciary to intervene when the legislative process is being used to unfairly disadvantage minority groups. Since each of these theories identifies different circumstances in which courts should intervene in the democratic process, both the nature of the inquiry and the scope of deference extended to the legislative branches will be correspondingly different as well.

Fundamental rights theory operates on the premise that there are certain social values that are so important that they have been committed to the judiciary specifically in order to protect those values from majoritarian political processes.[84] As such, greater judicial scrutiny is seen as necessary in cases where it appears more likely that the state has impermissibly infringed on the underlying right in question. Fundamental rights theory thus offers a profoundly countermajoritarian approach because it charges the judiciary to exercise more scrutiny precisely in those cases in which the political process is functioning smoothly, but in which individual interests have been subordinated to the common good.

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[81] *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 769 (1991) (listing "textualism, originalism, tradition, consensus, and fundamental rights" as competitors to political process theory).

[82] 304 U.S. 144, 152–53 n.4 (1938).

[83] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing that judicial review should focus on guaranteeing equal participation and fair representation within political process, and ensuring that political majorities are not permitted to take unfair advantage of minority groups).

[84] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) ("The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest."); *see also* Fiss, *supra* note 78, at 10 (refuting majoritarian concept of judiciary outlined in *Carolene Products* and claiming rather that role of judiciary is to "give concrete meaning and application to our constitutional values").

This approach can be extended to the Eighth Amendment context without difficulty, and indeed, it is in many respects consistent with the Court's current jurisprudence. Here, the protected right is the right against excessive criminal sanctions, and the test for the level of judicial scrutiny is the extent to which the punishment in question invades an individual's life, liberty, or property interests. As such, less invasive punishments, like monetary sanctions and brief prison sentences, would be accorded low-level scrutiny. More severe sentences, like the death penalty or life imprisonment, would receive strict scrutiny. The level of scrutiny would steadily increase along the range of punishments between these two extremes. This roughly accords with the current structure of the Court's jurisprudence, in which fines and imprisonment are accorded rational basis review and the death penalty is subject to heightened (though not strict) scrutiny. The per se prohibition of "inherently cruel" punishments like torture also could fit within this model, either on the theory that punishments like torture are more severe than the death penalty, or on the theory that there is never a rational basis for the use of such punishments, regardless of the circumstances of the underlying crime.

In contrast, the role of judicial review under political process theory is to correct failures in the legislative process itself, rather than overriding the substantive policy decisions that result from that process.[85] This allows the politically accountable branches to select the substantive ends of government as well as the means of achieving those ends, but gives the judiciary the power to facilitate this process by protecting certain classes of "discrete and insular minorities"[86] from being unfairly disadvantaged in the political arena.[87] Process theory is therefore a majoritarian doctrine concerned with promoting the reliability of legislative judgments, and accordingly maintains that the appropriate level of scrutiny must be determined by reference to the class of persons affected by the legislation. The more politically disadvantaged these groups are, the greater the concern that courts should have for protecting them from a systemic bias in the political process.

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[85] *See* Klarman, *supra* note 81, at 747 ("Under political process theory judicial review is deployed against systematic biases in legislative decisionmaking rather than against the outputs of a properly functioning political system.").

[86] Carolene Prods. Co., 304 U.S. at 153 n.4. *But cf.* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 723–24 (1985) (arguing that "discrete and insular" minorities are comparatively more politically effective than "anonymous and diffuse" minorities).

[87] *See* ELY, *supra* note 83, at 102–03 (describing constitutional adjudication as matter of correcting malfunctions in political process).

Process theory thus can be rather easily extended to the Eighth Amendment context, on the grounds that certain classes of criminal offenders are far more likely to be subject to distortions in the political process than others. To use an easy example, there is an enormous class of persons who have received or are likely to receive a parking ticket. As such, process theory would maintain that we should not be particularly concerned with excessive punishments in this context, because if the legislature were to authorize such a punishment, a large bloc of voters would be in a position to correct this through the political process. Accordingly, under this approach, rational basis review would seem to be the most appropriate standard for such cases. Individuals who commit serious felonies, however, seem far less likely to receive this kind of solicitude from the legislative branches. There are at least two reasons for this. First, in many states, felon disenfranchisement statutes preclude convicted felons from voting,[88] which takes them out of the political process altogether and deprives them of the most important mechanism through which they can influence legislation.[89] Moreover, for obvious political reasons, it seems highly unlikely that any mainstream politician would align herself with the interests of convicted murderers or rapists, and the evidence unsurprisingly shows that prosecutors and victims' rights organizations are far more effective in the political process.[90] Together, these two factors appear to create precisely the kind of systematic biases in the political process that judicial intervention is supposed to correct. Accordingly, process theory would require that criminal sanctions imposed on these politically disadvantaged classes of felons must be subject to heightened scrutiny.

The real issue, then, is deciding which of these two theories should govern the standard of review used under the Eighth Amendment. As was true of the various substantive standards discussed in Part II.A, very different value judgments underlie these two approaches to judicial review: Political process theory is an intrinsically majoritarian doctrine,[91] while fundamental rights theory is an

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[88] *See* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1300 n.1 (1989) (citing state constitutions and statues that disenfranchised felons as of 1988).

[89] *See* ELY, *supra* note 83, at 116–25 (describing failures in voting processes and role of judiciary in correcting them); *see also Carolene Prods. Co.*, 304 U.S. at 152–53 n.4 (citing cases involving restrictions on political process imposed by legislature).

[90] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723–30 (2005) (discussing differences in political effectiveness of interest groups involved in regulation of sentencing).

[91] *See* Fiss, *supra* note 78, at 6 ("The theory of legislative failure should be understood as a general presumption in favor of majoritarianism . . . .").

inherently countermajoritarian one. As such, the selection of one theory over the other requires a normative judgment to be made about the relative importance of promoting majority rule and protecting individual interests from being harmed by the workings of the legislative process.

CONCLUSION

This Note has attempted to provide a framework for analyzing the Eighth Amendment that will bring out the normative questions that accompany its broad prohibition of excessive punishment. Specifically, it has attempted to prove (1) that the substantive standard governing the excessiveness prohibition is necessarily tied to an underlying theory of punishment that will provide a baseline for the excessiveness inquiry, and (2) that the appropriate level of judicial scrutiny for a particular punishment must be derived from traditional theories of judicial review. Building upon these two basic considerations, this Note has further attempted to bring attention to the competing values that underlie different theories of punishment and theories of judicial review, such that future scholarship in this area will move in the direction of making normative arguments about why one or more of these competing values should inform our understanding of the Eighth Amendment.[92]

The problem we face today is that there seems to be strong resistance on the part of both the courts and the academic community to engage in this kind of normative analysis. Given the lengthy and largely unresolved historical debate on these issues, this hesitancy is perhaps understandable. The substantive content of the Eighth Amendment is ultimately dependent on these theoretical considerations, however, and our understanding of the excessiveness prohibition will not improve by refusing to acknowledge the true policy choices animating our jurisprudence. As is true of every other substantive value enshrined in the Constitution, the Supreme Court has been placed in the position of making some admittedly difficult decisions about what social values should inform the excessiveness prohibition. But this difficulty does not mean that these decisions can or should be avoided. For the Eighth Amendment to achieve its full potential to regulate crime and punishment in this country, these choices inevitably must be made.

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[92] One scholar appears to have recently undertaken just such a project. *See* Lee, *supra* note 5 (arguing that while government may pursue variety of goals of punishment, including deterrence of crime and isolation of dangerous individuals, principle of retributivism animates Eighth Amendment and constrains pursuit of these goals).