

DESERT AND THE EIGHTH AMENDMENT

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Is the Eighth Amendment prohibition of cruel and unusual punishments a retributivist constraint? Not always. Sometimes the Eighth Amendment is used as a way of guaranteeing a minimum level of humanity, dignity, and decency for everyone, without any regard to individual culpability of offenders. Prison conditions cases have this logic, and so does the belief that certain forms of punishment, such as drawing and quartering, crucifixion, and torture, are simply not allowed under the Eighth Amendment, no matter how heinous the crime or the criminal.

However, at other times, the Eighth Amendment is used as a retributivist constraint implementing the principle that people should not be punished beyond what they deserve. Cases such as *Coker v. Georgia*,¹ *Atkins v. Virginia*,² and *Roper v. Simmons*³ are, at least I would argue, best understood as retributivist constraint cases that prohibit the imposition of capital punishment on certain groups of offenders *because they do not deserve it*.⁴ I have also argued that the Eighth Amendment regulation of lengths of imprisonment should follow the retributivist principle. *Ewing v. California*,⁵ the “three-strikes” case, takes the position that Eighth Amendment violations occur only

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1 433 U.S. 584 (1977) (prohibiting the death penalty for rape).

2 536 U.S. 304 (2002) (prohibiting the death penalty for mentally retarded criminals).

3 543 U.S. 551 (2005) (prohibiting the death penalty for individuals who were under the age of eighteen when they committed their crimes).

4 Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005); see also Carol S. Steiker, Panetti v. Quarterman: *Is There a “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 292 (2007) (“[A] better understanding of the Court’s holdings is that retribution alone is a necessary limit on the constitutional use of capital punishment. Indeed, it is hard to make much sense of the Court’s Eighth Amendment jurisprudence without such an understanding.”).

5 538 U.S. 11 (2003) (holding that a prison term of twenty-five years to life under California’s “three-strikes” law was not excessive for shoplifting by a repeat offender).

when a punishment cannot be justified under *any* penological theory, and I believe it was wrongly decided for that reason.⁶

There is an asymmetry between the two models of the Eighth Amendment, which I will call the “dignity model” and the “desert model.” The “dignity model” fits well with a standard understanding of constitutional rights. Sometimes people may have excessively vindictive urges, and it is the minimum standard of decency and humanity guaranteed by the Eighth Amendment that can serve to restrain such retributive instincts. But what does a constitutional right based on desert look like? If “the people” believe that, say, child rapists should receive the death penalty, on what basis can one make an Eighth Amendment argument that says that “the people” got the desert question wrong?

Habitual offender statutes, the subject of *Ewing*, are in fact useful test cases. It is commonly, and casually, assumed that repeat offenders deserve more punishment than first-time offenders. The Federal Sentencing Guidelines, for instance, asserts that “[a] defendant with a record of prior criminal behavior is more *culpable* than a first offender and thus *deserving* of greater punishment.”⁷ The political rhetoric surrounding California’s “three-strikes” law frequently used the language of desert and retribution, with some people saying that repeat offenders deserve draconian prison sentences not just for committing new offenses after having been punished, but also for being recidivists.⁸

While the belief that repeat offenders are “deserving of greater punishment” thus seems widespread, there is far more ambivalence among desert theorists on this issue, and there has been no satisfactory theoretical account of the prevailing view that recidivists are more culpable.⁹ Desert theorists have been generally critical of sen-

6 Lee, *supra* note 4, at 736–42; see also Steiker, *supra* note 4, at 291 (describing *Ewing* as standing for the proposition that “[o]nly if a punishment is grossly disproportionate with regard to *any* possible purpose of punishment should the Court perform a more searching Eighth Amendment analysis”).

7 U. S. SENTENCING GUIDELINES MANUAL § 4A1.1, at 364 (2007) (emphasis added).

8 See, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 256 (explaining that California’s “three-strikes” law was enacted on the basis “that it is only ‘just’ that recidivists receive lengthy sentences”); Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 425–26 (1997) (noting that the law may be understood as “a judgment of an offender’s entire record”).

9 See, e.g., Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1212 (2005) (noting that “[p]unishment theory is quite underdeveloped” on this issue); Julian V. Roberts, *Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium*, 48 BRIT. J. CRIMINOLOGY 468, 469

tencing enhancements based on one's criminal history,¹⁰ and recidivist statutes such as California's "three-strikes" law have been criticized on retributivist grounds.¹¹ Such a state of affairs has led one commentator to note that on this issue, "[t]he difference between elite and popular conceptions of desert is stark."¹²

There are two standard approaches to resolving such disagreements between "elite" and "popular" understandings of what people deserve. First, one may believe that the questions of what people deserve or do not deserve are matters of objective moral reality, and "the people," or its frequent proxy, the democratic process, may come out with a wrong answer at times. According to this view, the purpose of the Eighth Amendment is to enforce the retributivist constraint, the content of which does not change with the whims of the democratic majority. This understanding of retribution coheres well with a common image of constitutional rights in general and of the Cruel and Unusual Punishments Clause in particular, as the Clause is typically understood as playing the role of holding the excessive, and frequently irrational, punitive instincts of "the people" in check by imposing a moral constraint.

(2008) (remarking that "a plausible retributive justification for the recidivist sentencing premium has proved as elusive as the legendary resident of Loch Ness"). In a forthcoming article, I attempt to give a retributivist account of the recidivist premium. See Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. (forthcoming 2009).

- 10 See, e.g., RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 67–74 (1979) (criticizing the imposition of such sentences as "both dubious on its own merits and seriously inconsistent with the deserts model, at least as perceived by most deserts supporters"); George P. Fletcher, *The Recidivist Premium*, 1 CRIM. JUST. ETHICS 54, 59 (1982) (noting the difficulty in "accounting for the intuition . . . that the recidivist premium expresses a principle of retributive justice"); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 595 (2003) ("Just desert theorists have far greater difficulty [than utilitarian theorists] in explaining why criminal history is a relevant sentencing factor.").
- 11 I count myself among those who have made such criticisms. See Lee, *supra* note 4, at 735 ("From the perspective of retributivism as a side constraint, [California's 'three-strikes' law] is highly problematic . . ."); see also FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 121 (2001) (arguing that the penalties under the law are "nonproportional or indeed antiproportional"); Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 705–07 (1995) (arguing that even if some recidivist statutes have retributivist support, California's "three-strikes" law does not); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1435–37 (2001) (criticizing the law's penalties for including a "purely preventive detention portion that cannot be justified as deserved punishment").
- 12 Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1318 (2006).

A contrasting approach might go as follows. One may believe that there should not be a gap between what a criminal deserves and what “the people” believe that a criminal deserves. According to this view, what an offender deserves is equivalent to what “the people” believe he deserves, and it is a misunderstanding of desert to believe that theorists can second-guess desert determinations made by “the people.” If “the people,” or their democratically elected representatives, think that child molesters deserve to be punished with death, on what possible grounds can a philosopher or a judge decide that their desert judgment is “incorrect”? If a federal judge disagrees with what “the people” believe on a question of desert, then so much the worse for the judge—is it not?

The task of this Article is to evaluate these two approaches to understanding the role of retribution as a constitutional constraint. And in order to do so, I would like to first answer a related question, one step removed: What should be the significance of ordinary intuitions about what people deserve when scholars theorize about what people deserve?¹³ If a popular belief about a question of desert does not match up with conclusions arrived at through theorizing and reflections about desert, who should revise their views—“the people” or the theorists?

I suggest in this Article that the answer is twofold. First, statements about desert that fail to capture the core of ordinary moral intuitions cannot be ultimately successful. Second, at the same time, it is a mistake to believe that answers to questions about desert can be simply read off public opinion surveys or inferred from laws passed by legislatures. The role of theories about desert is to take various particular convictions about what people deserve and test them against broad principles, while warning against various sources of confusion and excess that frequently infect desert judgments, such as prejudice and vindictiveness. Desert theories must also be able to identify when a particular desert judgment, while justifiable on desert terms, cannot be squared with other principles of political morality that we hold dear, such as human dignity, political equality, and individual autonomy.

By “capturing the core of ordinary moral intuitions,” I do not necessarily mean to say that desert theories must reproduce the same conclusions as those that are reflected in ordinary moral intuitions,

13 Of course, I am not the first to ask this question. For a thoughtful take that differs from mine, see Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635 (2000).

although that is certainly one way of doing it. A theory may also satisfy this standard by correctly articulating the underlying concerns and commitments that drive common sense notions even if, in the end, the theory reaches conclusions that differ from common sense beliefs. When that kind of disagreement occurs, the theory in question may propose a revision of the moral intuitions in ways that preserve the underlying principles and concerns of the problematic intuitions. Or the theory may reject the underlying principles and concerns as mistaken and demand a straightening of whatever kinks may be leading one to the wrong moral beliefs. But whatever it does, a theory of desert must engage and grapple with ordinary moral intuitions and ultimately be judged by how well it illustrates ordinary moral intuitions or how satisfactorily it revises or replaces them. Standing apart from such intuitions and ignoring them as primitive or pre-theoretical is not an option.

There are several reasons why theories of desert must be closely tied to ordinary moral intuitions. Here I mention three reasons, rooted in the fact that someone writing about questions of desert and their applications to the administration of criminal law and the institution of punishment has to wear at least three hats: one as a social theorist, one as a moral philosopher, and one as a legal scholar.

First, as a social theorist, a scholar studying desert has, as his or her object of study, a social practice. A social practice has participants, and participants bring to the practice their own understandings of what they are engaged in, and those self-understandings partly constitute the practice itself.¹⁴ From this, it follows that a theory of social practice that leaves out the understandings of the practice by the participants themselves—something that H.L.A. Hart called the “internal point of view”—must remain incomplete.¹⁵ Such self-

14 See 2 CHARLES TAYLOR, *Social Theory as Practice*, in PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 91, 93 (1985) (“There is always a pre-theoretical understanding of what is going on among the members of a society, which is formulated in the descriptions of self and other which are involved in the institutions and practices of that society. A society is among other things a set of institutions and practices, and these cannot exist and be carried out without certain self-understandings.”).

15 H.L.A. HART, THE CONCEPT OF LAW 89–90 (2d ed. 1994); see also Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 197, 199–200 (Steven J. Burton ed., 2000); cf. 2 CHARLES TAYLOR, *Understanding and Ethnocentricity*, in PHILOSOPHY AND THE HUMAN SCIENCES, *supra* note 14, at 116, 124 (“Social theory in general, and political theory especially, is very much in the business of correcting common-sense understanding. It is of very little use unless it goes beyond, unless it frequently challenges and negates what we think we are doing, saying, feeling, aiming at. But its criterion of success is that it makes

understandings may be mistaken or delusional, but that does not mean that they can be simply left out of the picture. Rather, a theory of desert must be evaluated with reference to the ways in which the concept is actually used in legal, political, and moral discourse by those who participate in the relevant social practices.¹⁶

The second reason to take ordinary instincts seriously has to do with the nature of the subject matter—desert—itsself, and understanding desert requires that one adopt the moral philosopher’s perspective. As Joel Feinberg explained in his seminal discussion, desert statements have the form, “*S* deserves *X* in virtue of *F*,” where *S* is the person deserving, *X* is *what* he deserves, and *F* is the desert basis, or whatever serves as the basis for *X*.¹⁷ The relationship between *X*, what is deserved, and *F*, the desert basis, is that of “fittingness” or “appropriateness.”¹⁸ “Fittingness,” in the punishment context, has two dimensions: type and amount. First, when choosing how to respond to a criminal behavior, it would be “fitting” or “appropriate” only if the response takes the form that symbolizes or expresses the society’s condemnatory attitude towards the criminal conduct.¹⁹ The second dimension of “fittingness”—that of amount—refers to the idea that the harshness of the punishment should reflect our level of condemnation or disapproval.²⁰

What this means is that the validity of desert judgments turns on appropriateness or fittingness of responses to desert bases. Such assessment of appropriateness or fittingness, in turn, can be made only within the context of a community of shared values.²¹ Given such an

us as agents more comprehensible, that it makes sense of what we feel, do, aim at. And this it cannot do without getting clear on what we think about our action and feeling.”).

16 See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3–4 (1980) (“[H]uman actions, practices, habits, dispositions and . . . human discourse. . . can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc. And these conceptions of point, value, significance, and importance will be reflected in the discourse of those same people, in the conceptual distinctions they draw and fail or refuse to draw.”).

17 JOEL FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 61 (1970).

18 *Id.* at 81–82.

19 *Id.* at 67–71; JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING*, *supra* note 17, at 95, 98–99 [hereinafter FEINBERG, *Expressive Function*].

20 FEINBERG, *Expressive Function*, *supra* note 19, at 118.

21 See R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 80 (2001); NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 176–77 (1988); see also ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 250 (2d ed. 2002) (“[T]he notion of desert is at home only in the context of a community whose primary bond is a shared understanding both of the good for man and of the good of that com-

expressive dimension of punishment and what it expresses, it would not make any sense to attempt to answer questions of who deserves what without referring to the ways in which the relevant communities would react to different kinds of stimuli that inspire praise and blame.

When the subject that is to be studied is punishment, it is especially ill-advised to ignore community sentiments in formulating a theoretical account of who deserves what punishment. What punishment expresses is not just disapproval, which may be formed from a distance and in a cold, rationalistic, judgmental manner, but also an emotive state. Emotions associated with the act of punishing are, for example, anger, resentment, indignation, and hatred.²² Such emotions may be thought to be subjective or irrational in that they can get “out of hand,” but because of their cognitive content they can also be evaluated as appropriate or inappropriate, rational or irrational.²³ When such emotions are felt, their appropriateness can be judged through reflection, and sometimes inappropriately felt emotions even disappear once there is a recognition of such inappropriateness, the way, say, anger at a friend based on a misunderstanding can evaporate once the misunderstanding is corrected. But it would be a mistake to ignore the fact that such emotions *are* emotions—part of what Peter Strawson called a “complicated web of attitudes and feelings which form an essential part of the moral life as we know it.”²⁴ This is yet another reason why desert theorists cannot afford to dismiss instinctive beliefs held by people at large as “emotional” or “irrational.”

munity and where individuals identify their primary interests with reference to those goods.”).

22 See Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY 35, 54–79 (Jeffrie G. Murphy & Jean Hampton eds., 1988) [hereinafter Hampton, *Forgiveness, Resentment*]; Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra*, at 111, 143–47 [hereinafter Hampton, *Retributive Idea*]; see also ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 79–81 (Knud Haakonssen ed., 2002) (1759); Peter Strawson, *Freedom and Resentment*, in FREE WILL 72, 75–80, 90–93 (Gary Watson ed., 2003). For a subtle discussion of such feelings, both pointing out their importance for understanding the institution of punishment and warning us against complacently accepting them as moral sentiments as opposed to expressions of cruelty, see DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 61–67 (1990).

23 See R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 11–12, 18–19 (1994); Hampton, *Forgiveness, Resentment*, *supra* note 22, at 54 (“Resentment is . . . more than instinctive rage following an attack: it is an idea-ridden response.”); cf. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 24–31 (2004); MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 19–88 (2001); BERNARD WILLIAMS, *Morality and the Emotions*, in *PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956–1972*, at 207, 224 (1973).

24 Strawson, *supra* note 22, at 91.

Finally, as a legal scholar, it is important to approach the question of desert in criminal law not as a freestanding moral philosophy problem, but as a legal problem, and more specifically, as a criminal law problem. As many have argued, an important function that criminal law serves is to *displace* feelings of resentment and desires for vengeance by responding to wrongdoing through the institution of punishment.²⁵ It is not just that the institution of punishment has a close relationship to feelings of resentment, which in itself would make it important for punishment theorists to pay close attention to popular sentiments, but it is also that a core purpose of criminal law and punishment is to sublimate those feelings, displace them, and provide an outlet for them. In other words, whether criminal law succeeds or fails in a society depends, not entirely of course, but importantly, on how well it responds to the punitive emotions of its citizens.²⁶

Of course, there are ways to understand the role of criminal law that may better fit our self-image as a modern, civilized society, such as deterrence and rehabilitation, and some readers may also think that a modern state should play no role in reproducing primitive, barbaric, uncivilized sentiments like vengeance. It is true that these emotions can sometimes be ugly and disturbing, and it is also true that criminal law also serves other functions. However, it would be misguided to lose sight of the ways in which our institution of punishment both shapes and responds to people's punitive emotions and the ways in which such interactions lie at the very core of criminal law and are not a mere incidence of it.²⁷

In sum, a legal scholar attempting to answer questions about what criminals deserve must approach the question as a social theorist, a moral philosopher, and a legal scholar, and each scholarly perspective leads to an argument for taking ordinary moral intuitions about desert seriously. A question that consequently arises at this juncture is: If ordinary sentiments are so important and so central to under-

25 For a particularly cogent statement of this view, see John Gardner, *Crime: In Proportion and in Perspective*, in FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 31, 31–33 (Andrew Ashworth & Martin Wasik eds., 1998). See also EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 11–174 (W.D. Halls trans., Free Press 1984) (1933). For an excellent, and appropriately critical, discussion of Durkheim's views, see GARLAND, *supra* note 22, at 28–35. For common statements of these views, see, for example, LACEY, *supra* note 21, at 34; WILLIAM WILSON, CENTRAL ISSUES IN CRIMINAL THEORY 74–76 (2002).

26 Gardner, *supra* note 25, at 33 (“[T]he criminal law's medicine must be strong enough to control the toxins of bitterness and resentment which course through the veins of those who are wronged, or else the urge to retaliate in kind will persist unchecked.”).

27 *Id.* at 33–38.

standing questions about the deservingness of offenders, what role is there left for scholars? Is it not the case that what criminals deserve is simply whatever the people say, as expressed through the democratic processes or as reflected in public opinion surveys?²⁸ Perhaps, but there are many problems with this line of thinking. Let me mention just a few.

First, there is the question of how to interpret legislation and public opinion polls. As mentioned above, the institution of punishment serves a variety of functions, such as deterrence, incapacitation, rehabilitation, and retribution. The question that we are interested in is the question of what people deserve, but if a legislature passes, say, a “three-strikes” law, it is not clear from looking at the end product which concerns have driven the legislation. For habitual offender statutes especially, the argument that those who have demonstrated an inability to live by the rules of society should be isolated can be a powerful rhetorical tool. It is too quick, though, to jump from a passage of legislation to the conclusion that whatever punishments are permitted or required by it are what is thought to be *deserved* by those offenders subject to it. Public opinion surveys, too, are frequently obscure on whether people’s approval of harsh sentences for repeat offenders reflect their judgments about what repeat offenders deserve, as opposed to their desire to incapacitate and isolate repeat offenders from the general population.

In addition, as many have pointed out, there are many reasons to doubt whether legislation can be relied upon as evidence of what “the people” see as just outcomes. Voters tend to focus on the most recent and salient examples of violent crimes, be influenced by the media and politicians, and frequently support punitive measures that may go much further than what they otherwise would be willing to support given additional information.²⁹ Therefore, desert theorists may take into account such imperfect measures of public sentiments in formulating their theories, but such manifestations should be the beginning, not the end, of inquiries about the deservingness of those who come under the reach of those laws.

²⁸ Ristroph, *supra* note 12, at 1316 (arguing that this is the implication of “current efforts to enshrine desert in sentencing policy”).

²⁹ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 748–54 (2005); Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 LAW & HUM. BEHAV. 451, 464–66 (1990); Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 LAW & HUM. BEHAV. 199, 200–01 (1990).

Second, that a function of criminal law is to displace vindictive impulses of the public does not mean that the punishment that is justly deserved is whatever punishment that is perceived to be necessary to satisfy the retaliatory impulses of “the people.” Even though there is a close relationship between desert and retribution on one hand, and vengeance and retaliation on the other, we must be careful not to accept wholesale retaliatory impulses as unfailingly reflecting correct moral sentiments. Punitive passions may be correctly generated by one’s sense that a moral wrong has been done,³⁰ but they can also be excessive and driven by other less desirable, yet no less common, sentiments such as cruelty, sadism, inhumanity, and—particularly relevant in discussing criminal justice in the United States—racial hatred and prejudice.³¹ In order to place appropriate proportionality-based limitations on punishment and to filter out the effects of impulses that should have no place in our administration of the criminal justice system, punitive emotions felt by “the people” should be scrutinized carefully and tested against broad principles of desert, both comparative and noncomparative.³² And it is here that thoughtful reflections by desert theorists can be helpful.

Finally, even assuming that the ordinary everyday judgments of “the people” as to what punishments should be imposed on offenders accurately reflect what offenders actually deserve, we still have to ask whether such judgments in particular cases are consistent with other principles of political justice, such as dignity, political equality, individual autonomy, and the rule of law.

It may be argued by some that the democratic processes can protect all relevant interests and that we can trust legislative outcomes as reflecting the views of “the people” that, all things considered, punishments authorized by said legislations are appropriate. However, such optimism about the ability of our current political system to reflect all relevant concerns is unwarranted, at least when it comes to criminal justice. As has been much noted, our system has built-in incentives that encourage more and more expansive criminal liability.³³

³⁰ Hampton, *Retributive Idea*, *supra* note 22, at 143–47.

³¹ FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 43–49 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge University Press 1994) (1887); *see also* Gardner, *supra* note 25, at 31.

³² *See* Gardner, *supra* note 25, at 38–41; *see also* Lee, *supra* note 4, at 708–20.

³³ *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001); *see also* MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 196–97 (2004); Barkow, *supra* note 29, at 748–54; Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal*

Politicians cannot appear weak on crime; therefore, there is enormous political pressure to advocate and vote for tougher and tougher laws governing criminal liability and sentencing. Prosecutors face incentives to reach convictions at the lowest cost—either at trial or through pleas—which calls for broad definitions of criminal liability and high sentences. Moreover, for several reasons, including felon disenfranchisement and the stigma attached to criminals, effective lobbying on behalf of criminal defendants is difficult. Therefore, we have reasons to doubt whether fundamental values of political morality are sufficiently protected through the legislative process, and whether our constitutional structure and the institution of judicial review are designed to deal with such doubts.³⁴ Here, too, desert theorists can play a role in supplying the broad perspective that may not always be present in the legislative process or in popular opinion formation.

What does this all mean for the Cruel and Unusual Punishments Clause as a retributivist constraint? First, the idea of restraining retribution with retribution may seem nonsensical at first, but the discussion thus far suggests that a constitutional constraint has an important role to play in our criminal justice system. Second, the courts have to play the delicate balancing act of taking ordinary intuitions about desert seriously as foundational in giving shape to the retributivist constraint under the Eighth Amendment, while at the same time keeping the democratic process honest about its motives and warning it against some of the sources of excess punishment.³⁵

And how would these considerations apply, for instance, to habitual offender statutes? A full account of the moral ins and outs of the

Factors Influencing the Development of (Federal) Criminal Law, 1 BUFF. CRIM. L. REV. 23, 49–51 (1997); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 771–74 (1999); Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POL'Y 429, 437 (1998) (“When it comes to statutes involving criminal punishments, legislators have every incentive to announce more punishment rather than less.”).

34 See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20 (1996) (“A lot of constitutional theory has been shaped by the idea, made famous by *Carolene Products* footnote four, that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it.” (citation omitted)); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

35 How all this is to be done is, of course, not at all straightforward. I have suggested various judicially manageable strategies that courts might employ to protect Eighth Amendment values without being dismissive of popular notions of desert. See Youngjae Lee, *Judicial Regulation of Excessive Punishments Through the Eighth Amendment*, 18 FED. SENT'G REP. 234, 234–36 (2006).

appropriateness of the recidivist premium as a retributivist matter is beyond the scope of this Article.³⁶ I can at least say this, however. Despite desert theorists' general dislike of the recidivist premium, it seems to me that a coherent desert account for it can be given. The core of the repeat offender's wrong after conviction and punishment, I would argue, lies in the offender's failure to change his life in a way that steers clear of criminality despite having gone through the process of conviction and punishment. There is extra resentment towards repeat offenders, and that extra resentment is undeniable and should not be dismissed lightly. This phenomenon of resentment towards repeat offenders should be the starting point of the constitutional analysis.

Having said that, there are reasons to be suspicious of habitual offender statutes, and a closer scrutiny is appropriate. A plausible-sounding argument based on retribution can be deployed to justify problematic policies that go beyond retributivist limitations. First, a powerful force that drives habitual offender policies is the desire for incapacitation and prevention of future crimes. Repeat offenders should be kept off our streets, people argue, because they have not been reformed by the criminal process and have shown a propensity to keep offending. This rationale, however, is based on deterrence and incapacitation, not on desert and retribution. Even though the key inquiry here should be our level of confidence in predicting whether a given individual will reoffend, as opposed to whether a person deserves to be treated in a certain way, there is a tendency in popular discourse to move quickly from the proposition that repeat offenders should be kept away from the general public to the proposition that repeat offenders are thus deserving of harsh punishments.

Second, people argue that repeat offenders have demonstrated that they are "bad people," "career offenders," "hardened criminals," and ought to be treated appropriately. This argument sounds more like an argument based on retribution, but here the legal system must guard against the temptation to exclude from society those who are "unlike us." Given the history of racism and the racial composition of the prison population today, we have good reasons to be vigilant about tendencies to quickly label certain offenders as those who are "not like the rest of us" and to segregate them from mainstream society for the remainder of their lives.

³⁶ For such an account, see Lee, *supra* note 9.

Finally, we must identify the moment at which the discourse of just deserts turns into an argument based on the idea of forfeiture. Versions of the just deserts theory retain the notion of treating offenders as part of the community. The idea would be that a political community imposes rules to live by on its members, and when a member fails to live up to the community standard, the community condemns the failure. Habitual offender statutes, however, sometimes seem as if they are ways of taking away people's citizenship and banishing them from the community's territory. There is a difference between giving people what they deserve and stripping them of their citizenship, and a constitutional standard based on retribution must be on the lookout for the moment at which a person who is a full member of the community whose acts call for condemnation turns into a person who should not be part of the community at all.

Admittedly, this is not a tidy picture, but there is no way around the mess. Punishment—intentional infliction of pain and deprivation of liberty by the government on its citizens, and on behalf of its citizens—is a troublesome practice. And the demands that are put on it—to “displace” retaliatory instincts of citizens without reproducing their excess, injustice, and inhumanity—are difficult to satisfy. As John Gardner has aptly put it, “by the nature of the endeavour there is very little margin for error.”³⁷ The relationship between desert theories and popular sentiments is thus quite complex, and we must be suspicious of simple assertions either in favor of dismissing theories as irrelevant or in favor of disregarding popular sentiments as base or irrational.

³⁷ Gardner, *supra* note 25, at 33.