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Judicial Regulation of Excessive Punishments through the Eighth Amendment



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After the Supreme Court upheld a prison term of twenty-five years to life for the crime of shoplifting by a repeat offender in *Ewing v. California*,¹ at least outside the capital punishment context, there appear to be no longer any meaningful constitutional limitations on disproportionate sentences.² We might even say that the idea of unconstitutionally excessive noncapital punishment died three times in the past twenty-five years or so, in *Rummel v. Estelle* in 1980,³ in *Harmelin v. Michigan* in 1991,⁴ and finally in *Ewing* in 2003. Expressing outrage at decisions like *Ewing* begins thus to seem like a ritual we go through roughly once every decade. At the same time, the idea of aggressive judicial regulation of punishments on proportionality grounds makes many of us uneasy. The concept of proportionality between crime and punishment seems too vague and indeterminate, “an invitation to imposition of subjective views” of federal judges, as Justice Scalia warned.⁵

Without doubt, the question of how much punishment is too much does not yield a precise answer.⁶ How many years in prison is the right amount of punishment for stealing a car? Two years? Ten years? And how much is too much? Two years? Seven years? Ten years? Stated this way, judicial regulation of punishment on proportionality grounds seems to be a nonstarter, facing overwhelming difficulties in implementation. The question simply seems impossible to answer, not because the very concept of “excessive punishment” is incoherent but because the concept does not come with precise boundaries.

This concern, while valid, is frequently exaggerated.⁷ To be sure, if the task is imagined to be that of each judge taking a case-by-case, ad hoc approach to determine whether a particular punishment “mismatches” the crime of which an offender has been convicted, then the concerns may be warranted. However, there are other ways to imagine the task of judicial regulation of excessive punishments. The first step is to recognize that the concept of proportionality can be thought of in terms of comparative proportionality as well as absolute proportionality.⁸ Once this is recognized, the judiciary can utilize various familiar doctrinal techniques to bring some determinacy to the task of placing proportionality limitations on punishments.

I. Line Drawing

In capital cases, the Supreme Court has categorically ruled certain crimes and groups of criminals outside the purview of the death penalty. The inquiry that drives these cases is whether the criminal defendant is less culpable than, or as culpable as, a paradigmatic first-degree murderer.⁹ A sentence of death is disproportionate for the crime of rape, for instance, not because rape is not a serious crime, but because it is not as reprehensible as “taking [a] human life.”¹⁰ “Robbery is a serious crime deserving of serious punishment,” but imposing a penalty of death would be inappropriate because it does not “compare with murder.”¹¹ It is unconstitutional to impose the death penalty on the mentally retarded because they as a group have “diminish[ed] . . . culpability,” given their mental deficiencies.¹² The juvenile death penalty is unconstitutional because “[juveniles’] irresponsible conduct is not as morally reprehensible as that of an adult,” and they “cannot with reliability be classified among the worst offenders.”¹³

The same line of reasoning can be applied in noncapital cases. One can list punishments in order of harshness and devise a tolerably uncontroversial list of crimes in order of seriousness.¹⁴ Then, just as the Court has proceeded on the assumption that the death penalty is the harshest punishment, the Court can start from the proposition that life imprisonment is the second harshest form of punishment. Given the seriousness of life imprisonment as punishment, the Court can announce rules that effectively reserved it only for serious crimes. For instance, generally violent crimes are considered more serious than nonviolent crimes. Why not have a general rule prohibiting governments from imposing life imprisonment as punishment for drug possession or for shoplifting or for passing a bad check?

Of course, it may not always be easy to draw sharp lines. Some arbitrary—and controversial—decisions will have to be made. Also, as our views of the seriousness of certain crimes may change over time, the level of their punishment may need to be revisited. But this is only a reason for the Court to keep its interventions well-targeted, focused, and infrequent and to refrain from creating anything like a detailed set of sentencing

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guidelines; it is not a reason to shy away from the approach altogether.

II. Policing Overbreadth

The Supreme Court often declares a governmental practice unconstitutional for one reason or another without specifying what should replace it. For instance, in *Furman v. Georgia*, the Court held that the capital sentencing regimes being reviewed were unconstitutional.¹⁵ *Furman* immediately brought about uncertainty about the status of the death penalty, similar to the way in which *Apprendi v. New Jersey*¹⁶ and *Blakely v. Washington*¹⁷ recently threw the status of various sentencing guideline systems in doubt. The law eventually settled when in subsequent cases the Court developed procedural parameters for the imposition of the death penalty.¹⁸

Similarly, one could imagine a judicial review in which the Court would ask, "Does the sentencing scheme that has generated the sentence in question sufficiently distinguish among offenders of different levels of seriousness?" Again, this is a technique that the Court has employed in the past. In *United States v. Bajakajian*, the Court held unconstitutionally excessive a forfeiture in the amount of \$357,144 for a violation of the law requiring persons to file a report when they transport money in excess of \$10,000 outside the United States.¹⁹ In striking down the forfeiture, the Court noted that the statute under which Bajakajian was sentenced merely stated that "[t]he court, in imposing a sentence on a person convicted of an offense in violation [of the reporting statute] . . . shall order that the person forfeit to the United States any property . . . involved in such offense, or any property traceable to such property."²⁰ Dismissing the government's claim that "[f]orfeiture of the undeclared cash is perfectly calibrated to the seriousness of the defendant's conduct," the Court responded that "[t]here is no inherent proportionality in such a forfeiture" and that "the harm respondent caused is [not] anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking \$12,000 out of the country in order to purchase drugs."²¹ In other words, the Court suggested that the sentencing scheme was overbroad and failed to sufficiently distinguish among offenses of varying seriousness.

In the imprisonment context, the Court can apply similar analyses to declare a sentencing scheme that has generated a particular punishment to be overbroad and, like in *Furman*, invite the legislature to give it another try. It may be difficult for courts to decide whether a particular punishment is excessive for a particular crime when the inquiry is conducted in a vacuum, but evaluating whether a statutory scheme shows an appropriate amount of "narrow tailoring" and sensitivity to differing levels of crime seriousness is a task that the judiciary can manage. This kind of dialogical back-and-forth between the courts and the legislature is a familiar doctrinal technique in constitutional law.

III. Looking for Intra-judicial Coherence

The Supreme Court has already employed another judicial technique in this context, albeit not consistently. In *Solem v. Helm*, the Court outlined a three-step process in reviewing punishments for excessiveness. First, courts should compare "the gravity of the offense and the harshness of the penalty," the gravity of the offense being determined "in light of the harm caused or threatened to the victim or society, and the culpability of the offender." Second, the Court stated that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction" and see whether "more serious crimes are subject to the same penalty, or to less serious penalties." Third, the Court suggested that "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."²²

This three-step test was substantially weakened in *Harmelin v. Michigan*,²³ and perhaps that is just as well. The first step calls for the kind of "matching" of crime and punishment that is, as discussed above, too indeterminate to be of any use. The third step, "interjurisdictional comparisons," on the other hand, is difficult to square with our federalist structure of government.²⁴ However, the second step, "intra-judicial comparisons," is worth reinvigorating. Through the analysis, the Court can ask how the punishment in question "fits" into the penal code of a state and whether it stands in appropriate relation to punishment for crimes that are as serious as or more serious than the crime for which the punishment is being imposed within the same jurisdiction. Given the relative ease with which we can list crimes in order of gravity and punishments in order of harshness, the analysis need not invite rudderless judicial activism.

Solem, which invalidated a sentence of life imprisonment without possibility of parole imposed on a recidivist for passing a "no account" check in the amount of \$100, showed how such an analysis could be done. The Court noted that in South Dakota, which did not have the death penalty, Helm's sentence was "the most severe punishment that the State could have imposed on any criminal for any crime" even though his crime was far less serious than other crimes that could be punished by life imprisonment in the state, such as "murder, treason, first degree manslaughter, first degree arson, and kidnapping," and some of the more serious crimes such as "a third offense of heroin dealing or aggravated assault" could not be punished by life imprisonment at all. The Court concluded that "[c]riminals committing any of these offenses ordinarily would be thought more deserving of punishment" than the defendant in the case.²⁵

In *Bajakajian*, the Court similarly noted that the maximum fine under the statute defining the violation (as opposed to the forfeiture statute) and the sentence under the Federal Sentencing Guidelines were "but a fraction of the penalties authorized" and concluded that they show that "respondent's culpability relative to other potential

violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—is small indeed.”²⁶ Similar analyses could have easily exposed the problems with the sentences in *Harmelin* and *Ewing*.²⁷

IV. Forcing Deliberation

Legislators are constitutional actors with an independent duty to observe and uphold the Constitution. One way for the Court to protect Eighth Amendment values while deferring to legislators’ substantive decisions is to examine the legislative process to determine whether proper deliberation has taken place, given the constitutional values at stake.

Justice O’Connor took this approach in her separate opinion in *Thompson v. Oklahoma*, which held that those who commit a crime at the age of fifteen or younger were less culpable than adult criminals and were therefore not deserving of death.²⁸ Even though Justice O’Connor disagreed with the plurality’s conclusion that “all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment,” she voted to vacate the sentence because the State of Oklahoma had not set a minimum age at which one could be sentenced to death.²⁹

Justice O’Connor’s message to state legislatures was to take proportional limitations seriously in crafting rules of punishment. Because of the widely accepted assumption that juveniles were as a group less culpable, the state legislature had to provide “the earmarks of careful consideration” regarding the relative culpability of juveniles by deciding at what age the line should be drawn.³⁰ Thus, Justice O’Connor framed the issue not as at what age the Court itself would draw the line but as whether the relevant legislature carefully considered the question of where to draw the line.

By forcing the legislature to consider and even articulate why a particular punishment it is authorizing is not disproportionate, the Court would encourage legislatures to join an interbranch conversation about punishment and force them to consider the issue of proportionality whenever they seek to deprive their citizens of life or liberty through the criminal process.³¹ Forcing legislatures to consider the constitutional values at stake in sentencing through the legislative process could alleviate the usual lack of representation of the criminal defendants’ interests in the democratic process.³²

V. Conclusion

Even though the approaches discussed here are not comprehensive and many line-drawing questions may

arise, this should not be a reason for the Court to evade its responsibility to enforce the Eighth Amendment, which appears to be the Court’s current position. The usual criticism that proportionality is an unworkable ideal is overstated. The Court could utilize familiar judicial techniques to protect Eighth Amendment values.

Notes

- ¹ 538 U.S. 11 (2003).
- ² See, e.g., Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 577 (2005).
- ³ 445 U.S. 263 (1980).
- ⁴ 501 U.S. 957 (1991).
- ⁵ *Id.* at 986.
- ⁶ See, e.g., Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547, 549-50 & 555-56 (2001).
- ⁷ See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005).
- ⁸ See *id.* at 708-30.
- ⁹ The Supreme Court jurisprudence in this area is not a model of clarity. I have defended this particular interpretation previously. See *id.* at 688-92 & 721-25.
- ¹⁰ *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality).
- ¹¹ *Enmund v. Florida*, 458 U.S. 782, 797 (1982).
- ¹² *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).
- ¹³ *Roper v. Simmons*, 534 U.S. 551, 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)), 569 (2005).
- ¹⁴ See, e.g., *Solem v. Helm*, 463 U.S. 277, 292-93 (1983) (stating that “courts are competent to judge the gravity of an offense, at least on a relative scale” and giving several illustrations); Lynch, *supra* note 6, at 550 (“The relative severity of sentences for different offenses can be rationally argued about. . . .”).
- ¹⁵ 408 U.S. 238 (1972).
- ¹⁶ 530 U.S. 466 (2000).
- ¹⁷ 542 U.S. 296 (2004).
- ¹⁸ See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).
- ¹⁹ 524 U.S. 321 (1998).
- ²⁰ *Id.* at 325.
- ²¹ *Id.* at 339.
- ²² *Solem*, 463 U.S. at 290-292.
- ²³ *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).
- ²⁴ See, e.g., *id.* at 999 (Kennedy, J., concurring in part and concurring in the judgment). For a more detailed criticism of “interjurisdictional comparisons,” see Lee, *supra* note 7, at 720 n.185.
- ²⁵ *Solem*, 463 U.S. at 281-84, 297-99.
- ²⁶ *Bajakajian*, 524 U.S. at 339 n.14.
- ²⁷ See Lee, *supra* note 7, at 730-36.
- ²⁸ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality).
- ²⁹ *Id.* at 848-49 (O’Connor, J., concurring in the judgment).
- ³⁰ *Id.* at 857.
- ³¹ *Cf. United States v. Lopez*, 514 U.S. 549 (1995).
- ³² See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-33 (2001).