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Why Proportionality Matters

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ARTICLE

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INTRODUCTION

The Supreme Court decided recently in *Graham v. Florida* that the Eighth Amendment prohibits a sentence of life in prison without parole for a nonhomicide crime committed by a minor. In its decision, the Court stated that "[t]he concept of proportionality is central to the Eighth Amendment"[1] and that it is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[2] What about proportionality makes it a matter of justice? And how does proportionality cohere with our constitutional values? This Article addresses these questions.

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[1] Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).

[2] *Id.* (alteration in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)) (internal quotation marks omitted).

I. WHY PROPORTIONALITY?

Why does proportionality matter for the Constitution? The principle of proportionality is commonly associated with the retributivist—or just deserts—theory of punishment, or the idea that people should receive the punishment that they deserve and no more.[3] However, simply saying that some people deserve to be punished does not explain why the *State* must be the one to mete out the punishment people deserve. As a general matter, the State is not in the business of ensuring just deserts. Bad things may happen to good people, just as some people may achieve far more success than they deserve. But it is not the State's job to intervene and take from those who have more than they deserve and give to those who have less.[4] We need to move beyond the simple assertion that some people deserve certain things when attempting to justify the State's role in doling out punishment.

To make some headway into the question of why proportionality matters, we must first explore the rationales for criminal law. I highlight two in particular here. First, criminal law plays an important role in preserving physical security through its system of prohibitions and punishments.[5] That is, harm reduction is an important goal of criminal law. Second, criminal law functions to *displace* feelings of resentment and desires for personal vengeance by punishing wrongdoing.[6] As John Gardner put it, "The blood feud, the vendetta, the duel, the revenge, the lynching: for the elimination of these modes of retaliation, more than anything else, the criminal law as we know it today came into existence."[7]

These two aspects of criminal law explain several key features of our criminal justice system, namely that it is *coercive*, *judgmental*, and

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[3] *See* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 1 (2005) (treating the terms "proportionate" and "deserved" interchangeably in the punishment context); *see also* Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment) ("Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution.").

[4] *See* David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 542 (1991) ("After all, the government, state, or 'society' does not automatically take it upon itself to give people what they deserve in other respects.").

[5] *See, e.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 3-6 (2001).

[6] *See, e.g.*, JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 213 (2007) ("The justifiability of criminal punishment, and criminal law in general, is closely connected to the *un*justifiability of our retaliating against those who wrong us.").

[7] *Id.* at 213.

preemptive. First, its *coercive* aspect reveals itself most dramatically and obviously through the process of apprehending and punishing offenders. The coercive aspect is essential for ensuring order and physical security—a key function of criminal law.[8]

Second, the criminal justice system is *judgmental* in the sense that when we punish, we also blame, condemn, and stigmatize the offenders.[9] By stigmatizing offenders, punishment gets "personal" and sends the message that their acts reflect badly on them.[10] This judgmental aspect derives at least partially from the displacement function of criminal law. A core purpose of criminal law and punishment is to manage the punitive and retaliatory emotions of those who have been victims of wrongdoers (as well as others in the community who feel indirectly victimized)[11] and to sublimate, displace, and provide an outlet for feelings of resentment toward the wrongdoers. The success or failure of a society's criminal law system thus depends on how well it responds to the punitive emotions of its citizens.[12]

Finally, the criminal justice system is *preemptive* in that the State is the exclusive agent licensed to punish criminal wrongdoing.[13] Although the basic idea of retribution—that people should receive what they deserve—appears facially neutral on the question of *who* should be the one

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[8] *See* VON HIRSCH & ASHWORTH, *supra* note 3, at 21-27 (describing how "hard treatment" prevents future crimes and harms).

[9] *See* JOEL FEINBERG, DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 100 (1970) (noting the tendency of punishment to express both society's "strong *disapproval* of what the criminal did" and a "kind of vindictive resentment" toward the criminal).

[10] *See* VICTOR TADROS, CRIMINAL RESPONSIBILITY 48 (2005) ("The imposition of criminal responsibility, at least within the range of relatively serious offences, necessarily involves moral criticism of the defendant as a person."); John Gardner, *On the General Part of the Criminal Law* ("The criminal law gets personal. To be convicted of a crime is to be criticised, or even sometimes condemned, as a person."), *in* PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 205, 236 (Antony Duff ed., 1998).

[11] *See* S.E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CANADIAN J.L. & JURISPRUDENCE 7, 20 (1998) ("A group can . . . 'share' the wrongs done to its individual members . . . . Wrongs done to individual members of the community are then wrongs against the whole community—injuries to a common or shared, not merely to an individual, good.").

[12] *See* GARDNER, *supra* note 6, at 216 ("[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.").

[13] *See* Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113, 115 (2008) ("To the extent that the state prohibits certain sorts of conduct, it is the state and the state alone that ought to administer sanctions for the violations of these prohibitions.").

giving wrongdoers what they deserve, the government is the only legitimate punisher, and the law prohibits private individuals from taking the law into their own hands.[14] This preemptive aspect is essential to both the harm prevention and the displacement functions of criminal law.

How does all this relate to our Constitution's requirement of proportionality? We cannot understand the various substantive and procedural safeguards rooted in our criminal justice system without reference to the overarching role that criminal law plays in our society. The government enjoys an enormous amount of power, not only to interfere forcefully with people's lives and to brand individuals with the stigma of blameworthiness, but also to prohibit others from doing the same. In order for the government to maintain its status as the exclusive legitimate wielder of this power, it must use its force in certain specified ways.

That is, the displacement function begets the judgmental aspect of punishment, and as the State metes out this punishment and blame, it must do so under the constraints of fairness. To achieve fairness, the State must punish in a manner that is consistent with principles of proportionality: it must treat its citizens equally.[15] To be more precise, proportionality principles ensure that the State treats the equals equally and the unequals unequally.

The fundamental legal protection that people be punished no more than they deserve is thus a requirement that flows neither from the laws of morality nor from some general principle that people ought to receive only what they deserve. Rather, it is one of many conditions that attach to the government's exclusive control of the power to criminalize and punish, and only by respecting such constraints can the State maintain the legitimacy of its exclusive control.

These three central aspects of criminal law not only establish the proportionality-based limitation as an important restriction on the State's power to punish, but they also suggest that that limitation should take the form of a constitutional *right* that is resistant to tradeoffs. The harm prevention and displacement functions of criminal law demon-

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[14] *See* GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 18 (1988) ("A legal system is possible only if the state enjoys a monopoly of force. When private individuals appeal to force and decide who shall enjoy the right to 'life, liberty, and the pursuit of happiness,' there can be no pretense of the rule of law.").

[15] *Cf.* Joel Feinberg, *Some Unswept Debris from the Hart-Devlin Debate*, 72 SYNTHESE 249, 254-57 (1987) ("[I]t is surely unfair that a less blameworthy violation of a statute should be morally condemned more severely than a more blameworthy one. Fairness requires that relevantly dissimilar cases should be treated in appropriately dissimilar ways.").

strate how the power to punish can be abused. Punitive passions, while frequently and correctly based on the belief that a moral wrong has occurred, can be excessive and driven by other less desirable sentiments such as cruelty, sadism, inhumanity, and racial hatred or prejudice.[16] Such sentiments may drive punishments well beyond what offenders deserve. In addition, the pressures the State faces to reduce crime could lead it to use excessive and unwarranted violence.[17]

Therefore, as the exclusive agent of punishment, the government has dual commitments. On the one hand, because citizens are generally prohibited from defending themselves with violence or retaliating against wrongdoers,[18] the government has an obligation to provide physical security to its citizens and respond adequately to any wrongdoing. On the other hand, the government cannot preserve its legitimacy as the sole rightful holder of the power to punish unless it respects the restrictions on its use of force, including proportionality.

These two commitments can pull the government in different directions. The State can sometimes provide physical security more efficiently and effectively by ignoring various substantive and procedural safeguards placed on its power. But if the State starts to abuse its power in this way, its status as the legitimate holder of the power to criminalize and punish will be threatened.[19] Yet there will be times when respecting these safeguards may seem downright irresponsible—a dereliction of duty—because the safeguards may get in the way of convicting and punishing wrongdoers.[20] This reality means that unless we treat the constraints against disproportionate punishment as near inviolable, proportionality-based restrictions on punishment will yield too often and will not meaningfully limit the government's power to punish.

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[16] *Cf.* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 45-49 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 1994) (1887) (examining moral prejudices and their sources).

[17] *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 252-53 (2011) (discussing the "political backlash" that led to increased incarceration rates in the mid-to-late twentieth century).

[18] *See, e.g.*, George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 556-58 (1996).

[19] *See, e.g.*, STUNTZ, *supra* note 17, at 285-86 (discussing "the crisis of legitimacy that the criminal justice system faces" due to the disproportionate number of black men imprisoned in America).

[20] For a provocative articulation of this perspective, see Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 750 (2005).

II. PROPORTIONALITY IN THE SUPREME COURT

How well are the justifications for proportionality presented in Part I reflected in our constitutional jurisprudence? In order to answer this question, we first have to be clear on various analytic devices the Supreme Court employs in its proportionality analysis. The Court uses at least four different tests.

First, sometimes the nature of the Court's proportionality analysis is essentially comparative. The questions are not whether, say, robbery is a serious crime, but whether it is as serious as other crimes,[21] and not whether a mentally retarded killer is culpable, but whether he is as culpable as an adult of normal intelligence who kills on purpose.[22] I will refer to the analysis the Court applies here as "relative culpability."

Second, the Court has also understood proportionality in noncomparative terms. As the *Graham* Court explained, proportionality calls for courts to compare "the gravity of the offense and the severity of the sentence."[23] This kind of proportionality analysis, which I will call the "absolute culpability" test, is about matching. It requires the court to take a particular crime and a particular punishment and set them against each other, without regard to how other crimes are punished. The absolute and relative culpability tests are closely related, and I will refer to them collectively as the "culpability test."

The third kind of proportionality analysis, which I will call the "pointless suffering" test, asks whether the punishment advances one of the goals of punishment or whether it is "nothing more than the purposeless and needless imposition of pain and suffering."[24] According to the *Graham* Court, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[25] Under this test, if the punishment does not advance a legitimate purpose, then it is not proportionate.

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[21] *See* Enmund v. Florida, 458 U.S. 782, 797-98, 801 (1982) (finding an individual's blameworthiness for committing robbery less than that of committing more heinous crimes, such as murder, and so concluding that the death penalty is inappropriate for convicted robbers).

[22] *See* Atkins v. Virginia, 536 U.S. 304, 317-21 (2002) (holding that mentally retarded individuals are less culpable for their actions as compared to adults of normal intelligence and thus cannot be sentenced to death).

[23] Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

[24] Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

[25] *Graham*, 130 S. Ct. at 2028.

Fourth and finally, there is the proportionality analysis advanced by the Court in *Ewing v. California*.[26] Under this test, which I will call the "disjunctive test," the Court asks whether the punishment advances one of the traditional goals of punishment.[27] The *Ewing* Court wrote, "A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation."[28] And according to the Court, for a punishment to pass constitutional muster, "it is enough that the [State] has a reasonable basis for believing" that its punishment "advance[s] the goals of [its] criminal justice system in any substantial way."[29]

The third and fourth proportionality analyses are closely related, but different. The "pointless suffering" test reflects the idea that punishment should not be imposed unless it advances *some* objective. That is, it states a necessary but not a sufficient condition for a punishment to survive a constitutional challenge. The disjunctive test from *Ewing*, by contrast, states a sufficient condition for constitutionality: as long as a punishment advances *some* objective, it is constitutional.

A. *The Relative Culpability Test*

As a theoretical matter, the relative culpability test is important for proportionality because what one wrongdoer deserves is sometimes determined by reference to what *other* wrongdoers deserve. When the State punishes, the relation of one person's punishment for a crime to punishments for other crimes supplies a reference point against which to judge how wrong society believes the behavior to be. A punishment would be "undeserved" if it is more severe than the punishment imposed on those who have committed more—or equally—serious crimes because the judgment the punishment expresses about the seriousness of the criminal's behavior would be inappropriate.[30]

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[26] 538 U.S. 11 (2003).

[27] *See id.* at 25.

[28] *Id.*

[29] *Id.* at 28 (alterations in original) (quoting Solem v. Helm, 463 U.S. 277, 297 n.22 (1983)) (internal quotation marks omitted).

[30] *See, e.g.*, FEINBERG, *supra* note 9, at 118 (arguing that "the degree of disapproval expressed by the punishment should 'fit' the crime . . . in the . . . sense that the more serious crimes should receive stronger disapproval than the less serious ones"); ANDREW VON HIRSCH, CENSURE AND SANCTIONS 15-16 (1993) ("By punishing one kind of conduct more severely than another, the punisher conveys the message that it is worse—which is appropriate only if the conduct is indeed worse (i.e. more serious). Were penalties ordered in severity inconsistently with the comparative seriousness of crime, the less reprehensible conduct would, undeservedly, receive the greater reprobation.").

For example, the death penalty carries a social meaning as the ultimate punishment reserved for only the most serious crimes. Thus, each time the State imposes a death sentence, it sends the message that it considers the crime to be not only among the most serious offenses, but also equally serious to other crimes that society has labeled—and punished—as the most serious. Those who commit less serious offenses and are still sentenced to death would be receiving harsher sentences than they deserve, because to receive the punishment they deserve they must be punished less harshly than the worst criminal.[31]

The Court thus rightly places much importance on the relative culpability test in its proportionality jurisprudence. The Court has created a number of categorical exemptions from death sentences for certain crimes and groups of criminals. A criminal cannot constitutionally be sentenced to death for the crime of rape,[32] even if the victim is a child.[33] It is also unconstitutional to punish by death someone who does not kill or intend to kill, but who is convicted under a felony-murder statute for aiding and abetting a murder,[34] unless the person showed "reckless indifference to human life."[35] A person cannot be sentenced to death if he is mentally retarded,[36] or for a crime committed before the age of eighteen.[37] Nor can a person be sentenced to life in prison without parole for a nonhomicide crime committed before the age of eighteen.[38]

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[31] Relative culpability is not the same as equality. Equality has generally come to mean equal treatment for similarly situated individuals. Relative culpability, by contrast, requires this and more: "like cases [should] be treated alike . . . [and] unlike cases [should] be treated in an appropriately unlike way." Thomas Hurka, *Desert: Individualistic and Holistic*, *in* DESERT AND JUSTICE 45, 54 (Serena Olsaretti ed., 2003). Differential treatment is thus fundamental to relative culpability.

[32] Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

[33] Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).

[34] Enmund v. Florida, 458 U.S. 782, 801 (1982).

[35] Tison v. Arizona, 481 U.S. 137, 158 (1987). *Tison* held that the death penalty was appropriate in a felony-murder case in which the defendant did not kill, but was a substantial participant in the felony and demonstrated reckless disregard for human life. *Tison* is a controversial case and is in tension with the principle of proportionality and the Court's recent proportionality jurisprudence. *See generally* Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371 (2011) (arguing that the Court's movement toward proportionality in the cases of *Atkins v. Georgia*, *Roper v. Simmons*, and *Kennedy v. Louisiana* gives cause to revisit the holding in *Tison*).

[36] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[37] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[38] Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

The logic driving these cases—and the relative culpability test in general—can be summed up in one sentence: *X* is bad, but not as bad as *Y*.[39] For instance, in *Kennedy v. Louisiana*, which held that a sentence of death is a grossly disproportionate punishment for the rape of a child, the Court reasoned that "there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other."[40] While acknowledging that the "latter crimes may be devastating in their harm," the Court concluded that "'in terms of moral depravity and of the injury to the person and to the public,' they cannot be compared to murder in their 'severity and irrevocability.'"[41] In *Graham*, too, the Court explained that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[42] That is, "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."[43] Moreover, the Court noted that "juveniles have lessened culpability" and are "less deserving of the most severe punishments."[44]

B. *The Absolute Culpability Test*

The importance of the absolute culpability factor for proportionality is obvious: that it would be disproportionate to punish a parking violation with a year in prison would be true even if every parking violation were treated equally and more serious crimes were treated more harshly.[45] However, it is unclear how the absolute culpability test, which calls for matching "the gravity of the offense and the severity of the sentence,"[46] is to be applied. A ten dollar fine for murder is obvi-

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[39] For a more detailed discussion of such a comparison of culpability, see Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 721-25 (2005).

[40] 554 U.S. 407, 438 (2008).

[41] *Id.* (citation omitted) (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion)).

[42] 130 S. Ct. at 2027.

[43] *Id.*

[44] *Id.* at 2026.

[45] *See, e.g.*, Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 311 (1974) ("If beheading and disembowelment became the standard punishment for overtime parking, . . . the penalty as applied in a given case would be unjust . . . even though it were applied uniformly and without discrimination to all offenders. Moreover, it would be unjust even if it were the mildest penalty in the whole system of criminal law, with more serious offenses punished with proportionately greater severity still . . . .").

[46] *Graham*, 130 S. Ct. at 2022.

ously too lenient, and five years in jail for jaywalking is clearly too harsh. Beyond such extreme cases, however, absolute culpability judgments seem contestable. The problem is that crime and punishment are incommensurable. That is, the two scales, one crime and the other punishment, seem to have little to do with one another. The crime scale cannot be translated into the punishment scale, nor vice versa, in the way a scale of inches can be translated into a scale of centimeters. As a result of this incommensurability, crime and punishment are incomparable, which creates a problem for the notion of equivalence between the two.[47] These concerns led H.L.A. Hart to call the idea of proportionality "the most perplexing feature" of retributivism,[48] while Oliver Wendell Holmes described it as "mystic."[49]

While, perhaps for these reasons, the absolute culpability test has not played a prominent role in the Supreme Court's proportionality jurisprudence, the Court has at times relied on the idea. For example, despite the sharpness of disagreement among some Justices in this area, it appears that one proposition has commanded broad, if not unanimous, support: life imprisonment for parking violations would be an excessive punishment and thus unconstitutional.[50] But the Court has also recently made statements that come close to making a commitment to other, less obvious propositions about absolute culpability. For instance, in *Kennedy*, the Court acknowledged its "hesitation" to allow the death penalty in situations "where no life was taken in the commission of the crime."[51] The Court indicated in *Kennedy* that there would be an incongruity between crime and punishment if the State took a life for a crime that did not itself take a life, suggesting an "eye

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[47] For a useful discussion of the distinction between "incommensurability" and "incomparability," see Ruth Chang, *Introduction* to INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1, 1-2 (Ruth Chang ed., 1997).

[48] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 233 (1968).

[49] OLIVER WENDELL HOLMES, THE COMMON LAW 37 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881).

[50] *See* Harmelin v. Michigan, 501 U.S. 957, 1018 (1991) (White, J., dissenting) ("[I]t [would not] be unreasonable to conclude that it would be both cruel and unusual to punish overtime parking by life imprisonment."); Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting) (asserting that levying a life sentence for a parking violation would "offend our felt sense of justice"); *cf. Harmelin*, 501 U.S. at 986 n.11 (opinion of Scalia, J.) (noting that life imprisonment for a parking violation would be "horrible," but that such a punishment would be unlikely to ever occur); *Rummel*, 445 U.S. at 274 n.11 (acknowledging that proportionality comes into play with such an "extreme example" as life imprisonment for overtime parking).

[51] Kennedy v. Louisiana, 554 U.S. 407, 435 (2008).

for an eye" type correspondence.[52] In *Graham*, the Court stressed that "[l]ife without parole is an especially harsh punishment for a juvenile,"[53] as it "deprives the convict of the most basic liberties without giving hope of restoration,"[54] and also fails to account for the fact that "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."[55] Again, the Court here appears to emphasize that the punishment of life without parole does not properly "match" offenses committed by juvenile offenders.

C. *The Pointless Suffering Test*

The pointless suffering test asks whether the punishment in question advances a traditional penological goal or is "nothing more than the purposeless and needless imposition of pain and suffering."[56] As a matter of proportionality, the pointless suffering test is redundant. To demonstrate that a punishment results in pointless suffering, one must first show that the punishment is disproportionate from the just deserts perspective. But once that finding has been reached, there is no reason to ask whether other purposes of punishment are being advanced. The punishment is problematic even without any such demonstration.

The pointless suffering test is not necessary as a doctrinal matter either, as illustrated by *Coker v. Georgia*. In *Coker*, the Court held that imposing the death penalty for rape is unconstitutional, and, after mentioning the culpability test and the pointless suffering test, stated that a "punishment might fail the test on *either* ground."[57] The Court explained in a footnote, "Because the death sentence is a dispropor-

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[52] The Biblical maxim of lex talionis (commonly known as "an eye for an eye") reads, "If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe." *Exodus* 21:23-25 (New Revised Standard); *see also* MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE 68-74 (1990) (discussing various versions of lex talionis in the Bible). Even though the maxim sounds cruel to the modern reader, lex talionis was a limiting principle in its historical context. As Igor Primoratz has explained, the principle served to "restrain[] the vengefulness of the wronged" by commanding "for one life, take one, not ten lives; for one eye, take one, not both." IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 87 (1989).

[53] Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

[54] *Id.* at 2027.

[55] *Id.* at 2028.

[56] Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

[57] *Id.* (emphasis added).

tionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment *even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so*."[58] The Court, in reaching this conclusion, relied exclusively on the culpability test and paid no heed to the pointless suffering test.[59] Interestingly, in its *Kennedy* decision, the Court repeated the language that a "punishment might fail the test on either ground,"[60] after it had been absent from majority opinions for three decades, although the Court did not rely on or explain the statement.

Moreover, when one applies the *Coker* Court's formulation that a punishment may be unconstitutional under either the culpability test or the pointless suffering test, it becomes evident that the latter test is not only unnecessary but also redundant. The Court considers retribution to be a legitimate goal of punishment, and its assessment of the culpability of the relevant class of offenders has not differed in any way from its assessment of whether the punishment can be justified on retributivist grounds.[61] Thus, if a punishment fails the pointless suffering test, then it must a fortiori fail the culpability test. In other words, a punishment may be unconstitutional either for failing the culpability test or the pointless suffering test, but a showing of the latter necessarily includes a showing of the former. Therefore, a punishment's failure to pass the culpability test is both necessary and sufficient for it to be unconstitutionally disproportionate, and the pointless suffering test is mere surplusage.

Although the Court has not acknowledged the pointlessness of the pointless suffering test, it has, as a matter of practice, made it redundant. Whenever the Court determines that a punishment is unconstitutional for failing the relative culpability test (that is, *X* is bad, but not as bad as *Y*), it also tends to conclude that the punishment in question fails the pointless suffering test. For example, the *Roper* Court, in declaring the juvenile death penalty unconstitutional, concluded that "neither retribution nor deterrence provides adequate justification for

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[58] *Id.* at 592 n.4 (emphasis added).

[59] The extent to which the Court paid attention to the deterrence question appears to be confined to the following single sentence in a footnote, implying an extremely demanding version of the purposes of punishment test: "We observe that . . . it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system." *Id.*

[60] Kennedy v. Louisiana, 554 U.S. 407, 441 (2008) (quoting *Coker*, 433 U.S. at 592) (internal quotation marks omitted).

[61] *See* Lee, *supra* note 39, at 690.

imposing the death penalty on juvenile offenders."[62] The *Atkins* Court, holding that the death penalty is unconstitutional when imposed on mentally retarded offenders, stated that it was "not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty."[63] The *Kennedy* Court, too, found that the death penalty for child rape "would not further retributive purposes"[64] and "may not result in more deterrence or more effective enforcement."[65]

Of course, there is nothing wrong with the idea that punishments that serve no purpose should not be allowed. Instead, the problem with the pointless suffering test is that it is unclear what it adds to the analysis, yet it gives the impression that for a punishment to be unconstitutional, it must not advance any of the traditional goals of punishment. This impression is misleading, because, under *Coker*, a punishment may be found unconstitutional for failing either the culpability test or the pointless suffering test. Further, the impression that a punishment must not advance any penological purpose to be excessive creates confusion between the pointless suffering test and the disjunctive test.

D. *The Disjunctive Test*

Under the disjunctive test, as long as a punishment advances *one* of the objectives of punishment, it is constitutionally permitted. As discussed above, providing physical security may sometimes be done more efficiently and effectively if the State can at times ignore proportionality limitations. Because of this strong temptation to punish excessively, it is important to implement proportionality limitations as *rights*. The right against excessive punishment should therefore have the following form: even if doing *X* to *A* would advance an overall purpose of punishment, it should not be done because doing *X* to *A* would be disproportionate. This structure is nonsensical from the perspective of the disjunctive theory because that theory terminates the analysis if a legitimate end of punishment is served. In our criminal justice system, we pursue various goals,[66] but the pursuit takes place

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[62] Roper v. Simmons, 543 U.S. 551, 572 (2005).

[63] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[64] Kennedy v. Louisiana, 554 U.S. 407, 442 (2008).

[65] *Id.* at 445.

[66] *See supra* notes 5-7 and accompanying text.

under a set of fairness constraints.[67] The disjunctive theory allows the delicate relationship between goals and constraints to be disturbed by dissolving the constraints and permitting the goals to dominate unchecked. This is a reason to reject the disjunctive theory.

As a doctrinal matter, the disjunctive theory is a relatively recent invention. The origin of the disjunctive theory can be found in Justice Kennedy's concurring opinion in *Harmelin v. Michigan*.[68] *Harmelin* held that a sentence of a mandatory term of life in prison without the possibility of parole for possession of 672 grams of cocaine was not cruel and unusual.[69] In his concurrence, Justice Kennedy stated that one of the principles governing the Court's inquiry into proportionality is that "the Eighth Amendment does not mandate adoption of any one penological theory," as "[t]he federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."[70] This statement is uncontroversially true.

However, there is a difference between the principle that the Constitution does not mandate the *legislature* to adopt any one penological theory in determining *how to set appropriate sentences*, and the principle that the Constitution does not mandate the *judiciary* to adopt any one penological theory in determining *how to set limits on sentences devised by legislatures*. The two ideas should not be equated, but that is precisely what the Court did in *Ewing v. California*, in which it held that a prison term of twenty-five years to life under California's three-strikes law was not excessive for the crime of stealing three golf clubs by a repeat offender.[71]

After citing *Harmelin* for the proposition that retribution, deterrence, incapacitation, and rehabilitation are all legitimate purposes of punishment, the plurality in *Ewing* stated that "[s]ome or all of these justifications may play a role in a State's sentencing scheme" and that "[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."[72] The plurality then

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[67] *See supra* note 15 and accompanying text.

[68] *See* 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

[69] *Id.* at 961, 994-96 (opinion of Scalia, J.). No opinion in *Harmelin* gained a majority, and the opinion that eventually came to assume the status of law is Justice Kennedy's concurring opinion, which was joined by Justices O'Connor and Souter.

[70] *Id.* at 999 (Kennedy, J., concurring in part and concurring in the judgment).

[71] 538 U.S. 11, 17-18, 30-31 (2003) (plurality opinion).

[72] *Id.* at 25.

noted that "[r]ecidivism has long been recognized as a legitimate basis for increased punishment" and that California has an interest in incapacitating repeat offenders and deterring crimes.[73] The plurality concluded by articulating the disjunctive theory: "It is enough that the State . . . has a reasonable basis for believing that [the punishment] . . . 'advance[s] the goals of [its] criminal justice system in any substantial way.'"[74]

So, it appears that to the extent the Supreme Court subscribes to the disjunctive test, it is committed to an incorrect theory of proportionality. Fortunately, there have been signs recently that the Court realizes that it took a wrong step in *Ewing*. For example, as mentioned above, the Court noted in *Kennedy* that "[a] punishment might fail the test on either" the culpability test or the pointless suffering test, which directly contradicts the disjunctive test.[75]

More significantly, the Court went a step further while discussing the deterrence rationale in *Graham*. After making the usual comment about the immaturity of juveniles, the Court added that "[e]ven if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered."[76] The Court concluded that "in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence," even though it is "perhaps plausible" that "the sentence deters in a few cases."[77] Similarly, in discussing the incapacitation rationale, the Court noted that "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[78]

These statements suggest that potential incapacitation or deterrence effects will not be reason enough to uphold certain punishments, which may mean that the era of the disjunctive theory is over. Along these lines, it is important to note that the Court made these statements after it declined to apply the *Ewing* framework. *Ewing* was the first case to clearly articulate the disjunctive test and also arguably

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[73] *Id.*

[74] *Id.* at 28 (fourth and fifth alterations in original) (quoting Solem v. Helm, 463 U.S. 277, 297 n.22 (1983)).

[75] Kennedy v. Louisiana, 554 U.S. 407, 441 (2008) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)).

[76] Graham v. Florida, 130 S. Ct. 2011, 2029 (2010).

[77] *Id.*

[78] *Id.*

the case most on point for *Graham* because it too involved noncapital excessiveness.

Before *Graham*, the Supreme Court's proportionality jurisprudence under the Eighth Amendment proceeded along two tracks—capital and noncapital—where the Court applied different tests, leading to different outcomes, depending on the track.[79] *Graham*'s ruling changed this framework.[80] The *Graham* Court, considering a challenge to a prison sentence, announced that "the appropriate analysis" was not the one used in *Harmelin* and *Ewing*, both of which dealt with prison sentences, but the one used in *Atkins*, *Roper*, and *Kennedy*, all death penalty cases.[81] After *Graham*, it seems that *Ewing* will no longer retain its status as the most important noncapital excessiveness case. *Ewing* and its disjunctive test may go the way of *Rummel v. Estelle*, in which the Court unsuccessfully attempted in 1980 to foreclose, once and for all, defendants' ability to challenge noncapital sentences on excessiveness

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[79] *See* Lee, *supra* note 39, at 687-99 (tracking the development of case law for capital and noncapital cases and concluding that the "death is different" rationale does not account for the different approaches between the two types of cases); *see also* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1175-86 (2009) (analyzing alternate theories to account for the difference between capital and noncapital cases, including administrative concerns).

[80] *See, e.g.*, Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT'G REP. 49, 49-50 (2010) (stating that the Court in *Graham* for the first time applied its categorical proportionality analysis for capital offenses to a noncapital crime); Richard S. Frase, Graham*'s Good News—and Not*, 23 FED. SENT'G REP. 54, 54 (2010) (arguing that *Graham* "suggests a more unified approach to proportionality," in contrast with the Court's prior "two-track distinction between death and prison sentences"); Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58, 58 (2010) (explaining how *Graham* represents a departure from the Court's prior two-track test); Eva S. Nilsen, *From* Harmelin *to* Graham*—Justice Kennedy Stakes Out a Path to Proportional Punishment*, 23 FED. SENT'G REP. 67, 68 (2010) (suggesting that the Court finally saw similarities between death and life without parole, showing that "[d]eath [i]s [n]ot [t]otally [d]ifferent"); Alison Siegler & Barry Sullivan, *"Death Is Different No Longer":* Graham v. Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 328-30 (stating that *Graham* signaled the end of the capital versus noncapital distinction); Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79, 81 (2010) ("Justice Kennedy thus managed to transform what had looked like a capital versus noncapital line, the application of which rendered noncapital challenges essentially hopeless, into a categorical rule versus individual sentence line, in which individuals asserting proportionality challenges based on special group circumstances (such as reduced moral culpability) could avoid the threshold chopping block that had previously doomed noncapital proportionality challenges.").

[81] *Graham*, 130 S. Ct. at 2023.

grounds.[82] In short, it seems that the Supreme Court in *Graham* has come closer than ever to the theory of proportionality outlined in Part I of this Article.

CONCLUSION

This Article has argued that there is a good reason, grounded in a broad political theory concerning the role of criminal law and the State, to consider that the "concept of proportionality is central to the Eighth Amendment"[83] and that it is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[84] This Article has further contended that this theoretical perspective is reflected—albeit unevenly and imperfectly—in the Supreme Court's proportionality jurisprudence.

Of course, many questions remain. Proportionality, even if understood correctly, remains a vague idea. Not only is it vague, but the questions of who deserves what and which crimes are more deserving and which less deserving of punishment are highly contestable issues.[85] The vagueness and contestability of proportionality strengthen the separation-of-powers norms that determinations of specific prison terms for crimes traditionally have been and should be "properly within the province of legislatures, not courts" and that courts should generally defer to legislatures in this realm.[86] In the end, the limited role of the judiciary should be kept in mind when shaping the doctrine and adjusting the level of deference given to legislatures at the implementation stage.[87]

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[82] *See* Rummel v. Estelle, 445 U.S. 263, 275-76 (1980) (explaining that the Court was reluctant to review terms of imprisonment that were legislatively mandated because of separation of powers concerns). While *Rummel* continues to be cited as good law, its holding is impossible to reconcile with the Court's subsequent jurisprudence. *See* Lee, *supra* note 39, at 730 n.246.

[83] *Graham*, 130 S. Ct. at 2021.

[84] *Id.* (alteration in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)) (internal quotation marks omitted).

[85] *See, e.g.*, Youngjae Lee, *Keeping Desert Honest* (arguing that incapacitation and deterrence "need to be constrained" by principles of desert), *in* CRIMINAL LAW CONVERSATIONS 49, 51 (Paul H. Robinson et al. eds., 2009); Alice Ristroph, *The New Desert* (stating that desert is an "elastic" concept that can change as reforms in the criminal justice system are made), *in* CRIMINAL LAW CONVERSATIONS, *supra*, 45, 49.

[86] *See Rummel*, 445 U.S. at 275-76.

[87] I have made some suggestions along these lines elsewhere. *See generally* Youngjae Lee, *Judicial Regulation of Excessive Punishments Through the Eighth Amendment*, 18 FED. SENT'G REP. 234, 234 (2006) (discussing how the Court can protect Eighth Amendment rights while maintaining deference to the legislature).

The starting point in this endeavor, however, should be to end the *Atkins-Roper-Kennedy* impression that enforcing the Eighth Amendment is appropriate only when it is costless to law enforcement. Being serious about enforcing the Eighth Amendment requires giving up some of the deterrence and incapacitation benefits of punishment in certain instances. That rights must be enforced despite their accompanying costs is a familiar notion in constitutional law. As Justice Alito reminded us recently, "[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes" have "controversial public safety implications."[88] In other words, the Eighth Amendment right against excessive punishment should be treated like any other right, and there is a good political philosophical reason for doing so.

[88] McDonald v. City of Chicago, 130 S. Ct. 3020, 3045 (2010).