

## ESSAY

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# PROPORTIONALITIES

*Youngjae Lee* \*

*“You keep using that word. I do not think it means what you think it means.”*

—*Inigo Montoya, The Princess Bride*<sup>1</sup>

*“Proportionality” is ubiquitous. The idea that punishment should be proportional to crime is familiar in criminal law and has a lengthy history. But that is not the only place where one encounters the concept of proportionality in law and ethics. The idea of proportionality is important also in the self-defense context, where the right to defend oneself with force is limited by the principle of proportionality. Proportionality plays a role in the context of war, especially in the idea that the military advantage one side may draw from an attack must not be excessive in relation to the loss of civilians. Finally, constitutional theorists around the world outside the United States have been at work for decades on the principle of proportionality as a constitutional principle. When so many different ideas come under the same label, confusion or at least ambiguity that could encourage confusion can easily creep in, which can lead to repeated mistakes and perpetuation and validation of erroneous thinking. Accordingly, this Essay first discusses various ways in which the idea of proportionality is used in law and legal theory and documents and corrects certain misunderstandings and misleading arguments in the academic literature, particularly in the context of the Cruel and Unusual Punishments Clause of the Eighth Amendment of the United States Constitution. This Essay then suggests that a better understanding of the term can yield new analytic and normative perspectives with which we might more effectively evaluate our current system of criminal law, policing, and punishment.*

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<sup>1</sup> THE PRINCESS BRIDE (Act III Communications & Buttercup Films 1987).

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## INTRODUCTION

A recent article, *Preventing Undeserved Punishment*, by Marah Stith McLeod begins with a reminder of some current problems with criminal law and punishment in our society, such as mass incarceration and overpunishment. McLeod notes “particularly heavy burdens for the poor, minorities, and the mentally ill,” and the resulting “distrust, racial alienation, and outrage.”<sup>2</sup> As one potential solution, McLeod suggests that we reform the sentencing process as follows:

[S]entencing courts should make desert the first and foremost question they address. The discretionary sentencing process should begin with a determination of how much punishment the defendant deserves. The sentencing court should state the upper bound of deserved punishment on the record, thereby fixing the ceiling of just punishment. Only after establishing the upper bound of deserved punishment should the judge go on to decide what specific penalty—not to exceed the deserved maximum—would best serve the full range of statutory sentencing goals (usually including not only retribution but also utilitarian goals such as deterrence, incapacitation, and rehabilitation).<sup>3</sup>

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<sup>2</sup> Marah Stith McLeod, *Preventing Undeserved Punishment*, 99 NOTRE DAME L. REV. 491, 495–96 (2023).

<sup>3</sup> *Id.* at 500 (footnotes omitted).

McLeod uses the term “desert” when she describes how judges ought to fix the upper limit when sentencing. Another term that is often used to express the same idea is “proportionality.” McLeod’s proposal then can be restated as a call for sentencing judges to use the idea of proportionality to set the upper limit on the sentences they impose on defendants. The suggestion is sensible, though I have some questions as to how much progress we will make under her proposal, if the goal is to reduce the overall harmful effects that the current system of criminal law, policing, and punishment imposes on our society.

Before we turn to those questions, however, it is important to be clear about the idea of proportionality, which anchors McLeod’s proposal. “Proportionality” is ubiquitous. The idea that punishment should be proportional to crime is familiar in criminal law and has a lengthy history. But that is not the only place where one encounters the concept of proportionality in law and ethics. The idea of proportionality is important also in the self-defense context, where the right to defend oneself with force is limited by the principle of proportionality. Proportionality plays a role in the context of war, especially in the idea that the military advantage one side may draw from an attack must not be excessive in relation to the loss of civilians. Finally, constitutional theorists around the world outside the United States have been at work for decades on the principle of proportionality as a constitutional principle.

When so many different ideas come under the same label, confusion or at least ambiguity that could encourage confusion can easily creep in, which can lead to repeated mistakes and perpetuation and validation of erroneous thinking. Accordingly, this Essay first discusses various ways in which the idea of proportionality is used in law and legal theory and documents and corrects certain misunderstandings and misleading arguments in the academic literature, particularly in the context of the Cruel and Unusual Punishments Clause of the Eighth Amendment of the United States Constitution. This Essay then suggests that a better understanding of the term can yield new analytic and normative perspectives with which we might more effectively evaluate our current system of criminal law, policing, and punishment. This Essay illustrates this suggestion by returning to McLeod’s proposal and explaining and assessing it.

## I. PROPORTIONALITY IN PUNISHMENT, SELF-DEFENSE, WAR, AND CONSTITUTIONAL LAW

### A. *Proportionality in Punishment*

The idea of proportionality in punishment may be put succinctly

like this: “the punishment . . . should be in proportion to the crime.”<sup>4</sup> This idea has been interpreted and concretized in many different ways. H.L.A. Hart describes the idea as the “requirement that the punishment should in some way ‘match’ the crime.”<sup>5</sup> Oliver Wendell Holmes restates it as the principle that “the punishment must be equal, in the sense of proportionate to the crime.”<sup>6</sup> These statements harken back to the way Kant and Hegel have invoked the notion of “equality” to describe the proper relationship between crime and punishment and to the Biblical maxim of *lex talionis*.<sup>7</sup>

Among contemporary punishment theorists, the same idea of proportionality is often explained in terms of desert or retributivism.<sup>8</sup> For instance, Victor Tadros explains that “[p]unishment is regarded as proportionate if the suffering imposed on the offender bears the appropriate relationship to the gravity of his crime.”<sup>9</sup> Douglas Husak also says that “[i]njustice occurs when punishments are disproportionate, exceeding what the offender deserves.”<sup>10</sup> I myself discussed proportionality in these ways when I argued that the Cruel and Unusual Punishments Clause’s ban on excessive punishment should be understood in terms of “the retributivist principle that the harshness of punishment should not exceed the gravity of the crime—one should not be punished more harshly than one deserves.”<sup>11</sup>

Some theorists emphasize censure, as opposed to desert. Andrew von Hirsch and Andrew Ashworth, the leading proponents of the principle of proportionality as the guiding principle of sentencing, argue that “[t]he principle of proportionality . . . is grounded . . . on the blaming character of punishment” and that “[o]nce one has created an institution with the condemnatory implications that punishment

4 John Gardner, *Crime: In Proportion and in Perspective*, in FUNDAMENTALS OF SENTENCING THEORY 31, 38 (Andrew Ashworth & Martin Wasik eds., 1998), *reprinted in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 213, 221 (2007).

5 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 233 (2d ed. 2008).

6 OLIVER WENDELL HOLMES, THE COMMON LAW 40 (The Belknap Press of Harvard Univ. Press 2009) (1881).

7 See IMMANUEL KANT, THE METAPHYSICS OF MORALS 115 (Lara Denis ed., Mary Gregor trans., Cambridge Univ. Press 2017) (1797); G.W.F. HEGEL, HEGEL’S PHILOSOPHY OF RIGHT § 101 remark (T.M. Knox trans., Oxford Univ. Press 1967) (1821); *Exodus* 21:23–25; MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE 68–74 (1990).

8 This is how McLeod uses the term.

9 VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 332 (2011).

10 DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 14 (2008).

11 Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683 (2005).

has, then it is a requirement of justice . . . to punish offenders according to the degree of reprehensibility of their conduct.”<sup>12</sup> They further explain: “Disproportionate punishments are unjust . . . because they purport to condemn the actor for his conduct and yet visit more or less censure on him than the degree of blameworthiness of that conduct would warrant.”<sup>13</sup>

The basic idea is, then, to look at the crime that is to be punished and ask what punishment “matches,” “fits,” or is “appropriate” for that crime. This idea of fittingness operates on both comparative and noncomparative dimensions.<sup>14</sup> The noncomparative dimension evaluates an appropriate punishment in a particular instance based on the seriousness of the crime, irrespective of how others are treated.<sup>15</sup> In contrast, the comparative dimension considers how others are punished.<sup>16</sup> For example, if a person is sentenced to five years in prison for car theft, noncomparative desert asks only whether the act justifies that response from the state, regardless of how similarly and differently situated individuals are being treated.<sup>17</sup> On the other hand, comparative desert examines whether the individual who stole the car is receiving equitable treatment compared to others who committed more or less serious crimes.<sup>18</sup>

12 ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 134 (2005).

13 *Id.*

14 See Joel Feinberg, *Noncomparative Justice*, 83 *PHIL. REV.* 297, 298 (1974).

15 *Id.*

16 *Id.*

17 See Youngjae Lee, *Proportionality in Punishment*, in *THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW* 549, 551–52 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).

18 *Id.* at 553. There is a way of thinking about proportionality in punishment that is different from the account I have given here, and that is the kind of proportionality principle one might derive from the utilitarian theory of punishment. One can start from the core idea, as stated by Jeremy Bentham, that “all punishment is mischief: all punishment in itself is evil,” and that punishment should be allowed “as far as it promises to exclude some greater evil,” to work out a theory of proportionate punishment. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 134 (Batoche Books 2000) (1781). However, because the primary concern of the utilitarian theory is to minimize the social loss associated with criminal activities, as opposed to attaining the correct relationship between the gravity of crime and the harshness of punishment, this version of proportionality departs too much from the idea of “proportionality in punishment” as it is generally understood. Therefore, I will set aside the utilitarian notion of proportionality here. For further discussion, see Lee, *supra* note 11, at 737–41; Youngjae Lee, *Problem of Proportional Punishment*, in *THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY AND SCIENCE OF PUNISHMENT* 126, 126–28 (Farah Focquaert et al. eds., 2021).

### B. *Proportionality in Self-Defense*

In the context of self-defense, proportionality means something quite different from proportionality in punishment. As we saw above, proportionality in punishment has to do with the *desert* or *blameworthiness* of the person being punished. By contrast, in self-defense, proportionality has to do with the idea of *liability*.<sup>19</sup> The idea of liability is used in the self-defense context to explain why it is morally permissible to attack a person. If *A* tries to kill *B*, and *B* kills *A* in self-defense, why is it morally permissible for *B* to kill *A*? The answer is that *A* has made himself *liable* to being killed in that situation because *A*, who would normally have a right not to be killed, has lost that right by his act of aggression. Since *A* no longer retains the right not to be killed in this situation, it is permissible for *B* to kill *A*. An intuitive way of explaining the concept of being liable to harm is in terms of *forfeiture*.<sup>20</sup> By trying to kill *B*, *A* has forfeited his right not to be killed.

However, the degree of forfeiture of one's rights is limited by the proportionality constraint, which in turn sets a limit to the amount of force *B* is morally permitted to use to repel *A*'s attack. As Tadros explains, the principle of proportionality means that "one may not use the force necessary to avert a threat if that force is out of all proportion to the magnitude of the threat that one faces."<sup>21</sup> So for example, if instead of *A* trying to kill *B*, we had a situation where *A* is trying to tickle *B* and *B* does not want to be tickled, *B* may protest and prevent the unwanted touching by pushing *A* away with minimal harm, if any, but not by killing *A*. In the tickle situation, *A* may have made himself liable to be pushed away against his will, but he has not made himself liable to be killed.

Another distinct idea, separate from proportionality but proximate to it, is *necessity*. In the original hypothetical, while *A* may have made himself *liable* to be killed by trying to kill *B*, it may still be morally impermissible for *B* to kill *A*, if it is possible for *B* to avoid being harmed by *A* by merely breaking *A*'s arm. If *B* is able to neutralize the threat of *A* some other way, but nevertheless kills *A*, *B*'s response may have been *proportionate*, but it was not *necessary*, and therefore may still be morally impermissible.<sup>22</sup> This distinction between *necessity* and

19 See, e.g., Jonathan Quong, *The Morality of Defensive Force: Replies to Otsuka, Frowe, Fabre, and Burri*, 16 CRIM. L. & PHIL. 555, 555 (2022); Kimberly Kessler Ferzan, *Forfeiture and Self-Defense*, in THE ETHICS OF SELF-DEFENSE 233 (Christian Coons & Michael Weber eds., 2016); Helen Frowe, *The Role of Necessity in Liability to Defensive Harm*, in THE ETHICS OF SELF-DEFENSE, *supra*, at 152.

20 See generally Quong, *supra* note 19; Ferzan, *supra* note 19.

21 TADROS, *supra* note 9, at 331.

22 See, e.g., Quong, *supra* note 19, at 557; Frowe, *supra* note 19, at 153.

*proportionality* means that the word *excessive* is ambiguous in this context. *B*'s response to *A* may be *excessive* in the sense of being *disproportionate* or in the sense of being *unnecessary*.

As this quick discussion shows, concepts surrounding the idea of self-defense can become complex in combination, but for our purposes the important point is that the idea of proportionality in self-defense should not be confused with the idea of proportionality in punishment, as the two ideas track distinct moral features. It is true that because one may make oneself *liable* to harm by attacking another, the question of *culpability*, which the idea of *desert* or *blameworthiness* tracks, sometimes appears to play an important role in self-defense analysis. However, that one's moral *desert* sometimes correlates with one's *liability* does not mean they are one and the same;<sup>23</sup> accordingly, it does not render proportionality in self-defense equivalent to proportionality in punishment.<sup>24</sup>

### C. *Proportionality in War*

Another place where the idea of proportionality plays an important role is in the context of war. As Thomas Hurka explains it, according to the principle of proportionality in war, "a war . . . is wrong if the destruction it causes is excessive, or out of proportion to, [its] benefits" and "an act in war is wrong if the harm it causes, especially to civilians, is out of proportion to its military benefits."<sup>25</sup> Unlike proportionality in punishment, which is about whether a punishment appropriately reflects the blameworthiness of a crime, and unlike proportionality in self-defense, which is about assessing permissibility of one's defensive action according to the extent to which the attacker the defender is defending against has made himself liable, proportionality in

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23 For a discussion, see generally HELEN FROWE, *THE ETHICS OF WAR AND PEACE: AN INTRODUCTION* (3d ed. 2023); TADROS, *supra* note 9, at 332 ("[T]he role that proportionality has played in the philosophy of punishment is quite different from the role that it has played in [self-defense and just war theory]."); Jeff McMahan, *Proportionate Defense*, 23 J. TRANSNAT'L L. & POL'Y 1, 22 (2013–2014) ("Proportionality is perhaps more familiar as a constraint on punishment than it is as a constraint on defense. It is therefore important to understand the ways in which proportionality in defense differs from proportionality in punishment."); Jonathan Quong, *Proportionality, Liability, and Defensive Harm*, 43 PHIL. & PUB. AFFS. 144, 146–47 (2015) ("[P]roportionality in defensive harm differs in crucial respects from proportionality in punishment, and so it is important to keep these domains distinct.").

24 For a discussion of the possibility of limiting amounts of punishment with the self-defense principle of proportionality rather than the traditional punishment principle of proportionality, see TADROS, *supra* note 9, at 332.

25 Thomas Hurka, *Proportionality and Necessity*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY* 127, 127–28 (Larry May ed., 2008).

war is about weighing various consequences and asking if the benefits of a war or a particular act in war outweigh the costs.

This statement, however, needs to be qualified. While proportionality in war is typically discussed in terms of weighing costs and benefits against one another, an influential discussion by Jeff McMahan has made it commonplace for theorists of war to distinguish between *narrow proportionality* and *wide proportionality*.<sup>26</sup> Under this account, *narrow proportionality* deploys the considerations we saw above in the self-defense context. In war, targets of a potential military attack may have made themselves *liable* to be attacked by, for instance, engaging in an act of aggression. The proportionality analysis would be similar to one in the context of self-defense: to what extent did the aggressors make themselves liable to the potential attack? In the process of that attack, however, if, say, civilian bystanders who have not made themselves liable to be attacked are to be harmed, then the attack can also be assessed in part by asking whether the benefits of the attack outweigh the costs the attack is likely to impose overall. This latter type of proportionality is *wide proportionality*.

There are two more parallels to draw to the self-defense framework. As in the self-defense context, the concept of *necessity* plays a role in the context of war as well in the sense that even if a military attack is proportionate (in both senses), it may still be morally problematic if a less harmful attack could have achieved the same objective. Also, even in the self-defense context, one may draw a distinction between *narrow* and *wide* proportionality, though such discussions are not common. Specifically, if a person attacks an aggressor in self-defense, the narrow proportionality analysis would focus on the aggressor's liability (to what extent have they forfeited their right to be free from harm?), and the wide proportionality analysis would consider the overall costs of the defensive attack (might innocent bystanders be harmed?).

Proportionality in self-defense and proportionality in war are thus analogous: in both contexts, one may employ the ideas of narrow proportionality, wide proportionality, and necessity. Proportionality in punishment is distinct from these ideas.

#### D. *Proportionality in Constitutional Law*

Proportionality is central also in constitutional law. As Moshe Cohen-Eliya and Iddo Porat observe, "European constitutional lawyers are concerned predominantly with one thing – proportionality!"<sup>27</sup> They continue: "Whether you are a German constitutional lawyer, an

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26 See McMahan, *supra* note 23, at 7–8.

27 MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 2 (2013).



Italian, a French or an English one, you will invariably have been debating and talking about the proportionality doctrine as part of your work.”<sup>28</sup> And it is not only European constitutional lawyers who use the idea of proportionality; it is important also “if you [are] a Canadian, Australian, Indian, Israeli, or a Chinese lawyer.”<sup>29</sup> A large literature on the constitutional doctrine of proportionality has developed over time, mostly by work of legal academics outside the United States.<sup>30</sup>

Proportionality in constitutional law concerns conflicts between rights and societal interests, which may sometimes necessitate placing limitations on the scope of rights. Proportionality in constitutional law formalizes this analytic process of placing limitations on rights in light of competing considerations with the following set of steps, as summarized by Cohen-Eliya and Porat:

[W]henever the government infringes upon a constitutionally protected right, the proportionality principle requires that the government show, first, that its objective is legitimate and important; second, that the means chosen were rationally connected to achieve that objective . . . ; third, that no less drastic means were available . . . ; and fourth, that the benefit from realizing the objective exceeds the harm to the right . . . .<sup>31</sup>

As Cohen-Eliya and Porat also point out, the United States has its own version of the proportionality doctrine in constitutional law—balancing, which can specify how constitutional rights may be limited in particular instances in light of important governmental interests.<sup>32</sup> There is an extensive debate about similarities and differences between balancing and proportionality, but the core idea of comparing costs and benefits of a government action infringing on an individual right is present in both balancing and proportionality. Additionally, to the extent that the proportionality doctrine involves a weighing of costs and benefits, it also bears some similarity to the idea of *wide* proportionality, discussed above in the context of war and self-defense. Proportionality in punishment, however, is not about weighing and balancing costs and benefits against one another, so it is distinct, not just

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28 *Id.*

29 *Id.*

30 *See, e.g.*, ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002); JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013); COHEN-ELIYA & PORAT, *supra* note 27; GRANT HUSCROFT, BRADLEY W. MILLER & GRÉGOIRE WEBBER, PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (2014).

31 COHEN-ELIYA & PORAT, *supra* note 27, at 2.

32 *Id.* at 3.

from proportionality in self-defense and war, but also from proportionality in constitutional law.

## II. PROPORTIONALITY IN THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION: THREE FALLACIES

Under the Cruel and Unusual Punishments Clause of the Eighth Amendment of the U.S. Constitution, proportionality is central to evaluating the constitutionality of certain punishments.<sup>33</sup> For instance, constitutionally permitted punishments such as death and imprisonment may nevertheless be unconstitutional because they are disproportionate to the crimes for which they are imposed.<sup>34</sup> Concededly, the Supreme Court's opinions in this area have not always been very clear. However, as I have argued previously in a series of articles, there is a coherent account one could give, based on those opinions, of the Eighth Amendment limitation on disproportionate punishments.<sup>35</sup>

In this Part, I will discuss a few prominent and influential articles that address the idea of proportionality in the Eighth Amendment to illustrate how the term "proportionality" can end up inviting and introducing confusing and erroneous discussions. For ease of discussion, this Part is structured in terms of the three following fallacies: 1) there is no one theory of proportionality in Eighth Amendment jurisprudence; 2) proportionality in the Eighth Amendment means something other than proportionality in punishment; and 3) proportionality in the Eighth Amendment is the same as proportionality in constitutional law generally.

### A. *First Fallacy: "There Is No One Theory of Proportionality in Eighth Amendment Jurisprudence."*

The Supreme Court jurisprudence on excessive punishment in the Eighth Amendment is a mess. However, the fact that the Court has failed to produce a clean and consistent body of caselaw does not mean that all critiques of its Eighth Amendment proportionality jurisprudence are correct. It certainly is tempting to throw up one's hands and declare the project of making sense of the existing caselaw hopeless, but that is a mistake.

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33 U.S. CONST. amend. VIII.

34 See Lee, *supra* note 11, at 678.

35 See, e.g., Lee, *supra* note 11; Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012) [hereinafter Lee, *Why Proportionality Matters*]; Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58 (2010) [hereinafter Lee, *Purposes of Punishment Test*].

One example of such a mistake is in John Stinneford's 2011 article, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, in which he argues, among other things, that "the Supreme Court has never clearly defined proportionality."<sup>36</sup> This statement overstates the case. One may point to any number of problems with the Supreme Court jurisprudence in this area, but the bare argument that the Court has not clearly defined proportionality in the Eighth Amendment context gives the Court too little credit. A closely related claim that Stinneford makes is that "[t]he Supreme Court has used . . . [different] theories [of punishment] to determine the proportionality of punishments but in a highly inconsistent manner."<sup>37</sup> This claim is problematic as well. Yes, the Court has been *inconsistent*, and, yes, it has pushed the law in different directions over time, but it has not been inconsistent *because* it has used different theories of punishment to determine the proportionality of punishment.

Contrary to Stinneford's claim that "the Supreme Court has never clearly defined proportionality," the Court has in fact clearly defined proportionality and applied it multiple times since 1977.<sup>38</sup> In *Coker v. Georgia*, which held in 1977 that the death penalty for the crime of rape is unconstitutionally excessive,<sup>39</sup> the plurality opinion clearly defined proportionality when it said that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly *out of proportion* to the severity of the crime."<sup>40</sup>

We might call the first prong of the *Coker* test the "pointless suffering test" and the second prong the "proportionality test," and it is important to keep them separate, as they say different things. The *Coker* opinion was clear that "[a] punishment might fail the test on *either* ground"<sup>41</sup> and proceeded to hold under the *proportionality* test that the death sentence for the crime of rape is unconstitutional. Justice White's opinion reasoned that rape was reprehensible, but not as

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36 John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 904 (2011).

37 *Id.* at 915.

38 What follows is a restatement (and an update to incorporate subsequent legal developments) of an argument that first appeared in my 2005 article in the *Virginia Law Review* and draws from it. See Lee, *supra* note 11, at 721–25. Stinneford's article came out several years later in 2011, but it is not clear whether he agrees or disagrees with my reading of the cases since he does not address my article at all, other than by dropping a brief citation to it in a footnote. See Stinneford, *supra* note 36, at 908 n.33.

39 433 U.S. 584, 592 (1977) (plurality opinion).

40 *Id.* (emphasis added) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion)).

41 *Id.* (emphasis added).

reprehensible as murder because it did not “involve the unjustified taking of human life.”<sup>42</sup> The Court also made the point that in Georgia, one could commit murder “with malice aforethought” but still not be punished with death without aggravating circumstances, and therefore found it “difficult to accept the notion . . . that the rapist . . . should be punished more heavily than the deliberate killer.”<sup>43</sup> The Court finally added that “[b]ecause the death sentence is a *disproportionate 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.*”<sup>44</sup>

Things became somewhat muddled after this moment, but the Court did arrive at a series of conclusions over time that are direct applications of the proportionality test component of the *Coker* plurality. First, in *Enmund v. Florida* in 1982, the Court considered the death penalty for accomplice liability in felony murders when there was no evidence that the defendant in question killed, attempted to kill, or intended to kill anyone during the course of the robbery in which he participated.<sup>45</sup> The Court stated that it had “no doubt that robbery is a serious crime deserving serious punishment” but that it did not “compare with murder.”<sup>46</sup> Even though a murder did take place during the course of the robbery, the Court pointed out, the defendant in the case did not kill or attempt to kill, and there was no evidence of an intent to kill on his part. The Court concluded:

Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims in the case]. *This was impermissible under the Eighth Amendment.*<sup>47</sup>

Then, although *Tison v. Arizona*<sup>48</sup> seriously limited the holding of *Enmund* in 1988, the Court did not stray from the proportionality test of *Coker*. The Court observed that “[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”<sup>49</sup> Noting that “reckless indifference to the value of human life may be every bit as shocking to the moral sense as

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42 *Id.* at 598.

43 *Id.* at 600.

44 *Id.* at 592 n.4 (emphasis added).

45 458 U.S. 782, 787 (1982).

46 *Id.* at 797 (quoting *Coker*, 433 U.S. at 598).

47 *Id.* at 798 (emphasis added).

48 481 U.S. 137, 157–58 (1987).

49 *Id.* at 156.

an ‘intent to kill,’” the Court held that the death penalty may be imposed on a person who “knowingly engag[es] in criminal activities known to carry a grave risk of death” even if he does not himself kill, attempt to kill, or intend to kill.<sup>50</sup>

The Court again addressed the question of proportionality in *Thompson v. Oklahoma* in 1988 and held that those fifteen years or younger are less culpable than adults and therefore not deserving of death.<sup>51</sup> Similarly, in *Atkins v. Virginia* in 2002, the Court considered the question of whether the Eighth Amendment permitted states to impose the death penalty on the mentally disabled by focusing on the relative culpability question.<sup>52</sup> The Court stated, referring to the mentally disabled, that “[t]heir [mental] deficiencies . . . diminish their personal culpability.”<sup>53</sup> Then, observing that “[s]ince *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes” and has sought “to ensure that only the most deserving of execution are put to death,” the Court concluded that the death penalty was excessive for the mentally disabled.<sup>54</sup> Also, in *Roper v. Simmons*, the Court stated in 2005 that “[juveniles’] irresponsible conduct is not as morally reprehensible as that of an adult”<sup>55</sup> and that “juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”<sup>56</sup> Noting “the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders,” the Court concluded that the death penalty should not be imposed on juvenile offenders because they “cannot with reliability be classified among the worst offenders.”<sup>57</sup>

The Court employed a similar reasoning in *Kennedy v. Louisiana* in 2008 and *Graham v. Florida* in 2010.<sup>58</sup> In *Kennedy*, which reaffirmed the holding of *Coker* and held that the death penalty was unconstitutionally excessive for the crime of rape even if the victim is a child, the Court explained its decision by stating that “there is a distinction between intentional first-degree murder on the one hand and non-homicide crimes against individual persons, even including child rape, on the other.”<sup>59</sup> And in *Graham*, the Court held that the sentence of

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50 *Id.* at 157.

51 *See* 487 U.S. 815, 838 (1988) (plurality opinion).

52 *See* 536 U.S. 304, 306–07 (2002).

53 *Id.* at 318.

54 *Id.* at 319.

55 543 U.S. 551, 570 (2005) (quoting *Thompson*, 487 U.S. at 835).

56 *Id.*

57 *Id.* at 568–69.

58 *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Graham v. Florida*, 560 U.S. 48 (2010).

59 *Kennedy*, 554 U.S. at 407, 438, 446.

life without parole for a juvenile offender for a nonhomicide crime was unconstitutionally excessive.<sup>60</sup> In doing so, the Court restated the *Coker* Court's position 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."<sup>61</sup> For its holding that the punishment was excessive, the Court noted that "compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."<sup>62</sup>

This discussion is highly abbreviated. There is a lot more going on in these cases. The point here is not that the Supreme Court jurisprudence in this area is clear or elegant; the point rather is that there is a discernible theory of proportionality in these cases, which can justify their outcomes in a theoretically spare and normatively defensible manner. So why does Stinneford claim that "the Supreme Court has never clearly defined proportionality"?<sup>63</sup>

As far as I can tell, Stinneford's basis for his claim is the following:

There are four primary theories of punishment that might serve as a touchstone for proportionality review: retribution, deterrence, incapacitation, and rehabilitation. The Supreme Court has used these theories to determine the proportionality of punishments but in a highly inconsistent manner. At times, the Court has held that legislatures must use retribution as the baseline for proportionality. At others, it has permitted legislatures to select from among some but not all of the four theories of punishment. The Court's current position appears to be that a legislature is free to choose from among any of the four major theories of punishment and that a punishment is not excessive if it satisfies any of the four.<sup>64</sup>

For ease of discussion, let us examine these claims one by one, proposition by proposition:

Proposition 1. "At times, the Court has held that legislatures must use retribution as the baseline for proportionality."

Proposition 2. "At others, it has permitted legislatures to select from among some but not all of the four theories of punishment."

Proposition 3. "The Court's current position appears to be that a legislature is free to choose from among any of the four major theories of punishment and that a punishment is not excessive if it satisfies any of the four."

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60 *Graham*, 560 U.S. at 48, 74.

61 *Id.* at 72.

62 *Id.* at 69.

63 Stinneford, *supra* note 36, at 904.

64 *Id.* at 915 (footnotes omitted).

Proposition 1, for which Stinneford cites *Coker*,<sup>65</sup> is correct. Proposition 2 is correct, but there are two issues with the complaint. First, that the Court sometimes mentions just two traditional purposes of punishment (namely retribution and deterrence) as opposed to all four has not created a problem, so it is an odd complaint to make. Second, and more seriously, Proposition 2 does *not* support Stinneford's charge that the Court is being *inconsistent*. Yes, the Court "*has permitted*" the legislature to pick among different theories of punishment, but that does not conflict with Proposition 1 since the Court can permit legislatures to institute a punishment for *some* of the common reasons to punish, *so long as* they stay within the constraint as defined by the retributive theory. That is, Proposition 1 and Proposition 2 are consistent with each other as they can be read together as saying that the legislature can enact criminal laws and spell out consequences for violating them for any number of reasons (Proposition 2) as long as the laws do not authorize punishments beyond what persons deserve (Proposition 1). Proposition 2 does *not* mean that as long as the purpose of a punishment sought to be advanced is one of the purposes of punishment, such as retribution and deterrence, the punishment is constitutionally permitted; it merely allows the legislature to choose which purpose of punishment to advance.

For Proposition 3, Stinneford cites *Graham*'s statement that "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification" for the punishment at issue in the case.<sup>66</sup> But the sentence Stinneford quotes is not the same as Proposition 3, so his citation does not support his claim. In that quote, the *Graham* Court was simply applying the "pointless suffering test" of *Coker*. Saying that a punishment does not advance any of the purposes of punishment and is thus unconstitutional is not the same as saying that "a legislature is free to choose from among any of the four major theories of punishment and that a punishment is not excessive if it satisfies any of the four."<sup>67</sup> In other words, 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. Proposition 3 from Stinneford, by contrast, states a *sufficient* condition for constitutionality: as long as a punishment advances *some* objective, it is constitutional. It is a simple logical error to equate the two.

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65 *Id.* at 915 n.63.

66 *Id.* at 915 n.65 (quoting *Graham v. Florida*, 560 U.S. 48, 71 (2010)).

67 *Id.* at 915.

Is it possible, though, that Proposition 3 is true for a reason that Stinneford does not mention? I have some sympathy for Proposition 3, and I understand the complaint that the Court has at times described proportionality in relation to *any* purpose of punishment, not just retribution. In fact, I made a very similar criticism in my 2005 article, *The Constitutional Right Against Excessive Punishment*, after the Supreme Court's 2003 decision in *Ewing v. California*<sup>68</sup> rejected an excessiveness challenge on the theory that any punishment can be constitutionally upheld as long as it can be justified under any one of the traditional justifications of punishment.<sup>69</sup> I called this theory the "disjunctive theory" and criticized it extensively in that article.<sup>70</sup>

To elaborate, at the time I criticized the Court with this argument, it seemed as though the Court had made an error between *Harmelin v. Michigan* in 1991 and *Ewing* in 2003. The origin of the theory that as long as a punishment advances *some* objective, it is constitutionally permitted can be found in Justice Kennedy's concurring opinion in *Harmelin*.<sup>71</sup> *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.<sup>72</sup> 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."<sup>73</sup> This statement is uncontroversially true.

In *Ewing*, however, the plurality took this uncontroversial statement and turned it upside down when it held that 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 person with a criminal history.<sup>74</sup> After citing *Harmelin* for the proposition that

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68 538 U.S. 11 (2003) (plurality opinion).

69 Lee, *supra* note 11, at 736.

70 See *id.* at 736–42.

71 See *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment). This paragraph and the two paragraphs that follow draw from a discussion that first appeared in my 2005 article in the *Virginia Law Review*. See Lee, *supra* note 11, at 733–34, 743.

72 *Harmelin*, 501 U.S. at 961 (opinion of Scalia, J.); *id.* at 994–96 (Scalia, J.) (majority opinion). No full 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.

73 *Id.* at 999 (Kennedy, J., concurring in part and concurring in judgment).

74 *Ewing v. California*, 538 U.S. 11, 17–18, 30–31 (2003) (plurality opinion). As demonstrated above, Stinneford appears to have fallen into the same logical fallacy when he read Proposition 3 from *Graham*.



retribution, deterrence, incapacitation, and rehabilitation are all legitimate purposes of punishment, Justice O'Connor's plurality opinion 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."<sup>75</sup> The plurality then noted that "[r]ecidivism has long been recognized as a legitimate basis for increased punishment"<sup>76</sup> and that California has an interest in incapacitating repeat offenders and deterring crimes.<sup>77</sup> 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.'"<sup>78</sup>

But this is an error. As mentioned above, there is a difference between the principle that the Constitution does not mandate that the legislature 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 plurality opinion of *Ewing* did, with a disastrous consequence. Stinneford's Proposition 3, then, may be charitably understood as a criticism of *Ewing* even though his specific citation does not support it.

The problem with Stinneford's argument, however, is that the only time the Court appears to have embraced Proposition 3 (or what I have called the "disjunctive theory") was in *Ewing*. While the disjunctive theory seemed to be the dominant theory when my 2005 article was published, by the time Stinneford published his 2011 article, the problem was no longer as acute. It is not that the *Ewing* plurality opinion was ever explicitly rejected by the Court; it is more that subsequent cases are inconsistent with *Ewing* and may be read as a disavowal of *Ewing*.

For one thing, in 2008, the Court noted in *Kennedy* that "[a] punishment might fail the test on either" the proportionality test or the pointless suffering test, which directly contradicts the *Ewing* test.<sup>79</sup> More significantly, the Court went a step further while discussing the deterrence rationale in *Graham*, a noncapital case. After making the usual comment about the immaturity and reduced culpability of

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75 *Id.* at 25.

76 *Id.*

77 *Id.* at 26.

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

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

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.”<sup>80</sup> 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.”<sup>81</sup> 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.”<sup>82</sup>

These statements suggest that potential incapacitation or deterrence effects will not be reason enough to uphold certain punishments, which may mean that the Court was stepping away from the disjunctive theory of the *Ewing* plurality.<sup>83</sup> 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 the case most on point for *Graham* because it involved a noncapital sentence. 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.<sup>84</sup> *Graham*’s ruling changed this framework.<sup>85</sup>

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80 *Graham v. Florida*, 560 U.S. 48, 72 (2010).

81 *Id.*

82 *Id.* at 73.

83 This paragraph draws from a discussion that first appeared in my 2012 article in the *University of Pennsylvania Law Review*. See Lee, *Why Proportionality Matters*, *supra* note 35, at 1849–51.

84 See Lee, *supra* note 11, at 687–99 (tracking the development of caselaw 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).

85 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”); Lee, *Purposes of Punishment Test*, *supra* note 35, at 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*”:

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.<sup>86</sup> After *Graham*, it seemed that *Ewing* would no longer retain its status as the most important noncapital excessiveness case. In short, it seems that the Supreme Court in *Graham* came closer than ever to the theory of proportionality in the *Coker* case in 2010, and Stinneford’s criticism of the Court in 2011 for embracing Proposition 3, which echoed my criticism in 2005, was thus no longer on the mark.

In sum, the proposition that there is no one theory of proportionality in the Eighth Amendment jurisprudence is a fallacy. *Ewing* was a problematic case that threatened to upend this jurisprudence, but cases decided since then have mitigated the risk it created. It remains the case that the proportionality jurisprudence is messy and ineffectual, but that is not the same as lacking a unifying theory.

*B. Second Fallacy: “Proportionality in the Eighth Amendment Means Something Other Than Proportionality in Punishment.”*

One theme of this Essay is that the term “proportionality” is used widely but carelessly in the legal academic literature. Commentators have offered their own theories of proportionality in light of the Court’s inconsistent and confusing jurisprudence, but these theories are generally no better than the existing one in the Court’s jurisprudence and ultimately serve to further muddy the waters. Two articles illustrate this problem, one of which is Stinneford’s *Rethinking Proportionality*, published in 2011 and already discussed above, and the other is Alice Ristroph’s *Proportionality as a Principle of Limited Government*, published in 2005.<sup>87</sup>

First, a brief history of the literature. In 2005, I argued in *The Constitutional Right Against Excessive Punishment* in the *Virginia Law*

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*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.”).

<sup>86</sup> *Graham*, 560 U.S. at 61.

<sup>87</sup> Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005).

*Review* that “the Eighth Amendment ban on excessive punishment should be understood as a constitutional norm adapted from the retributivist principle that the harshness of punishment should not exceed the gravity of the crime—one should not be punished more harshly than one deserves.”<sup>88</sup> In the same year, in *Proportionality as a Principle of Limited Government* in the *Duke Law Journal*, Ristroph proposed an alternative, conflicting account of proportionality, which will be discussed in detail below.<sup>89</sup> In 2011, Stinneford appeared to take my side in the debate in *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause* in the *Virginia Law Review* and concluded, as I did in 2005, that “[p]unishments are unconstitutionally excessive if they are harsher than the defendant deserves as a retributive matter.”<sup>90</sup>

But Stinneford only *appeared* to take my side because the theory of “proportionality” that he proposes is, in the end, not a theory of proportionality in punishment at all. Take these sentences from the abstract to his article: “This Article also demonstrates that proportionality is a retributive concept, not a utilitarian one. Punishments are unconstitutionally excessive if they are harsher than the defendant deserves as a retributive matter. *Finally, this Article shows that proportionality should be measured primarily in relation to prior punishment practice.*”<sup>91</sup> After defending the italicized portion throughout the article, he restates it as follows: “A punishment’s proportionality is to be measured primarily in terms of prior practice. If the punishment is significantly harsher than the punishments that have previously been given for the offense, it is likely to be excessive relative to the offense.”<sup>92</sup>

As these quotes indicate, Stinneford’s “proportionality” proposal, despite his invocation of retribution as a guiding principle, is not about proportionality. His test for whether a punishment is unconstitutionally excessive under the Eighth Amendment is not whether a punishment is disproportionately harsh in relation to the crime, but instead whether “a punishment is significantly harsher than prior practice would permit for a given crime,” as “excessiveness should be measured primarily against the boundaries established by prior practice.”<sup>93</sup> The idea of proportionality plays a role in Stinneford’s scheme only at the second step. Only once “a punishment is found to be unusual” does

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88 Lee, *supra* note 11, at 683.

89 See Ristroph, *supra* note 87, at 268.

90 Stinneford, *supra* note 36, at 899. Stinneford does not, however, spell out how he agrees or disagrees with me or Ristroph, as both 2005 articles (by me and by Ristroph) are mentioned together in one footnote with almost no commentary. See *id.* at 908 n.33.

91 *Id.* at 899 (emphasis added).

92 *Id.* at 978.

93 *Id.* at 968.

one ask “whether it is cruel” and “whether the departure from prior practice appears to be justified as retribution.”<sup>94</sup>

So, even though he says elsewhere in the article “[p]unishments are unconstitutionally excessive if they are harsher than the defendant deserves as a retributive matter,”<sup>95</sup> that is not where he comes out in the end. According to Stinneford’s decision procedure, a punishment is not unconstitutionally excessive, if it is not “significantly harsher than prior practice would permit for a given crime,” as “measured primarily against the boundaries established by prior practice,” no matter how harsh the punishment and no matter how much harsher the punishment may be in relation to what “the defendant deserves as a retributive matter.”<sup>96</sup> A so-called “proportionality” test that blocks a proportionality-based challenge against a punishment simply because prior practice has allowed the punishment is not accurately described as a proportionality test.

To see this, consider the implications of his theory. It appears that, under the Stinneford framework, which directs that prior practice determine the appropriateness of a punishment, the Cruel and Unusual Punishments Clause could not be used to challenge excessive punishments brought about by the decades-old War on Drugs. Even if a punishment due to the War on Drugs is undeserving, it may not be disproportionate according to Stinneford’s framework because it does not depart from “the boundaries established by prior practice.” Stinneford confirms this implication of his argument by stating, remarkably, that *Coker*, which held that the death penalty is excessive for the crime of rape was, *wrongly decided*—or, in his words, “*almost certainly not correct*” since at the time “Georgia had a long and unbroken tradition of imposing the death penalty for this crime.”<sup>97</sup> *Coker* is the foundational case upon which all excessive punishment decisions were built, and, as explained above, it had an unusually clear articulation of the Court’s excessiveness and proportionality jurisprudence, so his conclusion that *Coker* was not correctly decided puts his proposal at odds with perhaps the most important proportionality opinion in the jurisprudence.

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94 *Id.* at 972. It is true that the sentence, “If the punishment is significantly harsher than the punishments that have previously been given for the offense, it is likely to be excessive relative to the offense,” says nothing about other bases for finding a punishment to be excessive, but it is clear from his article that he means to say, “If *and only if* the punishment is significantly harsher than the punishments that have previously been given for the offense, it is likely to be excessive relative to the offense.” *Id.* at 978.

95 *Id.* at 899.

96 *Id.* at 899, 968.

97 *Id.* at 977 (emphasis added).

Therefore, Stinneford says he is proposing a theory of excessive punishment that is about “rethinking proportionality” and is based on the retributive theory of punishment, but his theory is *not* about proportionality and is *not* based on the retributive theory of punishment. It is based rather on the proposition that prior practice can determine whether a punishment is constitutionally excessive. Proportionality does play a role, but only if a punishment is *not* supported by established prior practice. Such a theory runs contrary to legal innovations that, on proportionality grounds, seek to reduce punishments in situations where settled practice supports harsher punishments.

As I have emphasized, the academic literature on the Eighth Amendment limitation of punishment on proportionality grounds is riddled with confusion. Stinneford’s article, by proposing a “proportionality” theory that is not a proportionality theory, has contributed to the problem, and his article should not be understood to stand for the proposition that the Eighth Amendment contains a proportionality limitation that is based on a theory of retributivism.

*Proportionality as a Principle of Limited Government* by Ristroph has a different problem. In it, Ristroph urges that we stop thinking about proportionality in the Eighth Amendment context as “an ideal linked to particular theoretical accounts of the purpose of punishment—usually, retributive accounts” and that we instead think of proportionality as “an external limitation on the state’s power to incarcerate or execute individuals.”<sup>98</sup> Ristroph’s proposal may initially seem vague, but she is drawing an analogy to “proportionality requirements in a variety of other contexts,” wherein “[p]roportionality is . . . invoked to limit an exercise of state power according to the scope of the conduct or injury that the state seeks to address.”<sup>99</sup> Ristroph is arguing that proportionality in the context of the Eighth Amendment should be understood not as equivalent to proportionality in punishment, but as equivalent to proportionality in constitutional law. That Ristroph understands Eighth Amendment proportionality in this way is confirmed by her observation that “courts in Germany and Canada use well-established proportionality tests as tools to limit state power.”<sup>100</sup> She also cites the United States courts’ use of “narrow tailoring” as a form of proportionality test, and that, too, confirms my reading that she seeks to replace “proportionality in punishment” with “proportionality in constitutional law.”<sup>101</sup>

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98 Ristroph, *supra* note 87, at 266.

99 *Id.* at 269.

100 *Id.* at 292.

101 *Id.* at 293.

She is clear, though, that she is offering a revisionist reading of Eighth Amendment jurisprudence because she correctly notes that the *Coker* plurality clearly articulated a proportionality test when it stated that a punishment is excessive and unconstitutional “if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly *out of proportion* to the severity of the crime.”<sup>102</sup> She also correctly notes that the Court applied the general principle that “a criminal sentence must be proportionate to the crime for which the defendant has been convicted” in *Solem v. Helm*.<sup>103</sup> While she complains that Eighth Amendment jurisprudence is a “muddle,”<sup>104</sup> her chief complaint is that the Court “inextricably link[s]” proportionality “to a theory of penal purpose.”<sup>105</sup>

The problem with Ristroph’s analysis, however, is that she does not convincingly show that her proposal is superior to existing Eighth Amendment jurisprudence. She points out that because of the “assumption that proportionality is inextricably linked to a theory of penal purpose,” proportionality reviews are often considered suspect for reasons of “institutional competence, legislative prerogative, and the difficulty of developing an objective standard.”<sup>106</sup> But her proposed standard, “political proportionality” (or proportionality in constitutional law), is not any easier for the judiciary and can be rejected for the same reasons of institutional competence, separation of powers, and vagueness. Ristroph complains that “desert is a highly subjective moral notion that is ill-suited to serve as a constitutional standard” and adds that claims about whether, say, “juveniles or the mentally disabled” deserve the death penalty are “highly contested and perhaps also nonfalsifiable.”<sup>107</sup> But it is not clear whether her theory of “political proportionality” is any more determinate. In the end, she identifies a number of different ways of understanding proportionality but fails to show why we ought to favor one over the other.<sup>108</sup> Her prediction that a Court that is unsympathetic to complaints of excessive punishments would become more sympathetic to them once we go from proportionality in punishment to proportionality in constitutional law seems to me to be merely wishful thinking.

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102 *Id.* at 305–06 (emphasis added) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)).

103 *Id.* at 308 (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)).

104 *Id.* at 301.

105 *Id.* at 266, 310.

106 *Id.* at 266.

107 *Id.* at 316.

108 McLeod makes the same point in her article. See McLeod, *supra* note 2, at 522.

Both Stinneford and Ristroph are examples of scholars who have attempted to develop alternative understandings of proportionality in the context of the Eighth Amendment jurisprudence. Stinneford has sought to replace proportionality in punishment with a non-proportionality-related test, and Ristroph has sought to replace proportionality in punishment with proportionality in constitutional law. Neither reading can be squared with Eighth Amendment jurisprudence (for Ristroph at least, of course, that is precisely the point), and both are instantiations of the second fallacy.

C. *Third Fallacy: "Proportionality in the Eighth Amendment Is the Same as Proportionality in Constitutional Law Generally."*

Let me illustrate now another fallacy, which is the view that the Eighth Amendment is the same as proportionality in constitutional law generally. Because the sameness of proportionality in punishment and proportionality in constitutional law is simply assumed, without argument, the best way to see the error is by quoting passages where the two concepts of proportionality are collapsed together and used almost interchangeably. Vicki Jackson repeatedly makes this error in her 2015 article, *Constitutional Law in an Age of Proportionality*.<sup>109</sup>

Consider the following passage: "Proportionality, accepted as a general principle of constitutional law by many countries, requires that government intrusions on freedoms be justified, that greater intrusions have stronger justifications, and that punishments reflect the relative severity of the offense."<sup>110</sup>

Notice how Jackson goes from "a general principle of constitutional law" to the idea that "punishments reflect the relative severity of the offense" without stopping and treats them as if they are the same idea.

Here is another:

"Proportionality" is today accepted as a general principle of law by constitutional courts and international tribunals around the world. "Proportionality review," a structured form of doctrine, now flows across national lines, a seemingly common methodology for evaluating many constitutional and human rights claims. The United States is often viewed as an outlier in this transnational embrace of proportionality in constitutional law. Yet some areas of U.S. constitutional law embrace proportionality as a principle, as in Eighth Amendment case law, or contain other elements of the structured "proportionality review" widely used in foreign

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109 Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

110 *Id.* at 3094.



constitutional jurisprudence, including the inquiry into “narrow tailoring” or “less restrictive alternatives” found in U.S. strict scrutiny.<sup>111</sup>

Here, too, Jackson goes from proportionality in constitutional law to proportionality in punishment and back again to proportionality in constitutional law, seemingly unaware that she is using the term “proportionality” in different ways.

Another example is found in this passage:

Proportionality as a principle is embodied in a number of current areas of U.S. constitutional law: for example, in Eighth Amendment “cruel and unusual punishments” . . . case law; . . . and in Takings Clause cases requiring “rough proportionality” between conditions on zoning variances and the benefits of the variance to the property owner. In each of these areas, the principle of proportionality imposes some limit on otherwise authorized government action, a limit connected to a sense of fairness to individuals or a desire to prevent government abuse of power.<sup>112</sup>

And here is one more example:

Americans are already familiar with the legal principle of proportionality in constitutional law. The Eighth Amendment’s case law has long recognized that punishments grossly disproportionate to the severity of the offense are prohibited as cruel and unusual punishment . . . . Since the 1990s the Court has invoked proportionality in several other constitutional contexts . . . . Under the Takings Clause, conditions for zoning permits must have “*rough proportionality*” to the effects of the proposed use of the property. Furthermore, the “undue burden” standard is now the controlling inquiry in the Court’s abortion cases, invoking in its language and application a concern for the reasonableness of regulations affecting women’s choices to abort their pregnancies prior to viability. All of these standards invoke proportionality in resolving individual rights questions . . . . Moreover, the Court has extended proportionality standards to federalism issues: as of 1997, legislation under Section 5 of the Fourteenth Amendment must have “congruence and proportionality” to conduct that Section 1 prohibits.

As these examples suggest, U.S. courts have found the concept of proportionality increasingly attractive in resolving interpretive challenges, prompting scholars to identify the roots of proportionality doctrines in U.S. constitutional law.<sup>113</sup>

My quarrel here is not with Jackson’s argument that proportionality in constitutional law seen in other countries’ courts should play a

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111 *Id.* at 3096 (footnotes omitted).

112 *Id.* at 3098.

113 *Id.* at 3104–05 (footnotes omitted).

larger role in the United States. The problem rather is that in trying to shore up her argument that the principle of proportionality (in constitutional law) is commonplace in the U.S. law, she draws from a jurisprudence that operates by a different logic, namely proportionality in punishment. Jackson has lots of other examples to draw from, and her overall thesis does not fail because of this mistake. At the same time, we should be clear that what appears to be the first (and perhaps in her mind the best) example she wants to mention to support her argument is not an example of proportionality in constitutional law, so her argument is weaker than she makes it seem.

There are two theories of excessiveness in Eighth Amendment jurisprudence that bear more resemblance to proportionality in constitutional law; one is what I referred to above as the pointless suffering test and the other is the disjunctive test. As discussed above, the pointless suffering test says that a punishment that does not advance a goal of punishment is unconstitutionally excessive, whereas the disjunctive test says that a punishment that advances any goal of punishment is constitutionally permissible. Could we save Jackson's proportionality analysis by positing instead that perhaps she is referring to either of these two versions of proportionality in Eighth Amendment jurisprudence? Even if we do, the error of confusing two different tests and using them interchangeably remains. Notice that Ristroph very clearly proposes eliminating one proportionality test and introducing a different proportionality test in its place; Jackson does not see the need for such a proposal because she treats them as one and the same and goes from one to another and back seemingly unaware of activating different conceptual apparatuses in her arguments.

This confusion is not merely semantic; if taken up by courts and commentators, it could end up unduly limiting the right against excessive punishment. To see this, let us revisit the *Graham* case. As we saw above, the Court noted the immaturity and reduced culpability of juveniles and then stated 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.”<sup>114</sup> The Court then noted 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.”<sup>115</sup> Similarly, in discussing the incapacitation rationale, the Court noted that “[i]ncapacitation cannot override all other

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114 *Graham v. Florida*, 560 U.S. 48, 72 (2010).

115 *Id.*

considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."<sup>116</sup>

What if instead of applying the proportionality in punishment constraint, the Court had applied the proportionality in constitutional law constraint? Since Jackson treats them to be one and the same, one could imagine a similarly confused Court saying it is applying the former while actually applying the latter. And what would happen then? It would all depend on how it is done, but let us try to apply the typical formulation we saw above:

[T]he proportionality principle [in constitutional law] requires that the government show, first, that its objective is legitimate and important; second, that the means chosen were rationally connected to achieve that objective . . . ; third, that no less drastic means were available . . . ; and fourth, that the benefit from realizing the objective exceeds the harm to the right . . . .<sup>117</sup>

So, one could imagine a court applying this test and concluding that despite the fact that juveniles are less culpable than adults, as long as the government has a legitimate objective (to reduce harm in society from criminal acts), the means it has chosen are rationally connected to achieve that objective (through deterrence and incapacitation rationales), no less drastic means are available (as other methods are unlikely to work, or at least so the claim might go), and that the deterrence and incapacitation benefits exceed the harm to the juvenile defendants. Of course, one could imagine a court applying the proportionality test in a more restrictive way, but it is just as easy to imagine a court applying the test in a more deferential way.<sup>118</sup>

By contrast, a court that sticks to the idea of proportionality in punishment would have a ready answer to the government's argument that deterrence and incapacitation policies should trump the need to protect the right juvenile defendants have against disproportionate punishments: because the principle of proportionality in punishment does not allow punishments beyond what the defendants deserve, the fact that there are law enforcement benefits to be had by punishing them disproportionately is of no moment. In other words, the third fallacy of confusing proportionality in punishment with proportionality in constitutional law exemplified in Jackson's article might end up turning "the Eighth Amendment's rule against disproportionate sentences" into "a nullity" as the *Graham* Court warned.<sup>119</sup>

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116 *Id.* at 73.

117 COHEN-ELIYA & PORAT, *supra* note 27, at 2.

118 Compare *Ewing v. California*, 538 U.S. 11, 35–53 (2003) (Breyer, J., dissenting), *with id.* at 14–31 (plurality opinion).

119 *Graham*, 560 U.S. at 73.

### III. HOW TO DO THINGS WITH PROPORTIONALITIES

Now that we have delved into the nuances of proportionality and recognized some common pitfalls, we can think about how we can apply the concept of proportionality to think through a problem. I return to McLeod's article *Preventing Undeserved Punishment* as a vehicle to illustrate different uses of proportionality in assessments of our system of criminal law and punishment. As noted above in the Introduction, McLeod suggests that we reform the sentencing process as follows:

[S]entencing courts should make desert the first and foremost question they address. The discretionary sentencing process should begin with a determination of how much punishment the defendant deserves. The sentencing court should state the upper bound of deserved punishment on the record, thereby fixing the ceiling of just punishment. Only after establishing the upper bound of deserved punishment should the judge go on to decide what specific penalty—not to exceed the deserved maximum—would best serve the full range of statutory sentencing goals (usually including not only retribution but also utilitarian goals such as deterrence, incapacitation, and rehabilitation).<sup>120</sup>

The basic idea, then, is for a judge with “significant discretion to select what penalties defendants will receive”<sup>121</sup> to *first* apply the principle of proportionality in punishment to set a ceiling *and then* decide what punishment to give after considering all purposes of punishment. This framework resembles aspects of Eighth Amendment jurisprudence as outlined above and proposed in my previous work. That is, the Eighth Amendment proportionality review process directs that punishments given for any number of legitimate reasons are constitutionally permitted *so long as* they stay within the constraints defined by the principle of proportionality in punishment (or, in McLeod's terms, the principle of desert in punishment). Similarly, McLeod suggests that the judges when sentencing pursue different legitimate goals of punishment, but only within the constraint of proportionality in punishment.

McLeod, unlike many others writing in the field, does not suffer from any of the confusions that can arise from the term “proportionality,” though we might ask whether another kind of proportionality could be helpful as we think through the problem of mass incarceration and overpunishment. But before we get to that, let us try to understand her proposal in more detail by raising some other questions.

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120 McLeod, *supra* note 2, at 500 (footnotes omitted).

121 *Id.* at 498.

First, we might wonder whether McLeod's proposal can make even a small dent in our current crisis. As commonly noted, ninety-five percent of cases prosecuted end with guilty pleas.<sup>122</sup> And as McLeod makes clear, the scope of her proposed reform is limited only to "tried cases," as opposed to cases in which defendants are convicted after guilty pleas.<sup>123</sup> She argues that this limitation is reasonable because "[p]lea bargains by their nature tend to reduce punishment exposure" and "[d]efendants who insist on trial, by contrast, face a well-known and widely criticized 'trial penalt[y].'"<sup>124</sup>

To better understand the significance of this limitation on the potential impact of McLeod's proposal, it is worth noting the argument that proportionality is not even at the root of our criminal justice problems.<sup>125</sup> For instance, we might assume that mass incarceration is directly linked to problems of proportionality: as lengths of punishments increase, so too would prison population, and therefore we could work towards dismantling mass incarceration by combatting disproportionate punishments.<sup>126</sup> However, while long sentences may grab our attention, the reality is that extremely disproportionate sentences are rare, and sentence lengths do not actually explain the size of the prison population. It is true that prison sentences in the books have increased over time as a result of tougher sentencing laws, but the actual amount of time served by individuals appears not to have increased much. What *has* changed, according to these studies, is the number of people who have gone to prison. The reason the prison population has increased over time, then, is not because people are serving longer sentences—they are not—but is because more people are going to prison than before.<sup>127</sup>

If it is true that sentence lengths and individual time served have not driven the sharp rise in the prison population, does McLeod's proposal, which is directed only at preventing disproportionate punishments, offer a solution that would make a difference? Anticipating the objection that her proposal will not make a big difference, she argues that the proposed reform would have an impact on the plea bargaining process because "[t]he use of anticipated draconian trial penalties as

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122 JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 132 (2017).

123 McLeod, *supra* note 2, at 547.

124 *Id.* (final alteration in original).

125 See Vincent Chiao, *Mass Incarceration and the Theory of Punishment*, 11 CRIM. L. & PHIL. 431, 442–45 (2017).

126 The following discussion draws from my chapter *Proportionality in Punishment* in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW. See Lee, *supra* note 17.

127 See PFAFF, *supra* note 122, at 6.

a prosecutorial tool to threaten defendants into a bad bargain would diminish.”<sup>128</sup>

This is a very important argument, and it is worth spending some time unpacking. To that end, consider the case of *Bordenkircher v. Hayes*.<sup>129</sup> Hayes was charged with the crime of forging a check in the amount of \$88.30, a crime which carried the sentence of two to ten years in prison at the time.<sup>130</sup> The prosecutor offered to recommend a sentence of five years in prison if Hayes pleaded guilty.<sup>131</sup> Otherwise, the prosecutor told Hayes, he would charge Hayes as a habitual offender, which would subject Hayes, with his previous convictions, to a mandatory life sentence.<sup>132</sup> When Hayes refused to plead guilty, the prosecutor carried out his threat, and Hayes was subsequently convicted and sentenced to life in prison. The Supreme Court upheld the conviction and the punishment.<sup>133</sup> That Hayes was a repeat offender does complicate the proportionality calculation a bit, but a life sentence for the crime of forging a check, even by a person with a criminal history, seems disproportionate.<sup>134</sup>

For our purposes, the important feature of this example is the five-year sentence offered by the prosecutor. A criminal defendant facing the sort of choice that Hayes did would feel an enormous pressure to plead guilty and take the five-year sentence, since the alternative is a potential life sentence after a trial. This would generate an easy conviction for the prosecutor.

The ease of conviction is accordingly a function of the degree to which a prosecutor can array negative consequences against the defendant and their ability to add or drop charges. The more powerful the prosecutor is in these respects, the more leverage they have over the defendant. And there is a substantial legal framework in place that enhances the prosecutor’s bargaining position. Here is a partial list of laws by way of illustration, some of which McLeod discusses<sup>135</sup> and some of which have already been mentioned:

- *Increases in Sentences*: Obviously, by increasing sentences for crimes, legislators strengthen the prosecutor’s bargaining position.

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128 McLeod, *supra* note 2, at 547.

129 434 U.S. 357 (1978).

130 *Id.* at 358.

131 *Id.*

132 *Id.* at 358–59.

133 *Id.* at 359, 365.

134 For discussions, see Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 574–75 (2009); and Youngjae Lee, *Repeat Offenders and the Question of Desert*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 49, 49–50 (Julian V Roberts & Andrew von Hirsch eds., 2010).

135 See McLeod, *supra* note 2, at 512–13.

- *Criminal History Enhancements*: As we saw in the *Hayes* case, laws that increase punishments for those with a criminal history can significantly impact the severity of sentences.
- *Mandatory Minimum Sentences*: If certain charges come with mandatory minimum sentences, judges are required to sentence at a certain minimum level. Mandatory minimums thus enable the prosecutor to make credible threats with predictable consequences.
- *Criminalization of Risk Creation and Proxy Indicators*: Sometimes the state criminalizes certain conduct not because it directly causes harm but because it is thought to lead to or contribute to harm. Various possession offenses—drugs, weapons, and child pornography—may be categorized this way. Similarly, the state also criminalizes conduct that may in itself be morally neutral but relatively easy to detect and is associated with criminal behavior. We may call such conduct “proxy indicators.” Money laundering is an example of criminalization of a proxy indicator, as is the requirement that those traveling internationally declare the amount of currency they are carrying over a certain amount. Drug possession with intent to distribute can fall under this heading, too.<sup>136</sup>
- *Overlapping Crimes*: Sometimes a single transaction can give rise to violations of multiple prohibitions. Say a person works with another person to sell drugs near a school while carrying a firearm. Such a person may be facing convictions for, among other things, 1) possession of drugs with intent to distribute near a school, 2) conspiring to use a firearm in furtherance of a drug crime, and 3) possessing a firearm near a school.<sup>137</sup> A prosecutor can threaten a defendant to charge and attempt to convict for all three counts unless the defendant pleads guilty.
- *Units of Crimes*: A person can be convicted of, for example, child pornography, under multiple counts if the law permits the prosecutor to charge the defendant one count for every image, even if the defendant acquired all the images in a single transaction. Say that a person has twenty images of child pornography, and the law specifies ten years in prison per image. In such cases, the prosecutor can decide to charge the person with anywhere between one and twenty counts and tell

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136 For discussions of such crimes, see Youngjae Lee, *Mala Prohibita, the Wrongfulness Constraint, and the Problem of Overcriminalization*, 41 L. & PHIL. 375, 380–82 (2022); Youngjae Lee, *Mala Prohibita and Proportionality*, 15 CRIM. L. & PHIL. 425, 426–28 (2021).

137 See *United States v. Cruz-Rodríguez*, 541 F.3d 19, 24–25 (1st Cir. 2008).

the defendant to either plead guilty and make most of these counts go away or fight for an acquittal and risk being sentenced to 200 years in prison.<sup>138</sup>

- *Consecutive Sentences*: The two factors just outlined, overlapping crimes and units of crimes, would not necessarily increase the overall punishment one faces, as sentences for multiple counts can run concurrently. However, if the option of running them consecutively is available, the stakes rise dramatically for the defendant.<sup>139</sup>

We began this discussion with the observation that the problem of mass incarceration appears not to have been caused by excessive punishments (given that lengths of sentences served have not increased over time). Upon closer examination of the plea bargaining process, however, it becomes clear that increases in punishments and in criminalization on the books can impact the size of the prison population even if the actual sentences are “reasonable.” This is because they strengthen the prosecutor’s bargaining position and enhance the government’s ability to induce guilty pleas through offers and threats to drop and add charges.

Of course, incentives to plead guilty are not always problematic, so the question is really one of regulation of the plea process. It is beyond the scope of this Essay to comprehensively undertake this task, but it is still helpful to consider some ways in which we might reduce coercive or problematic guilty pleas. For example, we could simply ask whether the guilty pleas are voluntary.<sup>140</sup> We could also examine whether there has been effective assistance of counsel throughout the process.<sup>141</sup> These two methods are indirect, process-focused ways of getting at troublesome prosecutorial threats. Yet another way—most relevant for this Essay—is to directly ask whether the threats are permissible, defined in terms of whether the threatened punishment would be proportionate to the defendant’s crime or crimes. According to this view, prosecutors should be permitted to threaten the defendant only with those negative consequences that the state would actually be permitted to impose, assuming that the state is not permitted to impose disproportionate punishments.<sup>142</sup>

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138 See *State v. Berger*, 134 P.3d 378, 380 (Ariz. 2006) (en banc).

139 See *Oregon v. Ice*, 555 U.S. 160, 163–64 (2009). For a discussion of “charge stacking” enabled by the last three factors listed, see Youngjae Lee, *Multiple Offenders and the Question of Desert*, in *SENTENCING MULTIPLE CRIMES* 113 (Jesper Ryberg et al. eds., 2018).

140 See generally *Brady v. United States*, 397 U.S. 742 (1970).

141 See generally *Missouri v. Frye*, 566 U.S. 134 (2012).

142 For a discussion of “coercion” and “threats” that is most conducive to this line of thinking, see Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45, 56–57 (2002).



Let us now revisit the initial argument that the problem of mass incarceration is not a problem of excessive punishments but is rather a problem of too many people entering prisons. The analysis here shows that we still have a proportionality problem, even if disproportionate punishments imposed and served do not contribute directly to mass incarceration: prosecutors are wielding threats of disproportionate punishments in order to induce guilty pleas, and the ease of obtaining guilty pleas translates to more prison admissions, which, in turn, contribute to mass incarceration. McLeod's argument, then, is broader in its impact than it may first seem. Even though her reform seems to prevent only disproportionate punishments, taking proportionality seriously can still have ripple effects throughout the system, particularly with regard to plea bargaining; one way to prevent prosecutors from using threats of disproportionate punishments as tools to generate convictions is to reset the baselines from which they are able to begin their plea bargaining negotiations.

While I am in agreement with McLeod on this score,<sup>143</sup> I would also offer three comments. The first comment is that it is not clear why McLeod limits her proposal to the sentencing processes post-*trial*, as opposed to post-*guilty plea*. It may be the case that by the time a guilty plea generates a conviction, the punishments may appear "reasonable" and the damage of the coercive plea bargaining process may already be done. If that is the case, then McLeod's proposal would not have much of an additional impact if applied to the post-guilty-plea sentencing process. But it is unclear why it would *hurt* to do so.

Second, McLeod's proposal does not have a good way of handling mandatory sentences. When facing mandatory sentencing laws, judges do not have the option of staying within the limits defined by the principle of proportionality in punishment, and McLeod's proposal would not make an immediate difference in those cases. Though she argues that in such cases judges should note that there is a "mismatch between deserved punishment and the more severe mandatory penalty" and that such notations "will give the legislature important feedback that its mandatory penalty may be excessively severe,"<sup>144</sup> it is anybody's guess whether the legislature would reform, retrench, or simply ignore such rulings. It therefore may be better in such situations to activate the Eighth Amendment in ways that I suggested above and in my previous work.<sup>145</sup>

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143 See, e.g., Lee, *supra* note 17, at 559.

144 McLeod, *supra* note 2, at 540.

145 See, e.g., Lee, *supra* note 11; Youngjae Lee, *Judicial Regulation of Excessive Punishments Through the Eighth Amendment*, 18 FED. SENT'G REP. 234, 236 (2006).

Third, and finally, I return to proportionality in punishment. McCleod starts her article with a mention of the problem of mass incarceration and how it imposes “particularly heavy burdens for the poor, minorities, and the mentally ill” and causes “distrust, racial alienation, and outrage” throughout the society.<sup>146</sup> McCleod also notes the presence of the prison abolitionist movement in our political discourse among other reform proposals. McCleod then argues that it is important to hold on to the idea of desert in punishment because “the principle of desert is a crucial barrier against unjust severity.”<sup>147</sup> But is it not the case that the violence created by our system of criminal law, policing, and punishment is so pervasive that we need a far more radical solution than just reforming our sentencing process?

To explore this question, let us examine how McCleod’s proposal would operate. Responding to the criticism that proportionality judgments are indeterminate, McCleod says two things. First, she says that “even if one cannot establish that some precise amount of punishment is deserved, it is quite frequently possible to conclude that certain punishments are clearly *undeserved*.”<sup>148</sup> Second, she says that there are “shared public norms about desert” as “laypeople usually agree about which offenders deserve more punishment than others along a given punishment spectrum.”<sup>149</sup> In other words, McCleod argues that the idea of proportionality in punishment has comparative and noncomparative aspects. As noted above, the noncomparative aspect stands for the view that a person convicted of a given crime should receive a certain amount of punishment, no matter how other people are treated, while the comparative aspect focuses on whether the punishment for a given crime is appropriate compared to punishments for different crimes of varying degrees of blameworthiness. McCleod is arguing that there tend to be agreements and strong intuitions on both dimensions, though the noncomparative aspect may not be as determinate as the comparative aspect.

The question then is whether a system that hands out punishments that pass McCleod’s tests—by not being “clearly undeserved” and falling into an appropriate place on the “punishment spectrum” among other crimes of varying gravity—would bring us closer to a

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146 McCleod, *supra* note 2, at 495–96.

147 *Id.* at 498.

148 *Id.* at 516.

149 *Id.* at 515–16. When making this argument, McCleod invokes the language of “empirical desert” and “deontological desert” from Paul H. Robinson’s chapter *Competing Conceptions of Desert: Vengeful, Deontological, and Empirical*, in his book *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 135–39 (2008). Her use of this terminology is unfortunate, as these terms are quite problematic. See Youngjae Lee, *Desert, Deontology, and Vengeance*, 42 ARIZ. ST. L.J. 1141 (2010).

world in which the problems of mass incarceration, racial division, alienation from the legal system, and disproportionate punitive and policing burdens on the poor, minorities, and the mentally ill are eliminated or at least significantly reduced.

The problem is that even if punishments look “mild” in comparison to punishments given for other crimes, and even if punishments do not look “clearly undeserved,” and even if the number of convictions and the size of the population decreases over time due to reforms in the sentencing process, we will likely still have those who are singled out and repeatedly scrutinized by law enforcement purposes in ways that can be highly intrusive and oppressive. Law enforcement may focus on certain groups of individuals not necessarily because of what those individuals have done but for the purpose of “managing people” and for “social control.”<sup>150</sup> Seen from this perspective, it is not clear how much McLeod’s world in which judges respect desert constraints by making sure sentences are not “clearly undeserved” or too severe relative to crimes of varying degrees of seriousness would differ from the world that we have today.

To think through this question, we may borrow the concepts of narrow and wide proportionality discussed in the context of self-defense and war. Adapted to the context of criminal law, narrow proportionality may refer to proportionality in punishment (or proportionality in desert) and wide proportionality can be a way of weighing the costs and benefits of using criminal law to deal with a social problem.<sup>151</sup> Another idea that we can borrow from these contexts is necessity: Even if a punishment imposed on a person for a crime that the person has committed is not disproportionate, it may still be *unnecessary* in that a less intrusive option may be available. In sum, we can consider not just whether a punishment is disproportionate, but also whether the punishment is necessary and whether the benefits of resorting to criminal law outweigh the costs. And it is at this stage that we can ask questions like whether the burdens a criminal law places on marginalized groups and on the society overall are justified by its benefits.

To operationalize this, one might design a set of restrictions on criminalization and enforcement of criminal law in the following way:<sup>152</sup>

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150 See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614 (2014).

151 Tadros has proposed something similar, but because he rejects desert as an idea, his approach is very different from what is proposed here. See TADROS, *supra* note 9, at 331–59.

152 This discussion draws from Youngjae Lee, *Valuing Autonomy*, 75 FORDHAM L. REV. 2973 (2007).

1. Do not criminalize *A*, *B*, and *C* . . . (*A*, *B*, and *C* . . . being exercises of fundamental rights).
2. So long as fundamental rights are not inhibited, the government may criminalize any conduct—from speeding to murder—as the government sees fit.
3. When the government enforces criminal law (enacted within constraints 1 and 2), it must do so without violating the principle of proportionality in punishment (*narrow* proportionality).

A society that applies this framework, however, might still be overly carceral. A system of criminal law and punishment activates involvement of public actors who are equipped with and authorized to use powerful and destructive tools, and such tools can be wielded in abusive and dehumanizing ways and further bring about disrespect of and alienation from the law, even if very few people are punished and even if those who are punished are punished relatively mildly. To address this issue, we might bring in the concept of *wide* proportionality to produce a proposal that looks like this.

1. Do not criminalize *A*, *B*, and *C* . . . (*A*, *B*, and *C* . . . being exercises of fundamental rights).
2. When regulating behaviors that do not fall within the scope of exercises of fundamental rights, use criminal law only when the costs of using criminal law are outweighed by its benefits (*wide* proportionality).
3. When the government enforces criminal law (enacted within constraints 1 and 2), it must do so without violating the principle of proportionality in punishment (*narrow* proportionality).

This framework could be more sensible than the first one because it calls for an analysis of both costs and benefits of using criminal law, while respecting the constraint of proportionality in punishment. This, too, however, may not go far enough because it may entail more sacrifice for society (or certain segments of society) than is necessary. So, to all this, we can incorporate the concept of necessity as follows:

1. Do not criminalize *A*, *B*, and *C* . . . (*A*, *B*, and *C* . . . being exercises of fundamental rights).
2. When regulating behaviors that do not fall within the scope of exercises of fundamental rights, use criminal law only when the costs of using criminal law are outweighed by its benefits *and* only as last resort. The government has many regulatory tools, and criminal law tools should be used only when it is *necessary* (*wide* proportionality and necessity).
3. When the government enforces criminal law (enacted within constraints 1 and 2), it must do so without violating the

principle of proportionality in punishment (*narrow* proportionality).

One might object at this point that I am using the idea of proportionality in constitutional law that I have urged that we keep separate from the idea of proportionality in punishment. If we revisit the Cohen-Eliya and Porat summary, the proportionality test says:

[W]henever the government infringes upon a constitutionally protected right, the proportionality principle requires that the government show, first, that its objective is legitimate and important; second, that the means chosen were rationally connected to achieve that objective . . . ; third, that no less drastic means were available . . . ; and fourth, that the benefit from realizing the objective exceeds the harm to the right . . . .<sup>153</sup>

Is my proposal then just another way of restating proportionality in constitutional law in the punishment context as embraced and defended by Jackson?

It is true that my proposed framework of combining different kinds of proportionality and necessity have strong resemblance to the framework of proportionality in constitutional law. The concept of wide proportionality is similar to the first, second, and fourth factors of proportionality in constitutional law, and the concept of necessity is similar to the third factor. However, notice what is missing from the idea of proportionality in constitutional law: *narrow proportionality* or proportionality in punishment. To reiterate, the problem with collapsing the idea of proportionality in punishment with the idea of proportionality in constitutional law is the real possibility of eliminating the concept of proportionality in punishment as a constraint with a structure that provides for stringency or resistance to trade-offs. I do not oppose the idea of using proportionality in constitutional law to think about crime and punishment similar to the way Ristroph proposes that we do as long as proportionality in punishment is allowed to provide a level of protection that is inviolable or close to inviolable. In fact, not only do I not oppose it, but I propose it as a way of making progress on the problems that motivate McLeod's proposal. Instead of hoping that the idea of proportionality in punishment (*narrow* proportionality) will do much work to alleviate our current crisis, we ought to apply the ideas of wide proportionality and necessity (or proportionality in constitutional law) to bring about a world in which criminal law and punishment play a much smaller role in our society than it does today.

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153 COHEN-ELIYA & PORAT, *supra* note 27, at 2.

## CONCLUSION

This Essay has argued that the label proportionality applies to many different proportionalities: proportionality in punishment, narrow proportionality in self-defense and war, wide proportionality in self-defense and war, and proportionality in constitutional law. When thinking through proportionality arguments, it is important to keep all the ideas separate and to understand the logic of each idea. Once we do so, we can think and talk clearly about what proportionality is and what it can do for us for different questions of law and morality.