Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry

Mark Alden James

The doctrine of proportionality requires that a criminal penalty be proportional to the severity of the crime.[1] Proportionality is rooted in the retributive aspect of punishment.[2] It questions whether the criminal has received his "just deserts" for his acts in relation to his moral culpability and to the harm he has caused to individuals and society.[3]

For years, courts have struggled with the question whether the eighth amendment, which prohibits cruel and unusual punishments, also prohibits disproportionate criminal penalties.[4] The Supreme Court has dealt with a

---

1. *See generally*, Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMONOLOGY 378 (1980); L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT (1975).

2. *See infra* notes 52-72 and accompanying text.

3. *Id.* The "porportionality" that is the subject of this Note questions, on an abstract scale, the appropriateness of a punishment for a given crime. *See* Solem v. Helm, 103 S. Ct. 3001 (1983). *See* discussion *infra* notes 7-9 and 16-40. A second type of proportionality review, not treated in this Note, presumes that the penalty is not "disproportionate" to the crime in some abstract sense. Instead, it inquires whether the penalty is "disproportionate" to other penalties that have been imposed for the same crime in similar cases within the jurisdiction. This type of proportionality challenge arose in the context of the death penalty where the Supreme Court held that such review is not an eighth amendment prerequisite to carrying out a death sentence. Pulley v. Harris, 104 S. Ct. 871, 875-76 (1984). The argument for this type of proportionality review was grounded in Furman v. Georgia, 408 U.S. 238 (1972), which struck down the death penalty because of its inconsistent imposition among criminals convicted of the same crime.

4. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII. For an in-depth analysis of the cases leading to the conclusion that the eighth amendment does not encompass the proportionality principle, see Schwartz, *supra* note 1. For an analysis of cases leading to an opposite conclusion, see BERKSON, *supra* note 1.

Some scholars argue that the eighth amendment was never intended to prohibit punishment of disproportionate length or severity. They contend that when the amendment was designed in England and adopted in the English bill of rights of 1689, it was intended to forbid torture and barbarous punishments of the type meted out during the "Bloody Assizes." The "Bloody Assizes" were brutal treason trials conducted under the 17th century reign of King James II. Thus, viewed as a reaction to the "Bloody Assizes," the English amendment must be understood as proscribing unusual cruelty only in the method of punishment. When the words of the English document were adopted substantially intact in the eighth amendment, they carried a similar import. The traditional view is, therefore, that the cruel and unusual punishments clause proscribes only torture and barbarous methods of punishment. *See* Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Schwartz, *supra* note 1, at 379-82 (1980); Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

Other commentators, however, assert that a concept of proportionality is embedded in the cruel and unusual punishments clause due to its historical derivations. One of these commentators, Pro-

variety of challenges to punishments on a disproportionality basis. Generally, the Court has held that the death penalty is an unconstitutionally disproportionate punishment for certain crimes.[5] Until recently, however, the Court has refused to invalidate a prison sentence solely on the basis of disproportionate length.[6] Recently, in *Solem v. Helm*,[7] the Court departed from this tradition when it struck down a life sentence without the possibility of parole imposed for a seventh non-violent felony. The Court thus made the proportionality doctrine generally applicable to all criminal penalties.[8] It added proportionality to other doctrines that form the substantive meaning of the ambiguously worded cruel and unusual punishments clause of the eighth amendment.[9]

The doctrine of proportionality, however, is more than just a principle of fairness in punishment. It also embodies a *method* of answering the moral question posed by the retributive theory of punishment.[10] To say that a criminal has received a proportionate sentence answers the question whether society has exacted an acceptable degree of retribution.[11] This question is not new today or even in this century, nor is it peculiar to eighth amendment jurisprudence. Instead, it is one that legal philosophers and others have struggled with throughout history.[12]

In *Helm*, the Supreme Court did not explore the philosophical roots of

---

fessor Granucci, rejects the "Bloody Assize" theory and instead focuses on other incidents in English history such as the case of the minister, Titus Oates. Oates was convicted of perjury under the reign of King James II in 1685 and sentenced to (1) a fine of 2,000 marks, (2) life imprisonment, (3) whippings, (4) periodic pillorying, and (5) defrocking. A minority of the House of Lords and a majority in the House of Commons labeled the punishment "cruel and unusual." Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 857-59 (1969).

Granucci also argues that the English treatment of punishments throughout history was characterized by notions of proportionality, stemming from the Biblical admonishment "an eye for an eye, a tooth for a tooth." *Id.* at 844-48. Granucci argues that when the framers borrowed the phrase "cruel and unusual" from the English Bill of Rights of 1689, the phrase carried with it these historical underpinnings and interpretations. He posits, however, that the phrase was subject to subsequent misinterpretations in America resulting in modern uncertainty about the place of proportionality in punishment. *Id.* at 860-66. *See also* Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: an Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975) (arguing that the framers were influenced by Beccaria's view of excessiveness in punishment); R. PERRY, SOURCES OF OUR LIBERTIES 236 (1959) (stating that the English prohibition on cruel and unusual punishment embodied "the longstanding principle of English law that the punishment . . . should not be, by reason of excessive length or severity, greatly disproportionate to the offense charged").

5. Enmund v. Florida, 458 U.S. 782 (1982) (felony murder); Coker v. Georgia, 433 U.S. 584 (1977) (rape).

6. *See* Hutto v. Davis, 454 U.S. 370 (1982) (40 years for possession with intent to distribute 9 ounces of marijuana); Rummel v. Estelle, 445 U.S. 263 (1980) (life for violation of state recidivist statute); Badders v. United States, 240 U.S. 391 (1916) (five years for seven counts of mail fraud); Howard v. Fleming, 191 U.S. 126 (1903) (ten years for conspiracy to defraud); O'Neil v. Vermont, 144 U.S. 323 (1892) (fifty-four years for violating state liquor laws).

7. 103 S. Ct. 3001 (1983).

8. *Id.* at 3009.

9. *See infra* notes 41-65 and accompanying text.

10. *See infra* notes 52-72 and accompanying text.

11. *Id.*

12. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); G.W.F. HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans. 1965); I. KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT (W. Hastre trans. 1974); H.L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

proportionality.[13] Nor did the Court acknowledge that, in accepting proportionality as a standard for eighth amendment jurisprudence, it was embracing a philosophy discordant with a utilitarian view of punishment.[14] As a result, the *Helm* opinion exposes neither the implications nor the limits of the proportionality analysis that the Court holds is constitutionally mandated.

This Note explores the philosophical derivations of the proportionality doctrine. It then examines the criteria available for applying the proportionality principle to specific cases. The *Helm* Court's criteria are identified, examined, and criticized. In conclusion, the Note suggests an extended eighth amendment analysis to elicit a more refined result in harmony with the Court's earlier eighth amendment pronouncement in *Coker v. Georgia*.[15]

I. *SOLEM V. HELM*

In 1979, Jerry Helm pled guilty in a South Dakota trial court to a felony charge of writing a bad check for $100.[16] He had six prior unrelated felony convictions in South Dakota. These included three convictions of third degree burglary, one of obtaining money by false pretenses, one of grand larceny, and one of repeatedly driving while intoxicated.

Under South Dakota law, the maximum punishment for the sole offense of writing a bad check was five years' imprisonment and a $5000 fine.[17] Helm's prior record, however, brought him within South Dakota's recidivist statute.[18] Under the statute, the maximum penalty was life imprisonment without the possibility of parole, plus a $25,000 fine.[19] The only relief for a person sentenced to life under the recidivist statute was the possibility of a gubernatorial commutation of the sentence to a term of years.[20]

The state trial court accepted Helm's guilty plea and imposed the maximum sentence.[21] The sentence was the harshest penalty permitted under

13. *See infra* notes 28-40 and accompanying text.
14. *See infra* notes 59-72 and accompanying text.
15. 433 U.S. 584 (1977).
16. The facts in Solem v. Helm are set forth 103 S. Ct. at 3004-05.
17. S.D. COMP. LAWS ANN. § 22-6-1(6) (1967 ed. Supp. 1978) (now codified at S.D. CODIFIED LAWS § 22-6-1(7) (Supp. 1982)).
18. The statute stated: "When a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. CODIFIED LAWS § 22-7-8 (1979) (amended 1981).
19. S.D. COMP. LAWS ANN. § 22-6-1(2) (1967 ed., Supp. 1978) (now codified at S.D. CODIFIED LAWS § 22-6-1(3) (Supp. 1983)). Parole was not available to a person sentenced to life imprisonment in South Dakota. S.D. CODIFIED LAWS § 24-15-4 (1979).
20. S.D. CONST., Art. IV, § 3.
21. In pronouncing Helm's sentence the trial court stated:

> Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all of this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.
>
> It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further

existing state law.[22]

After exhausting state court relief,[23] Helm applied to the Governor of South Dakota for a commutation to a fixed term of years. The Governor denied the request. Helm then turned to the federal courts for relief, arguing that his sentence was disproportionate and thus in violation of the eighth amendment.[24] A federal district court rejected Helm's disproportionality argument,[25] but the Eighth Circuit reversed, ruling Helm's life sentence disproportionate and unconstitutional.[26] The Supreme Court affirmed.[27]

In order to succeed in the Supreme Court, Helm had to overcome the Court's adverse proportionality ruling in *Rummel v. Estelle*.[28] In *Rummel*, the Court rejected the eighth amendment disproportionality argument of a small-time recidivist offender sentenced to life imprisonment in Texas. Although the Court had embraced the proportionality doctrine prior to *Rummel*, the *Rummel* Court distinguished the prior rulings as concerning the death penalty or other punishments that imposed hardship more extreme than incarceration.[29] The Court drew a bright line around such punishments, stating that they differ "in kind" from any sentence of imprisonment.[30] Based on this reasoning, the *Rummel* Court broadly posited that the length of a prison term imposed for any felony, properly so classified, is purely a matter of legislative prerogative.[31]

Helm attempted to overcome the *Rummel* holding by distinguishing his sentence from Rummel's. Rummel's sentence included the possibility of parole,[32] while Helm had only the hope of the Governor's rarely exercised commutation.[33] Helm argued that his sentence had a finality that likened it to the death penalty.[34] Accordingly, he argued that his sentence was different in kind from a normal prison sentence and so should be subject to the

---

victims of your crimes, just be coming back before Courts [sic]. You'll have plenty of time to think this one over.

State v. Helm, 287 N.W.2d 497, 500 (S.D. 1980) (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

22. South Dakota has since reinstated its death penalty. S.D. CODIFIED LAWS § 22-6-1(1) (1979 ed., Supp. 1983).

23. *See* State v. Helm, 287 N.W.2d 497 (S.D. 1980).

24. Petition for Writ of Certiorari, Appendix at page A-56, Solem v. Helm, 103 S. Ct. 3001 (1983).

25. *Id.*

26. Helm v. Solem, 684 F.2d 582 (8th Cir. 1982).

27. 103 S. Ct. 3001.

28. 445 U.S. 263 (1980).

29. *Id.* at 274. *See* Coker v. Georgia, 433 U.S. 584 (1977); Weems v. United States, 217 U.S. 349 (1910). In *Coker*, the Court held that the death penalty is disproportionate to the crime of raping an adult woman. *See infra* notes 113-18 and accompanying text. In *Weems*, the Court held unconstitutional a Philippine penalty of fifteen years in chains at hard labor, plus a fine and civil interdiction, for the crime of making a false entry in a public document. The Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense [sic]." 217 U.S. at 367.

30. 445 U.S. at 275 (citing Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

31. 445 U.S. at 274.

32. *Id.* at 280-81.

33. Between 1975 and 1982, the Governor of South Dakota commuted no sentences, denying 25 such applications, including Helm's. Helm v. Solem, 684 F.2d 582, 585 n.6.

34. See Brief for Respondent at 11-18, Solem v. Helm, 103 S. Ct. 3001 (1983).

proportionality principle applied in the death cases.[35]

Significantly, the *Helm* Court did not rest its holding on that distinction.[36] Instead, it opted for a broad ruling making the proportionality principle applicable to all criminal penalties.[37] *Rummel* was limited to its facts.[38]

The *Helm* Court adopted a three-part analysis for determining the proportionality of a given punishment. The analysis includes consideration of 1) the gravity of the offense and the harshness of the penalty; 2) the sentences imposed on other criminals in the same jurisdiction; and 3) the sentences imposed for commission of the same crime in other jurisdictions.[39] Applying these criteria, the Court ruled Helm's sentence disproportionate to his crimes.[40]

II. PHILOSOPHICAL UNDERPINNINGS OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

Helm requires the state to mete out a punishment that is in proportion to the severity of the crime. Where this newly heralded doctrine of proportionality fits in eighth amendment jurisprudence is best understood by examining the philosophical notions underlying the cruel and unusual punishments clause.

A. *The Evolving Standard*

The eighth amendment states that "cruel and unusual punishments" shall not be inflicted. The clause is ambiguous on its face. It is devoid of substance because it does not define the types of punishments that are cruel and unusual. The framers of the Constitution had a very different conception of cruelty than that which we embrace today.[41] In addition, courts and scholars conflict in their historical justifications for modern eighth amend-

35. *Id.* at 15.

36. Helm's analysis of his sentence, had it been adopted by the Court, would have resulted in a more limited proportionality principle. Presumably, the principle would not apply to prison sentences that were not in some way as final as the death penalty or as unique as the punishment in *Weems*. The Eighth Circuit read *Rummel* as so limiting the principle and framed its holding in those terms. 684 F.2d at 585. Compare the Supreme Court's handling of this point, *infra* at note 38.

37. 103 S. Ct. at 3009 ("[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.").

38. 103 S. Ct. at 3016 n.32. The court read *Rummel* as rejecting the proportionality principle only as it applied to the particular sentence challenged in that case. Since the *Rummel* court offered no standards for determining whether there is an eighth amendment violation, *Rummel* is only controlling in a similar fact situation. *Id. See also* 103 S. Ct. at 3009 n.14 (rejecting the possible broad implications of language in *Rummel*).

39. 103 S. Ct. at 3011. Note that in Pulley v. Harris, 104 S. Ct. 871 (1984), the court rejected a type of "proportionality" review that would have required courts to determine whether the death penalty, as imposed in a given case, is disproportionate to other penalties imposed for the same crime in similar cases within the jurisdiction. *See supra* note 3. This type of "proportionality" review resembles the intrajurisdictional comparison factor (the second factor) set forth as one of the criteria of just deserts proportionality review in *Helm*. Thus, while *Harris* may have rejected such review as a prerequisite to the death penalty, convicts condemned to death may still obtain such review as part of the abstract proportionality review of *Helm*.

40. 103 S. Ct. at 3016.

41. During the debates on the adoption of the Bill of Rights, one member of the first Congress stated: "[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in [the] future to be prevented from inflicting these punishments because they are cruel?" 1 ANNALS OF CONG. 754 (Gales & Seeton ed. 1789).

ment interpretations.[42] The Supreme Court has recognized that the concept of cruelty in punishment is a changing one, and has settled on an evolving standard for eighth amendment adjudications.[43] Whether a punishment is cruel must be evaluated in terms of contemporary social norms.[44]

B. *The Dignity Principle*

Accepting an evolving eighth amendment standard is an initial step in infusing substance into the words "cruel and unusual." Under the standard, some punishments are so inherently degrading to both punisher and punished that they violate "individual and collective human dignity."[45] These violations are found in three overlapping categories of punishments.

First, some punishments are historically offensive to human dignity, even without reference to any evolving standard. The framers themselves condemned these punishments, which include the thumbscrew and the rack.[46] Such punishments form the "core" cases of cruelty under the eighth amendment; they are obviously cruel under an evolving standard as well.[47]

A second category includes punishments that offend the dignity principle under an evolving standard. Flogging and pillorying are such punishments. Congress' first criminal statute prescribed these punishments for larceny and perjury.[48] Most would agree today, however, that such punishments offend dignity and are, therefore, cruel and unusual.[49]

A third group includes those punishments that are intrinsically degrading and offensive to human dignity without reference to any standard, historical or evolving. The hallmark of an intrinsically cruel punishment is the failure to accord the punished person the level of decency and respect he deserves by virtue of his status as a human being.[50] Torture, for example, is an inhuman manner of relating to another person, and seeks to reduce the person to something less than human.[51]

---

42. *See supra* note 4.

43. The Court expressed this view in Trop v. Dulles, 356 U.S. 86 (1958), when it stated: "the [eighth] [a]mendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

44. Radin, *The Jurisprudence of Death*, 126 U. PA. L. REV. 989, 1033 (1978).

45. *Id.* at 1043.

46. *See* Furman v. Georgia, 408 U.S. 238, 319-22 (1972) (Marshall, J., concurring).

47. Radin, *supra* note 44, at 1037.

48. Radin, *supra* note 44, at 1031 n.165.

49. A punishment need not involve physical pain to offend the dignity principle. A punishment is dehumanizing if it involves a deprivation of rights society regards as essential to a person's functioning in the human community. Radin, *supra* note 44, at 1044-45. Thus, in Trop v. Dulles, the punishment of denationalization for military desertion was dehumanizing because it denied the individual the essential right to a place in organized society. 356 U.S. 86, 101-02 (1958); Radin, *supra* note 44, at 1045 n.210.

50. J.G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 233 (1979).

51. *Id.* The notion that a punishment can be intrinsically cruel is advanced by the philosopher Immanuel Kant. Jeffrie G. Murphy recently explained and expanded upon Kant's notion:

> Sending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil, or eviscerating him, or gouging out his eyes—these are not *human* ways of relating to another person. He could not be expected to understand this while it goes on, have a view about it, enter into discourse about it, or conduct any other characteristically human activities during the process—a process whose very point is to reduce him to a terrified, deficating, urinating, screaming animal.

The recognition that punishments may be cruel if they violate the evolving principle of human dignity does not exhaust the substantive import of the words "cruel and unusual." Indeed, if the clause prohibited only dignity-offending punishments, its limitation would have little contemporary application. Today, states rarely mete out torture and the like to punish criminals.

Consequently, courts have looked further under the evolving standard to give vitality to the cruel and unusual punishments clause as a limitation on punishment. They have accomplished this through the notion of excessiveness. The principle of *proportionality* lies within the broader concept of excessiveness.

C. *Excessiveness*

A fundamental premise underlies the broad concept of excessiveness: because punishment is the deliberate infliction of suffering or deprivation upon another individual, it is prima facie wrong.[52] Thus, when the state punishes a criminal, the state must support its action with some accepted philosophical justification; if it does not, that action is no more legal than the criminal's infliction of suffering or deprivation upon the victim.[53] An excessive punishment is one that exceeds the state's proffered justification. It follows that the particular justification the state chooses for a punishment determines whether that punishment is excessive.[54]

In developing that justification, states confront the utilitarian and the retributive theories of punishment.[55] These are two broadly opposed approaches to punishment, which although conceived in antiquity, continue to represent the fundamental dichotomy in the search for a justification for punishment.

In a general sense, the utilitarian theory looks forward from the crime to evaluate the social consequences of a given punishment.[56] Under the utilitarian theory, the intrinsic evil of punishment is justified only if outweighed by its social utility.[57] A utilitarian measures the severity of a punishment against its net benefit to society to determine the proper punishment for a given crime.[58]

Opposed to the utilitarian theory is retributivism, which looks back to

---

Id. (emphasis in original).

52. S. BENN, PUNISHMENT, 7 ENCYCLOPEDIA OF PHILOSOPHY 29 (1967); J. BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 170 (Hafner Library of Classics No. 6, 1948) ("[a]ll punishment is mischief: all punishment in itself is evil").

53. *See* BENN, *supra* note 52, at 29.

54. *See id.*

55. *Id.* at 30. For the classical exposition of utilitarian theory, see J. BENTHAM, *supra* note 52.. For the classical expression of retributive theory, see I. KANT, METAPHYSICAL ELEMENTS OF JUSTICE, 99-108, 131-33 (Ladd Trans. 1965).

56. Radin, *supra* note 44, at 1049; D. RICHARDS, THE MORAL CRITICISM OF LAW 232 (Dickerson 1977).

57. Radin, *supra* note 44, at 1049-50.

58. RICHARDS, *supra* note 56, at 232-33. The social utility of a punishment is most often framed and evaluated in terms of its deterrent effect. Casenote, *Death as a Punishment for Rape—Disproportional, Cruel and Unusual Punishment*: Coker v. Georgia, 21 HOWARD L.J. 955, 961 (1978). The notion of deterrence encompasses general deterrence (deterring the general public from doing the act punished), and specific deterrence (deterring the person punished from doing the act

the criminal's morally wrongful act to justify punishment.[59] Forward-looking benefit to society through the punishment of criminals is irrelevant and even antithetical to retributivist theory.[60] Underlying retributive theory is the concept of "just deserts."[61] A criminal deserves punishment only because he has committed a morally wrongful act, and therefore the severity of the punishment must be commensurate with the magnitude of the moral transgression.[62] To the utilitarian, the punishment of criminals is a means to achieve a desired end.[63] To the retributivist, the punishment of a guilty person is a moral end in itself.[64]

Applied to the concept of excessiveness, these two justifications for punishment yield different definitions of an "excessive punishment." Under the utilitarian theory, a punishment is excessive if it fails to yield some net social utility. Under the retributive theory, a punishment is excessive if it exceeds a criminal's moral just deserts.[65]

1. *Proportionality*

If one adopts the retributive theory, the most obvious question is "How does one determine a criminal's just deserts?" Retributive justice demands that the punishment "fit the crime."[66] This demand for reciprocity could literally mean a biblical *jus talionis*—like for like, eye for eye, and tooth for tooth.[67] In many cases, such a literal interpretation would violate the independent dignity standard of the eighth amendment, e.g., to demand rape for the rapist, or mutilation for one who commits mayhem.[68] In other cases, such a standard would simply result in the absurd, e.g., to demand that the burglar be burglarized, or that the conspirator be conspired against.[69] Consequently, retributive theory realistically demands a kind of *proportionality*

---

again). RICHARDS, *supra* note 56, at 231-32. There are, however, other utilitarian justifications, including the isolation of dangerous individuals from society and rehabilitation. *Id.* at 233-34.

59. Radin, *supra* note 44, at 1049-50; RICHARDS, *supra* note 56, at 230.

60. BENN, *supra* note 52, at 30.

61. *See id.* at 32.

62. RICHARDS, *supra* note 56, at 230.

63. Punishment for a purpose other than social utility cannot be justified from the utilitarian point of view. *See* BENTHAM, *supra* note 52, at 170-77. The utilitarian viewpoint was originally advanced to limit the "barbaric" consequences of retributivism. Radin, *supra* note 44, at 1050. Professor Radin notes that now retributive theory is held out as a limit on utilitarianism. *Id.* This Note suggests that utilitarianism may be resorted to as a secondary analysis to curb the potential for prejudice in the application of a retributive standard. *See infra* notes 126-32 and accompanying text.

64. BENN, *supra* note 52, at 30. This is derived from the retributivist view that people, by virtue of their status as rational beings, deserve to be treated as ends in themselves and not merely as means to achieve a desired end, whether social utility or other end. I. KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 45 (T. Abbot trans. 1949).

Some retributivists see punishment as necessary to restore the moral order of the universe which the criminal's wrongful act has upset. Hegel (*supra* note 12) embraced this view. BENN, *supra* note 52, at 30. In this sense, punishment is truly the moral end in itself without regard to compensation, restitution to the victim, or even revenge, which often characterizes the popular understanding of retributive theory.

65. These definitions are not only different, but in a practical sense, opposite and irreconcilable. *See infra* notes 109-23 and accompanying text.

66. BENN, *supra* note 52, at 32.

67. MURPHY, *supra* note 50, at 231.

68. *Id.* at 231-32.

69. *Id.*

between crime and punishment.[70] Crimes must be ranked on a scale of seriousness and paired with corresponding punishments similarly ranked.[71] Such a ranking must be developed by utilizing certain criteria that reveal the severity of different punishments and the gravity of different crimes.[72]

2. *Proportionality Criteria*

Courts have determined whether a punishment is proportionate by relying on certain criteria.[73] As stated above,[74] the *Helm* Court embraced three criteria: 1) the gravity of the offense and the harshness of the penalty; 2) the sentences imposed on other criminals in the same jurisdiction; and 3) the sentences imposed for commission of the same crime in other jurisdictions.[75] Although accepted by courts prior to *Helm*,[76] the Court's criteria are subject to criticism.

The second and third *Helm* criteria are representative of a positivist approach to proportionality determinations.[77] Positivist philosophy holds that society may only be analyzed by objective, empirical means.[78] Accordingly, a legal positivist determines the truth of a given proposition or the validity of a given action by reference to pre-existing legal rules. The positivist rejects abstract notions of justice and other moral values and normative standards.[79] The two positivist criteria are intended to indicate the proportionality of a given crime and its punishment by revealing the current treatment of the crime under positive law.[80]

Professor Radin, in discussing the death penalty, points out that the

---

70. *Id.* at 232.

71. *Id.*; *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 25 (1968).

72. Radin, *supra* note 44, at 1057-62.

73. *See infra* note 76.

74. See *supra* notes 39-40 and accompanying text.

75. 103 S. Ct. at 3010-11 (1983).

76. These criteria were originally applied in their systematic framework in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). In *Hart*, the court struck down a life sentence under a West Virginia recidivist statute on the ground of unconstitutional disproportionality. The court applied a four-factor test for disproportionality: 1) The nature and gravity of the offense; 2) the legislative purpose behind the punishment; 3) the punishments for the same crime in other jurisdictions; and 4) the punishments imposed for other crimes in the same jurisdiction. 483 F.2d at 140-42. The court distilled these factors from the concurring opinions of Justices Brennan and Marshall in Furman v. Georgia, 408 U.S. 238 (1972), and from Weems v. United States, 217 U.S. 349 (1909); *see* 483 F.2d at 140-42.

The presence of the second factor in the *Hart* court's analysis presents an ambiguity. Theoretically, consideration of *legislative* purpose should have no place in proportionality analysis. Legislatures generally have both retributive and utilitarian goals in mind when fixing punishments. *See infra* note 108. Since these objectives are in conflict in the context of eighth amendment jurisprudence, the legislature's utilitarian goals do not belong in retributive proportionality analysis. *Id.*

In Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978), the court, while in theory approving the *Hart* test, rejected the legislative purpose factor as part of proportionality analysis. *Id.* at 660-61. The Supreme Court in *Helm* did not revive the factor.

77. Radin, *supra* note 44, at 1034-39. Writing the plurality opinion in Coker v. Georgia, 433 U.S. 584, 592 (1977), Justice White suggested other positivist criteria, not relied on in *Helm*. These included history, precedent, and the response of juries in their sentencing decisions.

78. H.L.A. HART, *Legal Positivism*, 4 ENCYCLOPEDIA OF PHILOSOPHY 418, 419 (1967).

79. *Id.*; *see also* RICHARDS, *supra* note 56, at 11-27.

80. Justice Powell, who wrote the *Helm* opinion, has asserted that "the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives." Furman v. Georgia, 408 U.S. at 437 (Powell, J., dissenting).

positivist approach to proportionality is circular.[81] It seeks objective indications of the proportionality of a challenged punishment by looking to the very institutions that initially authorized the punishment.[82] Moreover, the intrajurisdictional analysis ignores the possibility that the subject jurisdiction might disproportionately punish *all* crimes.[83] If the same were true in other jurisdictions, the interjurisdictional analysis is similarly defective.[84]

Radin's criticisms, however, simply point out the characteristics of positivist analysis. In the positivist view, these are not inherent flaws. Rather, they are manifestations of the correct results of positivist analysis in certain cases.[85] A perhaps more cogent criticism of the positivist approach to proportionality determinations centers upon its content rather than upon its results. At the heart of positivist theory is the separation of law and morals.[86] Generally, positivism rejects the relevance of moral questions.[87] Proportionality analysis, however, endeavors to answer the moral question of just deserts.[88] A moral inquiry should, therefore, be at the heart of proportionality analysis.[89]

The *Helm* Court's first criterion broaches a moral inquiry. It calls for a comparison of the relative gravity of the offense and the harshness of the penalty. Unlike the second and third criteria, this criterion requires a normative evaluation of the crime and punishment.[90] The normative approach judges or values actions in light of normally-expected conduct.[91] Such expectations, when shared by all or many of the members of society, amount to "complementary expectations" or "norms."[92]

Legal scholars recognize that a normative inquiry must be the essential element of proportionality analysis.[93] The *Helm* Court's normative inquiry took the form of a list of secondary factors on which courts could rely to judge the seriousness of offenses.[94] The Court asserted that it is a widely shared view that nonviolent crimes are less serious than violent crimes; that the greater the harm caused or threatened to the victim or society, the more

81. Radin, *supra* note 44, at 1036.

82. *Id.* at 1059-60. This is a traditional characteristic of legal positivist thought. Law is to be identified by the coercive commands of a sovereign. RICHARDS, *supra* note 56, at 11.

83. Radin, *supra* note 44, at 1059-60.

84. *Id.* at 1060.

85. *See supra* note 82.

86. RICHARDS, *supra* note 56, at 11-14. ("[M]oral questions are either nonexistent or irreducibly subjective" or they are "susceptible of rational, objective determination in terms of considerations which should guide the reform of the law; in order to achieve this reformist aim, law must be seen as it is, aside from its moral aims.") *Id.* at 12.

87. *See id.*

88. *See supra* notes 66-72 and accompanying text.

89. Moral inquiry seeks to determine what the law ought to be. The notion is one of natural law. Laws must be morally justified. RICHARDS, *supra* note 56, at 12. Positivism, on the other hand, asks only what the law *is*.

90. 103 S. Ct. at 3011; Radin, *supra* note 44, at 1060.

91. S. STOLJAR, MORAL AND LEGAL REASONING 58-59 (1980).

92. *Id.* at 61. This is one way of explaining the normative approach. Basically, a norm is any authorative or prescriptive rule, standard, or ideal which can serve as a point of comparison for the evaluation of some conduct. Stoljar's explanation is useful, however, because it explains how norms, particularly moral norms, emerge in society. Moral norms are the essential proportionality criteria. *See supra* notes 85-89 and accompanying text.

93. Radin, *supra* note 44, at 1060; VON HIRSCH, DOING JUSTICE 82 n.* (1976).

94. 103 S. Ct. 3011 (1983).

serious the crime; that attempts are less serious than completed crimes; and that intentional or malicious acts are more serious than reckless or negligent acts.[95] While the Court cited statutes and cases reflecting these factors, its analysis was truly a normative one. The Court did not offer its citations to positive law as conclusive of the validity of the proffered factors, but rather as evidence of the wide acceptance of the propositions. This acceptance justified them as reliable norms for use in proportionality analysis.[96]

The Court departed from a true moral-normative analysis, however, in characterizing its analysis as "objective."[97] Samuel Stoljar describes moral norms as commonly shared vicarious feelings or reactions, which mobilize a social complaint in response to a society member's wrongful act.[98] Thus, when a person is murdered, vicarious outrage brings society's resentment to bear on the murderer, even though the victim is unavailable to complain about the harm and describe the suffering.[99]

Stoljar points out, however, that vicarious feelings inevitably produce norms that are somewhat vague and indeterminate.[100] Ultimately, such vicarious feelings and reactions to wrongs remain individual judgments.[101] In assessing what is bad or harmful for someone else, each person has only the knowledge of what is bad or harmful for himself. Since each individual's

---

95. *Id.*

96. *Id.* the Court stated that the list "simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale. . . ." *Id.*

97. *Id.* at 3010.

98. STOLJAR, *supra* note 91, at 64-65.

99. *Id.* at 65. Professor Richards, *supra* note 56, at 240-41, explains these same concepts in terms of the "public morality":

> The public morality . . . defines a range of human actions which justifiably are the object of public concern and, where appropriate, the application of coercive sanctions. Such moral principles underlie the moral sentiments of indignation and resentment, as well as guilt. Thus, one experiences indignation when someone else is hurt unjustly or immorally, and this indignation takes the characteristic form of seeing that the harm is righted; one experiences resentment when she is herself hurt unjustly or immorally, and this resentment takes the form of demanding some form of restitution; one generally experiences guilt when he culpably violates moral principles, and this guilt is resolved by apology, confession, restitution, and acceptance of punitive consequences.

100. STOLJAR, *supra* note 91, at 65.

> To point to these vicarious reactions is by no means to claim that a group is thereby endowed with a fund of precise values, with a ready code of specific moral rules. All we have is a social norm or presumption against the infliction of harm, and a norm which still only gives us a somewhat vague and indeterminate end. The norm is vague because our "social" judgements concerning harm, including our collective resentments and disapprovals of injury, begin as and remain individual judgements, vicarious though they may also be. For in saying what it is, in certain actions, that we condemn as "bad" or harmful for others, or in that sense "bad" for everybody, each one of us starts only with the knowledge of what is bad or harmful for him. There is then in a group's total judgement as to what is a "bad" action an initial and ineliminably individual component, even though our individual feelings or reactions must, both empirically and logically, still be (assumed to be) sufficiently coincident or convergent to allow these individual feelings to aggregate, vicariously yet concordantly, into something constituting the group's general moral standard or norm. Still, as just said, this convergence can never constitute an exact concordance, for the social norm is not like a wall built of identical bricks, of identical units of reactive or emotive attitudes. They are not identical because our sensibilities to physical or mental or economic harm differ from person to person, just as harm to ourselves or to those near or dear to us weighs more heavily with each of us than pain inflicted on persons who are remote or hardly known.

Id. at 65-66.

101. *Id.*

sensitivity to physical, mental, or economic harm is different, the aggregate of vicarious reactions to a given action constitute not a specific moral rule, but a general moral standard or norm.[102] Under the Stoljar theory, the *Helm* Court's normative analysis appears susceptible to the vagaries of the suggested norms at two levels: 1) in the content of the norms; and 2) in their application.

First, the Court's suggested analytical norms are not *objective* factors. Rather, they are broad and generalized expressions of societal value judgments, composed of wide ranging individual value judgments on the particular subject. For example, the Court posits that "stealing a million dollars is viewed as more serious than stealing a hundred dollars."[103] A person who earns only one hundred dollars a month probably views stealing one hundred dollars as a very serious crime. That person may have no basis upon which to vicariously judge the relative culpability of one who steals one million dollars. Thus, the Court's "magnitude" norm is not a norm for some members of society.

The second level of the Court's analysis, application of the norms, is also subject to the inherent vagueness of normative inquiry. Judges, like all people, make normative evaluations from individual perspectives, which in turn yield different evaluations. For example, in *Helm*, the majority viewed Helm's crimes as non-violent,[104] while the dissent characterized his acts as having "harsh potentialities for violence."[105]

These criticisms suggest that the results of a particular analysis are not any more precise than the criteria utilized in the inquiry. If the normative criteria utilized are generalized and subjective, the resulting measure of just deserts is also generalized and subjective.[106]

Should generalized and subjective criteria ultimately determine what is "cruel and unusual" under the eighth amendment? Future disproportionality cases may not involve Helm's compelling circumstances or extreme sen-

---

102. *Id.* at 66. Stoljar goes on to argue that it is precisely because of this vagueness in resulting ultimate moral norms that they must be translated into "action-specific rules" so that they might give moral content to the law. *Id.* Stoljar's thesis is that the law needs moral content to transform it from hollow coercion into a set of morally justified standards with an internal purpose. *Id.* This Note suggests that a purely moral-normative inquiry can be useful in proportionality analysis if properly bound by a more objective analysis to curb the vagaries identified by Stoljar. *See infra* notes 126-32 and accompanying text.

103. 103 S. Ct. at 3011.

104. *Id.* at 3012-13.

105. *Id.* at 3023. Justice Rehnquist, author of the *Rummel* opinion, pointed out some of the ambiguities of the normative criteria on which the *Helm* Court relied. Justice Rehnquist noted that notions of "violence" and "magnitude" might not always provide a firm standard by which to judge the seriousness of an offense. 445 U.S. 263, 282 n.27 (1980). For example, Brutus' murder of Caesar by stabbing was violent, but Claudius' murder of Hamlet by poison was not. Can one say that one crime was more serious than the other? *Id.* Similarly, is embezzlement of large amounts of money to be viewed as more or less serious than the armed robbery of a smaller sum? *Id.* How do the conflicting norms regarding violence and magnitude inform us in such a situation? While these considerations do not necessarily lead to the conclusion that a normative inquiry "will not wash" (*Id.*), they do point out some of the latent ambiguities in the Court's proportionality analysis which are cause for concern. *See supra* notes 73-108 and accompanying text.

106. The *Helm* Court recognized that its normative analysis was a general one, stating that the comparison of the severity of different crimes is possible on "a broad scale." 103 S. Ct. at 3011. *See also* HART, *supra* note 71, at 25. ("A common sense scale of gravity . . . consists of very broad judgements both of relative moral iniquity and harmfulness of different types of offence . . . .")

tence. Convicted criminals may, nevertheless, receive sentences that would be considered excessive under more refined standards. The analysis should not stop with disproportionality. Refined standards can be distilled from the Court's eighth amendment cases.[107] The development of these standards involves the reconciliation of the retributive and utilitarian theories in a two-step test to determine the constitutionality of punishments under the eighth amendment.

III. THE COKER EXCESSIVE PUNISHMENTS TEST: ATTEMPTS TO RECONCILE UTILITARIAN AND RETRIBUTIVE THEORIES

On one level, the utilitarian and retributive theories are reconcilable. Most modern penal codes are founded upon both retributive and utilitarian justifications.[108] In eighth amendment jurisprudence, however, the theories become irreconcilable. From the standpoint of constitutional review, the excessiveness concept, as an ultimate limitation on the severity of punishment, yields conflicting results under retributivist and utilitarian analyses.[109] Utilitarian theory justifies punishments that are not justified under retributive theory.

The classic illustrative example is that utilitarian theory can justify the severe punishment of an innocent person to deter others from crime.[110] A more practical example better illustrates the point: A person is sentenced to fifty years in prison for stealing a watch. Retributive analysis would find this punishment excessive, since under almost any moral criteria, fifty years in prison is not commensurate with the moral culpability of a watch thief. Under the utilitarian theory, however, if the punishment contributes to utilitarian goals—e.g. specific and general deterrence—[111] then it is justified and is not, therefore, excessive.[112] In light of this inherent conflict, it appears that only one of these theories can provide the substantive meaning of the eighth amendment's limitation on excessive punishments.

The Supreme Court, however, has adopted an eighth amendment test, which attempts to reconcile the two theories. In *Coker v. Georgia*,[113] a plurality of the Court held that "a punishment is 'excessive' and unconstitutional if it 1) makes no measurable contribution to acceptable goals of

107. *See infra* notes 123-27 and accompanying text.

108. VON HIRSCH, *supra* note 93, at 78 and n.*.

109. *See supra* notes 64-65 and accompanying text.

110. RICHARDS, *supra* note 56, at 232-33. Punishment imposed on the innocent relatives of a criminal is an example where punishing innocent persons has a specific deterrent effect. But even the indiscriminate punishment of innocent people has some general deterrent value because it demonstrates the state's power to punish and reminds the public of the nature of the consequences of crime.

Since retributive theory justifies punishment only when one deserves it by reason of a moral transgression, the utilitarian punishment of the innocent presents the classic violation of retributive theory.

111. *See supra* note 58.

112. Professor Richards offers the example of the utilitarian imposition of the death penalty for traffic violations. RICHARDS, *supra* note 56, at 233. He muses that utilitarian theorists would argue that such a penalty would never be imposed because, though it possesses deterrent value, it would inevitably sacrifice a higher interest in the preservation of life. *Id.* He points out, however, that strict utilitarian theory could justify such a sacrifice if there were, on balance, a greater number of lives saved due to a concomitant decrease in traffic deaths. *Id.*

113. 433 U.S. 584 (1977).

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."[114]

The second prong of this test sets forth a retributive basis for excessiveness.[115] The first prong of the test is ambiguous. The Court has not defined acceptable goals of punishment. If *retribution* is an acceptable goal of punishment, the first prong provides no independent basis for striking down the punishment. A punishment proportionate under the second prong serves at least one acceptable goal—that of retribution.[116] Conversely, a disproportionate punishment is unconstitutional despite its contribution to other acceptable penal goals. The first prong provides no independent basis for upholding a disproportionate penalty. Thus, the only inquiry under the test is whether a punishment is proportionate or disproportionate.

It is apparent that for the two prongs to be independent, the first prong must refer to goals of punishment *other* than retribution. These, however, are utilitarian goals.[117] Under such a construction, the test offers two alternative bases for finding excessiveness under the Constitution, each grounded in a conflicting justification for punishment. Such a test is not definitive of eighth amendment excessiveness. Rather, it provides conflicting meanings that yield different results.[118]

In theory, the *Coker* test could be utilized if interpreted as having two independent prongs.[119] A court could find punishments excessive and unconstitutional if they failed under either of the separate utilitarian and retributive inquiries.[120] In practical terms, however, the first prong of the test

---

114. *Id.* at 592.

115. *See supra* notes 66-72 and accompanying text.

116. At least one member of the Court views retribution as an unacceptable goal. *See* Furman v. Georgia, 408 U.S. at 363 (1972) (Marshall, J., concurring). Justice White, on the other hand, clearly views retribution as an acceptable penal goal. *See* Roberts v. Louisiana, 428 U.S. at 354 (1976) (White, J., dissenting). *See also* Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders.").

117. *See supra* note 58.

118. *See supra* notes 109-13 and accompanying text.

119. Professor Radin explained the test in this manner:

> Before considering how a court should decide whether a punishment is disproportionate to a crime, let us consider the relationship of these two standards in light of the utilitarian and retributivist theories of punishment. In the first place, if one is a retributivist, then the proportionality standard and the first standard coalesce, because a punishment is disproportionate to a crime if its sanctions are more severe than the criminal deserves. Because retributivists argue that the only acceptable justification of punishment is that criminals deserve it, punishing disproportionately would serve no acceptable goal of punishment. On the other hand, if one is a pure utilitarian the two standards also coalesce, because a punishment is disproportionate to a crime if the social benefit of deterrence gained from it is less than the social harm caused by the pain it inflicts. Because utilitarians argue that the only acceptable goal of punishment is achieving a net social benefit, a punishment that results in a net social loss serves no acceptable goal. It is clear, then, that the *Coker* plurality's two excessiveness standards are distinct only if one adopts the Hart/Packer mixed view, or a dualist view with no reconciling rationale. Interpreted in light of either view, the first part of the *Coker* test requires that punishments result in a net social gain, and the second part functions as a limitation on particular punishments that may serve utilitarian ends, but violate the element of human dignity inherent in retributivism.

Radin, *supra* note 44, at 1053.

120. *See id.*

would still lack independent significance. It is difficult to conceive of instances where a punishment, though proportionate, fails to contribute measurably to utilitarian goals and is therefore unconstitutional under the first prong. All proportionate penalties provide at least some measure of deterrence, isolation, or rehabilitation. Conversely, there are many instances where punishments justified under the first prong fail under the second. Again, punishing the innocent serves to deter, but it is disproportionate. Hence, the two-pronged aspect of the test works in only one direction. The disproportionality prong serves as an ultimate limitation on punishments otherwise justified on utilitarian grounds, but the utilitarian prong provides no similar check on proportionate penalties.

In tacit acknowledgement of this problem, the Court has never relied solely on the first prong of the *Coker* test to strike down a punishment.[121] Indeed, in *Coker* the Court found the death penalty disproportionate to the crime of rape and, therefore, found it unnecessary to examine the utilitarian goals of the punishment.[122] In *Helm*, moreover, the Court ignored the first prong of *Coker* and applied the singular proportionality standard.[123]

After *Helm*, proportionality analysis rooted in retributive theory is the singular eighth amendment standard of excessiveness, despite the Court's prior explicit recognition of the relevance of utilitarian theory.[124] Coupled with the existence of inherent shortcomings in proportionality analysis,[125] this aspect of *Helm* points up the need to develop a more comprehensive eighth amendment standard. This standard must encompass utilitarian inquiry in the interests of more fairly defining excessiveness and maintaining the vitality of *Coker*. A reinterpretation of the *Coker* test provides that standard.

IV. PROPOSAL FOR THE FULL APPLICATION OF THE *COKER* DUALIST STANDARD

This proposal is based upon the propositions established in the preceding sections: 1) normative proportionality analysis is inherently subjective in content and application, and, therefore, its results must be acknowledged as so influenced;[126] and 2) the *Coker* two-pronged excessiveness test in reality provides only a singular proportionality standard, and even when interpreted as a dualist standard, its utilitarian prong has no practical, independent significance.[127] The *Coker* test should permit an initial retributive-

121. The first prong was discussed in Enmund v. Florida, 458 U.S. 782, 798 (1982) where the Court considered the constitutionality of the death penalty imposed upon a man who drove the car for two other people who robbed and killed an elderly couple. Citing *Coker*, the Court stated that the penalty could not stand unless it would contribute measurably to deterrence or *retribution*. *Id.* The Court found that the penalty did not and held it unconstitutional. *Id.* at 801. This application of the test merely serves to illustrate that if retribution is one of the acceptable goals of punishment, the two prongs coalesce. Thus, once the Court determined that the punishment was more than Enmund's just deserts, the inquiry was complete under *Coker*. *See id.* at 798-801.

122. 433 U.S. at 592 n.4.

123. 103 S. Ct. 3001, 3010-3012 (1983); *see also supra* notes 36-40 and accompanying text.

124. *See supra* notes 113-20 and accompanying text.

125. *See supra* notes 73-107 and accompanying text.

126. *Id.*

127. *See supra* notes 113-20 and accompanying text.

proportionality analysis and, in proper cases, should guard against the vagaries of such analysis through utilitarian principles.

A. *Margin of Error*

The results of proportionality analysis contain a degree of error on either the high or the low side of the perfectly just punishment for a given crime.[128] Divine insights or a grasp of metaphysical notions of justice might reveal that judges' proportionality determinations are often erroneous and that either a greater or lesser punishment is truly morally justified. Errors can result from bias, prejudice, or other subjective variables that enter into any predominantly moral calculus.[129]

The results of proportionality review should allow for that degree or margin of error. Proportionality review may not yield the exactly "fitting" punishment for a crime, but it may yield an acceptable range within which the state may—*prima facie*—constitutionally punish. Within that range, a more objective level of analysis can refine and check the measure of just deserts. The *Coker* test provides the appropriate framework for such analysis.

B. *Ranges of Punishment*

Proportionality review might result in a range of years within which any prison sentence imposed for the crime must fall. The range might also be made up of two or more punishments of close, but different severity, which differ in kind.[130] This is the situation where, for example, life imprisonment without the possibility of parole, and death, are each deemed morally justified.

When a challenged punishment is viewed in relation to such a range, there are three possible results. First, if the punishment is beyond the range, it is disproportionate and unconstitutional, and the inquiry ends. Second, if the punishment is at the low end or well within the range, it is reasonable to assume that the margin of error is not exceeded, and the punishment is proportionate and constitutional. Third, if the punishment is at the high end of the acceptable range, it is reasonable to assume that the challenged penalty is within the margin of error. Such a punishment should not be upheld without further scrutiny.

C. *Refining the Ranges: Objective Utilitarian Justification*

Where the margin of error is implicated, *Coker* should be read to re-

128. The degree of error results from the generalized nature of proportionality criteria. *See supra* notes 100-107 and accompanying text.

129. *See id.*

130. The notion that some punishments differ in kind rather than degree was suggested by Justice Stewart in Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring):

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

quire the state to justify the greater punishment on utilitarian grounds.[131] The state must demonstrate that the increment of greater punishment contributes measurably to utilitarian goals. Under *Coker*, if the state cannot make such a showing, its chosen punishment is the gratuitous infliction of suffering and is therefore excessive and unconstitutional. This analysis is not a departure from the ultimate principle of just deserts; it deals only with the proper choice between a range of punishments already justified on retributive grounds.[132] This second level of inquiry only requires, in keeping with *Coker*, that the state choose, from a range of morally acceptable punishments, a punishment that contributes to utilitarian goals, and reject as excessive those that do not.

An example illustrates the proposed analysis. An offender is sentenced to a twenty-five year prison term for possession and distribution of a small amount of marijuana. Through proportionality review, a sentence ranging from ten to twenty-five years is justified retribution. The state must demonstrate that the added fifteen years (or a number of years reasonably thought to be within the margin of error) contribute measurably to utilitarian goals, e.g., deterrence. If the state fails to make the showing, the additional penalty, though morally justified, has no utilitarian basis and is therefore the added infliction of purposeless suffering. The analysis does not require striking down the whole punishment, but only that increment which utilitarian grounds cannot justify.

A more compelling example of the need for this analysis occurs where proportionality analysis yields two morally acceptable punishments that are nearly equal in severity, but differ in kind. For example, an offender might morally deserve either life imprisonment without the possibility of parole or death. A murderer's crime might involve a sufficient number of aggravating and mitigating circumstances to justify either punishment as proportionate, depending on the relative weight given to the various countervailing elements. Conceding that moral exactitude is not possible in proportionality analysis, either of these penalties is justifiable on retributive grounds. For the convict sentenced to death, the proposed second level of analysis is crucial. The state must show that death, which differs both in severity and in kind from the lesser punishment of life in prison without parole, makes some measurably greater contribution to deterrence. If there is no measurably greater utility in execution, the punishment is not justified under the first *Coker* prong.

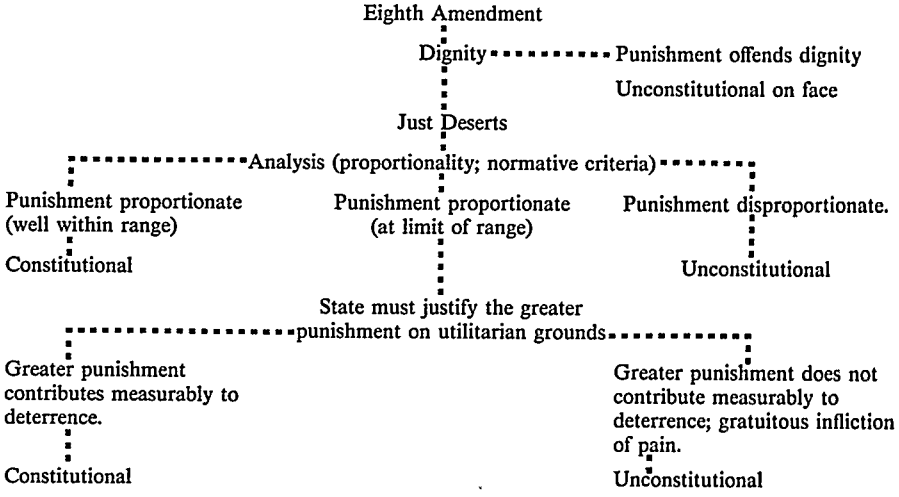
---

131. *See supra* notes 113-25 and accompanying text.

132. Andrew Von Hirsch, in his *Report of the Committee for the Study for Incarceration* in DOING JUSTICE, *supra* note 93, expresses the committee's view that the principle of "commensurate" (just) deserts "is a requirement of justice." *Id.* at 69. For the Committee, states Von Hirsch, "departures from the principle—even when they would serve utilitarian ends—inevitably sacrifice justice." *Id.* at 69 n.*. Nevertheless, Von Hirsch also reports that though the just deserts principle should have priority, to the extent it leaves choice, utilitarian goals may be considered. *Id.* at 94. In describing the method for constructing a scale of severity for punishments, he states: "[I]n deciding the magnitude of the scale, deterrence may be considered within whatever leeway remains after the outer bounds set by commensurate deserts have been established." *Id.*

V. SUMMARY

The eighth amendment analysis proposed in this piece is summarized in the following chart:



VI. CONCLUSION

The doctrine of proportionality is a moral principle of fairness in punishment. Like equitable principles of the civil law, the doctrine provides a method by which courts may give expression to the conscience of the law. The Supreme Court's holding in *Solem v. Helm*, that proportionality is embodied in the eighth amendment concept of cruel and unusual punishment, is an important step toward insuring that the state fairly exercises its awesome power to punish. The *Helm* proportionality analysis permits courts to decide the constitutionality of a punishment with reference to indicators of the public morality. This is arguably in accord with the Court's modern view of the eighth amendment as an evolving standard that keeps pace with the moral progress of society.

Moral inquiry, however, is a two-edged sword. Since no person has a barometer by which to measure moral just deserts, subjective variables may enter the analysis at every level. Thus, the proportionality doctrine is peculiarly susceptible to the moral inclinations of particular tribunals. *Helm* did not so acknowledge.

The solution is not to discard a progressive principle of justice. Rather, it is to recognize the shortcomings of proportionality analysis and provide a method for objectively checking its results. Since the Court has previously espoused a utilitarian test for constitutionality, that test provides an appropriate standard. Moral justification, coupled with a basis for assessing social utility, provides the best method for determining the constitutionality of punishments under the eighth amendment.