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RESPONSE

SEPARATING RETRIBUTION FROM PROPORTIONALITY: A RESPONSE TO STINNEFORD

William W. Berry III[*]

PROFESSOR John Stinneford follows his initial article concerning the original meaning of the Eighth Amendment[1] with an excellent article in the *Virginia Law Review*, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*.[2] In this latest piece, Stinneford argues that the original meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause includes not only a prohibition against barbaric punishments (defined as ones without "long usage"), but also against excessive or "disproportionate" punishments.[3] Stinneford then advocates rethinking the Supreme Court's Eighth Amendment evolving standards of decency jurisprudence to center the "cruel" inquiry on whether the punishment at issue is "proportionate," in a retributive sense, in light of prior punishment practices.[4]

[*] Assistant Professor of Law, University of Mississippi.

[1] In this initial article, Stinneford broke new ground by re-examining the original meaning of the Eighth Amendment, correcting historical misunderstanding and arguing that "unusual" refers to not having "long usage," emphasizing the need for Eighth Amendment scrutiny for new or innovative forms of punishment. John F. Stinneford, The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739, 1745 (2008).

[2] John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 Va. L. Rev. 899 (2011).

[3] Id. at 907.

[4] Id. at 967–68.

Stinneford's article is important both in that it legitimizes, from an originalist perspective, the use of proportionality in the application of the Eighth Amendment, and in that it offers a proposal for restructuring the application of the Eighth Amendment around this principle. In doing so, Stinneford uses his historical interpretation of the Eighth Amendment to argue for a new approach to applying proportionality in a solely retributive manner.

In this brief Response, I raise two possible objections to Stinneford's analysis. First, Stinneford insists that proportionality must be solely a retributive concept for Eighth Amendment purposes, both as a matter of original interpretation and sound application. While retribution is certainly part of the "proportionality" analysis, I believe that utilitarian justifications of punishment are also relevant to the concept of proportionality. As explained below, this is true both as a matter of original interpretation and perhaps more importantly as a reasonable basis for the Court's current application of the Eighth Amendment.

Second, I question whether, if one adopts Stinneford's model of Eighth Amendment retributive proportionality, application of the Eighth Amendment would achieve the purposes he advocates. Specifically, I am not persuaded that limiting the application of the Eighth Amendment to the question of retributive proportionality would improve the much-criticized application of the Eighth Amendment in capital cases.[5] Further, I am not convinced that the retributive model of proportionality Stinneford advocates would effectively bridge the gap between the two-tiered application of the Eighth Amendment in capital and non-capital cases.[6]

Despite these criticisms, I do believe that Stinneford rightly advocates the adoption of proportionality as an important part of applying the Eighth Amendment. My view, however, is that a broader

[5] See, e.g., Tom Stacy, Cleaning up the Eighth Amendment Mess, 14 Wm. & Mary Bill Rts. J. 475, 476–77 (2005); Samuel B. Lutz, Note, The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition, 80 N.Y.U. L. Rev. 1862, 1863–66 (2005) (exploring the social values that should inform the interpretation of the Eighth Amendment, arguing that "there has been a general failure to develop any larger theory of the Eighth Amendment").

[6] See, e.g., 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, 1162–63 (2009); Douglas A. Berman, A Capital Waste of Time? Examining the Supreme Court's "Culture of Death," 34 Ohio N.U. L. Rev. 861, 861 (2008).

concept of proportionality—including both retributive and utilitarian principles—would better achieve the goal of a more intelligible and robust Eighth Amendment in capital and non-capital cases alike.

DEFINING "PROPORTIONALITY REVIEW"

Before exploring the efficacy of the concept of proportionality that Stinneford articulates, which he terms "proportionality review," it is important to distinguish this conceptualization from the proportionality review performed by many state supreme courts in reviewing capital sentences.[7] The proportionality review that state supreme courts employ seeks to provide a safeguard against disparity among jury verdicts in capital cases.[8] The purpose of this proportionality review is to ensure that outcomes are proportional in a relative sense, that is, without significant disparity *between* cases.

When Stinneford refers to "proportionality review," however, he means something entirely different. He focuses solely on the Supreme Court's application of the Eighth Amendment to permit or exclude the use of a particular punishment in light of its relationship to the offender and the criminal offense. The Supreme Court has adopted a two-tiered approach for its application of the Eighth Amendment, using categorical exclusions in capital cases to bar the use of the death penalty for mentally retarded offenders, juveniles, and non-homicide crimes, while generally allowing punishments in non-capital cases unless they are "grossly disproportionate."[9] Both federal and state supreme court cases thus employ elements of the concept of proportionality in their analysis. Stinneford's "propor-

[7] See, e.g., Gregg v. Georgia, 428 U.S. 153, 161 (1976).

[8] Query whether such review provides any safeguard at all, as state supreme courts rarely use proportionality review to overturn jury verdicts. See, e.g., Walker v. Georgia, 129 S. Ct. 453, 455 (2008) (mem.) (Stevens, J., dissent to denial of certiorari) (describing the inadequacy of Georgia's proportionality review).

[9] See Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring) (applying "grossly disproportionate" review to non-capital cases); see also Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (non-homicide crimes); Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (mentally retarded offenders). But see Graham v. Florida, 130 S. Ct. 2011, 2022–23 (2010) (applying the capital track to a non-capital case). I have argued elsewhere for a "third" track for life-without-parole cases. William W. Berry III, More Different than Life, Less Different than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After *Graham v. Florida*, 71 Ohio St. L.J. 1109, 1111–12 (2010).

tionality review" examines proportionality in an absolute sense—that is, whether a punishment comports with the intended purpose of punishment.[10]

WHY PROPORTIONALITY NEED NOT BE EXCLUSIVELY RETRIBUTIVE

In his article, Stinneford goes to great lengths to demonstrate that Justice Scalia's view, that proportionality was not part of the original meaning of the "cruel and unusual" punishments language of the Eighth Amendment, is incorrect. He emphasizes that the intent of the framers of the Constitution was to include the concept of proportionality as part of the meaning of the Eighth Amendment. Stinneford's evidence, however, does not foreclose the possibility of a more robust conception of proportionality as a matter of original interpretation.

As he recognizes, the writings of Cesare Beccaria, an advocate of utilitarianism, influenced many of the Founders. Indeed, some have observed that Beccaria's book *On Crimes and Punishment* was "more influential than any other single book" during the 1770s and 1780s.[11] In his work, Beccaria explained the central nature of the concept of proportionality to the theory of deterrence:

> [T]he purpose of punishment is neither to torture and afflict a sentient creature nor undo a crime already done. . . . The aim, then, of punishment can only [be to] prevent the criminal [from] committing new crimes against his countrymen, and to keep others from doing likewise. Punishments, therefore, and the method of inflicting them, should be chosen *in due proportion to the crime* so as to make the most efficacious and lasting impression on the minds of

[10] Stinneford, of course, believes that this concept of proportionality should be exclusively retributive in nature, examining only whether the punishment comports with the just desert of the offender. Stinneford, supra note 2, at 967–68.

[11] Adolph Caso, We The People . . . : Formative Documents of America's Democracy 264 (1995); see also Donald S. Lutz, The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought, 78 Am. Pol. Sci. Rev. 189, 193 (1984) (noting that Beccaria's book was the sixth most cited secular source from 1760-1805); Michael J. Zydney Mannheimer, Not the Crime, but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula, 86 Ind. L.J. 879 (2011) (describing Beccaria's influence on the Founders).

> men, and the least painful impressions on the body of the criminal.[12]

Stinneford discounts Beccaria's influence, arguing:

> There is no evidence that anyone at the time the Eighth Amendment was adopted believed that the Cruel and Unusual Punishments Clause incorporated Beccaria's ideas. All the early cases discuss the Cruel and Unusual Punishments Clause in light of traditional common law standards of proportionality, not new ideas regarding deterrence.[13]

But the common law standard that Stinneford refers to is based on the concept of "relative" proportionality as opposed to a concept of purely retributive proportionality. In other words, under the common law as Stinneford presents it, a case is "proportional" if it yields a similar (or not drastically inconsistent) outcome to cases before it. This concept is neither retributive nor utilitarian in nature—it merely requires consistency with prior results.

Stinneford assumes that all of the prior sentencing outcomes in criminal cases under the common law result from the application of a *just deserts* theory of retribution. If this is true, then his assessment is correct. Given, though, the history of brutal punishments under Judge Jeffreys and others during the Bloody Assizes, punishments that arguably stemmed from a desire to deter certain behaviors, it seems quite possible that any concept of proportionality embedded in the concept of "cruel and unusual" punishments might also be the result of a desire to prevent over-deterrence or other excessive pursuits of utilitarian aims.

Perhaps more importantly, even if Stinneford is accurate in his claim that the "original" understanding of Eighth Amendment proportionality consists only of retribution, there are serious questions as to whether such an approach comports with the Founder's own views of "constitutional" interpretation. As Professor Larry Kramer has explained:

> The problem is that there was *not* an agreed upon set of conventions for interpreting the Constitution at the time of the Founding,

[12] Cesare Beccaria, Of Crimes and Punishments 49 (Jane Grigson trans., Marsilo Publishers 1996) (1764) (emphasis added).

[13] Stinneford, supra note 2, at 967.

> as evidenced by the extensive debates that erupted. . . . [D]ifferent and competing principles developed, and there was no more agreement about what the "correct" way to interpret the Constitution was or should be in the early years of the Republic than there is today.
>
> That being so, it is impossible to talk about the notion of an original public meaning, because at that point you really are just making it up from the top down. You are deciding what principles should have been used in the eighteenth century to determine public meaning, because those principles were never settled.[14]

Thus,

> insofar as there were, at the time, two or more plausible positions on the correct original public meaning of a provision of the Constitution, all one does in embracing one of them today is to take sides in a historical dispute that was not resolved at the time of the Founding, and so is not resolvable on originalist terms today.[15]

Indeed, the United States Supreme Court recognized the inherent limitations in restricting the Eighth Amendment to any "original" understanding in its first significant Eighth Amendment case, *Weems v. United States*.[16] In *Weems*, the Court observed that

> While legislation, both statutory and constitutional, is enacted to remedy existing evils, its general language is not necessarily so confined and it may be capable of wider application than to the mischief giving it birth.
>
> The Eighth Amendment is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice . . . .[17]

Thus, even if the "original" meaning of the Eighth Amendment restricted the concept of proportionality to retribution, the Supreme

[14] Larry Kramer, Two (More) Problems with Originalism, 31 Harv. J.L. & Pub. Pol'y 907, 912 (2008).
[15] Id. at 911.
[16] 217 U.S. 349, 379 (1910).
[17] Id. at 350.

Court's application of the Eighth Amendment has consistently emphasized the relevance of all justifications for punishment, not solely retribution. The Court's evolving standards of decency doctrine has consistently explored whether a given punishment comports with *any* of the applicable purposes of punishment.[18]

Stinneford attempts to discredit this approach in part by leveraging an 1828 definition of excessive to suggest that retributive punishments are the only way to achieve justice. He explains:

> It is important to note the distinction between the justification for punishment and the purposes of punishment. A punishment's justification is that which gives the punishment the quality of justice. At the time the Eighth Amendment was adopted (as today), "justice" meant principally: "The virtue which consists in giving to every one what is his due . . . ." The justification for punishment is that which ensures that the offender gets his due. By contrast, the purposes of punishment are the good things we hope to achieve through it, irrespective of what is due to the offender as a matter of justice. . . . On the face of it, it would seem that utilitarian theories cannot tell us whether a punishment is just, merely whether it is useful.[19]

But Beccaria does not see it this way: "[T]hough a punishment may have a good result, it is not on that account always just; to be just a punishment must be necessary . . . ."[20] For Beccaria, Jeremy Bentham, and other utilitarians, justice is administering a punishment that achieves society's needs, including deterrence and protection from dangerous individuals. And contrary to Stinneford's statement that "only retribution can justify punishment, and only punishment that goes beyond a defendant's moral desert can be considered 'beyond the bounds of justice[,]'"[21] a broader account of proportionality can serve to exclude punishments on utilitarian grounds—that such punishments are unjust because they go beyond what is needed to achieve such goals. As Professor Alice Ristroph explains, "The first rule of proportionality (for which Bentham cites Beccaria) requires that '[t]he value of the punishment must not be

[18] Stinneford, supra note 2, at 962.
[19] Id. (footnote omitted).
[20] See Beccaria, supra note 12, at 49.
[21] Stinneford, supra note 2, at 967.

less in any case than what is sufficient to outweigh that of the profit of the offence.'"[22]

Stinneford also claims, echoing H.L.A. Hart's argument, that the Eighth Amendment's conception of proportionality should be solely retributive because the Constitution's treatment of criminal law is primarily retributive.[23] But the Constitution clearly does not forbid the use of other justifications as a basis for punishment. In fact, the primary federal sentencing statute, 18 U.S.C. § 3553, presently *requires* consideration of non-retributive purposes of punishment in sentencing.[24] It seems odd that the question of whether a sentence was excessive as a matter of *just deserts* would be the only way by which to determine if a sentence that may be based on utilitarian rationales would survive the Eighth Amendment.

To be clear, I am not advocating the adoption of a utilitarian framework for the application of proportionality under the Eighth Amendment. Rather, it seems to me that a conception of proportionality that encompasses both retributive and utilitarian elements provides the Supreme Court the ability to apply the Eighth Amendment in a more flexible and consistent manner.

THE CONSEQUENCES OF ADOPTING RETRIBUTIVE PROPORTIONALITY

Having argued that the Cruel and Unusual Punishments Clause incorporates the concept of retributive proportionality, Stinneford then advocates rethinking the application of the Eighth Amendment in light of this concept. His approach first asks whether a particular punishment is "unusual," using the concept developed in his previous article that unusual punishments are ones that have not enjoyed "long usage." If a punishment is "unusual," Stinneford's model then requires a determination of whether the punishment is "cruel." The

[22] Alice Ristroph, Proportionality as a Principle of Limited Government, 55 Duke L.J. 263, 276 (2005); see also id. at 284–85 (developing a robust conception of "political" proportionality and explaining that proportionality can be broader than the retributive concept of *just deserts*).

[23] Stinneford, supra note 2, at 964.

[24] This section requires a sentencing judge to "impose a sentence sufficient, but not greater than necessary" and to consider the need for the sentence to: "reflect the seriousness of the offense . . . ;" "afford adequate deterrence to criminal conduct;" "protect the public from further crimes of the defendant;" and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553 (2006).

"cruel" inquiry encompasses the question of retributive proportionality, that is, whether for *just deserts* purposes, the punishment exceeds the culpability of the defendant.

Interestingly, though, Stinneford's model adds a second part to this conception of "retributive proportionality"; he requires a comparison to prior punishment practice. Along these lines, Stinneford proposes that the Supreme Court use "the size of the gap between prior punishment practice and the new punishment being challenged" as the "guideposts" in assessing whether a punishment is "cruel" for Eighth Amendment purposes.[25] This inquiry, though, has little to do with *just deserts* retribution; rather, it seeks to define a punishment as "cruel" based on its *relative* proportionality to other cases. As indicated above, this determination is independent of the *purpose* of punishment; instead, it is dependent on the *past practice* of punishment, which might or might not be retributive.

Indeed, applying the concept of *just deserts* retribution as *the* measure of proportionality results in an approach similar to that of the Supreme Court in non-capital Eighth Amendment cases. In such cases, the Court affirms punishments unless they are "grossly disproportionate" to the offense committed and the offender's culpability. Using Stinneford's originalist interpretation that identifies retributive proportionality as a central aspect of the Eighth Amendment, one might modify the test from grossly disproportionate to merely disproportionate. An application of *just deserts* retribution as the basis for proportionality yields this similar test. This approach would certainly be workable, provided the Court would use it in capital cases in lieu of its much-criticized evolving standards of decency approach. Indeed, the problem of two-track application of the Eighth Amendment is not related to retributive or utilitarian justifications for the use of the concept of proportionality; it is the Court's unwillingness to use the concept *at all* in almost every non-capital case.

Elsewhere, I have argued that the Supreme Court should apply a two-pronged Eighth Amendment analysis based on the two different types of proportionality identified here: relative ("unusual") and ab-

[25] Stinneford, supra note 2, at 972.

solute ("cruel").[26] I think Stinneford is correct in recognizing that there needs to be consistency (that is, relative proportionality) in sentencing under the Eighth Amendment—this concern is at the heart of the Court's opinion in *Furman*[27]—but it is equally clear that *relative* proportionality and *absolute* proportionality are unique, if not competing, concepts.[28]

I depart from Stinneford in defining the concept of absolute proportionality. I believe that this concept is more robust than *just deserts* retributive proportionality. As the Court's evolving standards of decency jurisprudence emphasizes, utilitarian considerations such as deterrence, future dangerousness, and rehabilitation help define whether a punishment is excessive for Eighth Amendment purposes.[29] In other words, a punishment violates the Eighth Amendment, in terms of absolute proportionality, where no penological justification can support the punishment given the circumstances. Finally, I suggest that the Court engage in the relative proportionality analysis, through robust state appellate court proportionality review, *subsequent to* the absolute proportionality analysis to further narrow the cases that satisfy the absolute proportionality requirement.

CONCLUSION

This brief Response has attempted to explore two potential weaknesses in Stinneford's outstanding contribution: (1) the view that proportionality under the Eighth Amendment is purely retributive and (2) the consequences of applying a purely retributive conception of proportionality to determine whether a punishment violates the Eighth Amendment. Criticisms aside, Stinneford's article, perhaps most importantly, highlights the centrality of the concept of proportionality in the application of the Eighth Amendment and the

[26] See William W. Berry III, Promulgating Proportionality: A Reframing of the Eighth Amendment, 46 Ga. L. Rev. (forthcoming 2011), *available at* http://ssrn.com/abstract=1768411.

[27] Furman v. Georgia, 408 U.S. 238 (1972).

[28] See Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in judgment).

[29] Of course, these justifications generally do not support the use of capital punishment. See William W. Berry III, Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty, 52 Ariz. L. Rev. 889, 903–04 (2010).

possibility that by more clearly defining and applying the concept, the Supreme Court can strengthen its Eighth Amendment jurisprudence.