

Proportionality, Subjectivity, and Tragedy

*Margaret Jane Radin**

INTRODUCTION

In this essay I shall comment upon the role of proportionality in the moral justification of punishment and its bearing on execution as practiced in our system of criminal justice. For execution to be fair under the liberal ideal of the rule of law it must (at least) be administered nonarbitrarily; but given that a moral judgment of desert is involved in fair imposition of punishment, this aspiration of nonarbitrariness is at odds with the modern liberal propensity to view moral choices as inherently subjective or arbitrary. In this essay I shall sketch how the debate over proportionality is a subcategory of the debate over desert, which in turn is a microcosm of the modern debate over the ontology and epistemology of morals. This discussion is intended to show how execution puts the rule of law ideal to the test. I shall also suggest that the intensity of debate over execution may be distracting us from worse and more pervasive social injustices.

I. ABSOLUTE AND COMPARATIVE PROPORTIONALITY (FIT AND EQUALITY)

The requirement of proportionality in punishment is best seen as a component of the Kantian form of retributivist justification.¹ Punishment is supposed to be just desert, so it is unjustified if it is not what the criminal deserves. One way it can fail to be what the criminal deserves is by being the wrong kind of punishment, and another way it

* Professor of Law, University of Southern California. B.A. 1963, Stanford; M.F.A. 1965, Brandeis University; J.D. 1976, University of Southern California.

¹ Kantian retributivism grounds the justification of punishment in the notions of personhood and desert. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965) [hereafter I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*]; Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1164-80 (1980).

can fail is by being too much punishment.² In both cases we would say the punishment does not fit the crime — is disproportionate to the crime — and hence is unjustified. This is the absolute aspect of proportionality, and it is a pure retributivist moral judgment.

There is also a comparative aspect of proportionality, which is best seen as rooted in the Kantian notion of equal concern and respect for persons. This is the idea that it is unfair to punish unequally; we must treat (relevantly) like cases alike. If ten crimes are equally bad, it would be unfair to punish one criminal more severely than the other nine — even if God or an ideal observer could tell us that the more severe punishment was indeed deserved (in the absolute sense) by the unlucky one. In the comparative view disproportionality means greater severity of punishment when only equal severity could be justified under the norm of equal respect for persons. If we consider ourselves to be under a moral imperative of equal treatment, once we choose to punish some criminals in a way God or the ideal observer could tell us is too lenient, all relevantly like cases must likewise receive the same lenient treatment.

The comparative aspect of proportionality is not at first glance assimilable to the pure Kantian retributivism of which the absolute aspect of proportionality is the core. Absolute proportionality, the judgment whether this particular punishment fits this particular crime, seems on the surface to be purely an individualist scheme; justification of punishment is a matter solely between the individual criminal and God or the ideal observer. Nevertheless, the moral requirement of comparative proportionality is indeed part of the same moral scheme, once the rest of the human world (or the collective social whole) is taken into account. That is because both the requirements of absolute proportional-

² What ultimately might be meant by the wrong kind of punishment or by too much punishment is a philosophically difficult problem. As noted below, *infra* text accompanying notes 4-5, I imagine this is because the notion of absolute proportionality is no longer coherent with the prevailing moral world view. Superficially the distinction is not meaningless. Perhaps denationalization is the “wrong kind” of punishment for treason, rather than “too much,” *see* *Trop v. Dulles*, 356 U.S. 86 (1958); perhaps life imprisonment without possibility of parole is “too much” punishment for recidivist check forgery, rather than the “wrong kind,” *see* *Solem v. Helm*, 463 U.S. 277. But the distinction does not help us reason about the fittingness of execution. It seems execution is *both* “too much” *and* the “wrong kind” of punishment for rape or being an accomplice to an unplanned killing. *See* *Coker v. Georgia*, 433 U.S. 584 (1978) (death penalty for rape violates eighth amendment’s prohibition of cruel and unusual punishments); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty for murder under felony murder doctrine when defendant lacked intent to kill violates eighth amendment).

ity (fit) and comparative proportionality (equal treatment) are based on the Kantian *Grundnorm* of respect for persons. According to this norm, persons must get what they deserve, or we fail to treat them with the required respect. The requirement of absolute proportionality assumes that under this norm desert requires that the punishment fit the crime. At the same time the Kantian norm tells us that persons deserve equal treatment, and this entails the requirement of comparative proportionality. Kantian moral justification rests on universalizability: we are to act so that our personal maxim could in reason be a universal law. The universal law or categorical imperative arrived at, given that each of us is only one in a world of other persons, must be equal respect for persons, which entails like treatment in relevantly like cases.³ This reasoning is true to Kant's spirit, if not explicit in his theory of punishment, and, more important, it reflects a strongly held assumption or commitment in the moral culture of our day. Equal treatment of relevantly like cases is the imperative of liberal government and the liberal rule of law.

II. EQUALITY VERSUS FIT

But when there is a conflict between equality and fit, which prevails? Some might argue that it fails to respect a criminal's personhood to punish her less than God or the ideal observer would decree fits her crime and hence is deserved.⁴ If we accepted this argument we would be stuck in a philosophical paradox: required by respect for persons to punish her equally with all other like criminals, even if that punishment is too little ideally, and required at the same time by respect for persons to punish her unequally because that punishment is what fits. Damned if we do and damned if we don't. But I think we are not stuck in this paradox, because I think the equality argument must prevail.

Equality must prevail for two reasons. First, the notion of absolute

³ See, e.g., I. KANT, METAPHYSICAL PRINCIPLES OF THE SCIENCE OF RIGHT 28-29 (W. Hastie trans. as KANT'S PHILOSOPHY OF LAW 1887). The formulation in terms of equal respect for persons is due to modern Kantians like Dworkin and Rawls. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); J. RAWLS, A THEORY OF JUSTICE (1971).

⁴ Kant himself might have agreed with this. In a famous passage, he declared that "the last murderer" must be executed even if civil society were to dissolve. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 1, at 106. But this particular argument (which referred to "blood guilt" tainting society if it failed to execute) does not now seem coherent with Kant's general Enlightenment principles.

fittingness of punishment has always been philosophically murky. In the moral discourse of today it does not seem a helpful mode of thought. I venture to say it is part of an anachronistic vision of the world, bound up with the naive symbolism of eye for eye and tooth for tooth, and perhaps also related to the idea that what is due someone is determined by her place in a natural moral order. If in the ancient world it seemed inherent in the nature of things that some people were fit to be slaves, it might also have seemed self-evident that certain punishments were automatically fitting to certain crimes. In fact, the death penalty itself is an atavism belonging to this former world view. In the moral discourse of today we no longer have any obvious sense for these symbolic retaliations; it does not seem an obvious starting point for moral reasoning that a child who bites deserves to be bitten back, or that a thief should have her offending hand cut off. Of course, we do reason about the severity of an offense in deciding upon the appropriate severity of punishment. But there is no obvious ineluctable direct connection with appropriate punishment somehow inherent in the nature of the crime itself. We might decide that a thief deserves a year in prison, or a child deserves confinement to her room for an hour, but once the anachronistic idea of the ineluctable direct connection between crime and punishment is gone, these decisions become inescapably comparative. Our moral reasoning process compares theft to other crimes, places it somewhere on the continuum of badness, and then selects the "corresponding" place on the continuum of customary punishment (customary for other reasons, not any direct connection with the criminal's moral status). This being so, equality becomes our only guide to fit.

Second, equality is more important because it takes into moral account that all punishments are imposed in a collective, systemic way (in a political order) and under conditions of uncertainty. In an ideal system we might avoid inequality by making sure everyone is punished exactly as she deserves, no more, no less. Then, the supposed paradox of fit "versus" equal treatment would never arise. But the one thing we know for certain about the operations of government vis-a-vis its subjects, and about the operations of the criminal justice system in particular, is that this ideal is unachievable.

The second-best solution is to try at least to get rid of obvious inequalities. To do this, we have to single out a group of relevantly like cases in which different punishments have been initially proposed, itself

a dubious enterprise.⁵ Then, we could either try to ensure that everyone in this group is punished equally with the most severely punished, or ensure that everyone is punished equally with the least severely punished, or select some point in between as the standard. This choice depends upon whether we wish to risk errors against the punisher (that is, too little punishment for some) or against the punished (that is, too much punishment for some). Of course this choice allocating the risk of moral error in punishment is itself a moral choice. In my view, the norm of respect for persons requires that the risk of error be borne by the punisher and not the punished.⁶

III. PROPORTIONALITY AND JUSTIFICATION: THE IRRELEVANCE OF DETERRENCE

The connection between these views of proportionality and the problems in trying to justify execution as punishment is obvious. The problem from the absolute view is whether anyone who kills deserves to

⁵ To find cases to be relevantly alike involves choosing a blanket description of the circumstances, and this act of drawing together cases under one description is not separate from the act of moral evaluation. See, e.g., Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981). Since by hypothesis different punishments have been initially proposed, the initial moral evaluation presupposed different descriptions. To carve out a group of like cases under the circumstances is just to perform a moral and linguistic reconsideration (i.e., "appellate review"). There is a deep philosophical problem here, because it appears that the judgment of equality ultimately rests on a judgment of fit. The observer must fit the description/moral evaluation to each particular case in order to collect a set of particular cases under a single description. But if, as I argued in the text, we cannot accept the notion of ineluctable direct fit between a particular case and moral status, neither can we make an acceptable judgment about equal treatment as long as this is its basis. The certainty of the general comparative judgment is only as good as the certainty of the particular absolute judgments that comprise it. If carried to the extreme, this argument undermines the whole ideal of equal treatment of relevantly like cases, not merely the notion that execution could be nonarbitrarily imposed according to this ideal. In the text I do not go all the way down this road, nor need we, to renounce execution. In everyday discourse we are able to apply descriptions and carve out categories. But in the context of inflicting death as punishment the inherent uncertainties create severe risk of moral error. If we are uncertain about how to view absolute fit and our judgments about it, but definitely unwilling to give up the ideal of equal treatment under the rule of law, then the dubiousness of any judgments of equality, along with the gravity of the risk of moral error against individuals, should preclude execution.

⁶ See Radin, *Risk-of-Error Rules and Non-Ideal Justification*, in NOMOS XXVIII: JUSTIFICATION (J. Chapman & J. Pennock eds. 1985); Radin, *supra* note 1, at 1155-63 (arguing that respect for persons precludes execution in light of the gravity of the risk of moral error entailed).

be killed by the government — whether execution can fit some crime. The problem from the comparative view is whether anyone can deserve to be executed under a system that does not execute all those and only those whom God or the ideal observer would judge deserving (assuming for the sake of argument that someone can deserve to be executed).

Deterrence is irrelevant to both problems. They are part of the retributivist normative methodology, which does not evaluate treatment of persons in terms of its usefulness to other persons. A pure utilitarian would argue that we should execute whomever, and however many, we need to in order to deter the “right” amount, defined by some incremental excess of benefits over costs compared to other methods of social control. Whether someone is guilty of a crime or deserves to die for it is not of concern to the pure utilitarian. But no one in her right mind is a pure utilitarian. Those who think cost-benefit analysis can justify execution still think that anyone who is executed must first *deserve* execution in the retributivist sense. To put this into rights-talk, there is a nonutilitarian right not to be executed if one does not deserve it, and this right “trumps” the cost-benefit analysis. Hence, the deterrence argument falls by the wayside as long as desert, because of the philosophical problems with fit and equality, is in serious doubt.⁷

It is the comparative aspect of the philosophical problem of desert, the equality problem, that puts the liberal ideal of the rule of law to the test. The moral requirement of equal treatment makes systemic concerns about the operation of the criminal justice system, that is thought about procedures, morally central. *If the liberal rule of law cannot choose who dies with satisfactory (appearance of) equal treatment, then under the liberal rule of law no one chosen can deserve to die.*

IV. HUBBARD'S MISGUIDED “DILEMMA”

Thus, Hubbard in his article, “*Reasonable Levels of Arbitrariness in Death Sentencing Patterns: A Tragic Perspective on Capital Pun-*

⁷ Similarly, for those whose primary philosophical world view is utilitarian, these desert arguments would fall by the wayside as long as deterrence, because of the philosophical and practical problems with the empirical judgments it requires, is in serious doubt. Earlier I argued that given our moral culture in which both utilitarian and Kantian views are basic, a punishment is unjustified unless it satisfies *both* modes of moral reasoning. See Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978). Today I would be more inclined to stress the philosophical incompleteness of both modes of reasoning, as traditionally practiced, even if they are conjoined. (I am currently more hopeful that respect for persons can be philosophically rehabilitated than I am that utilitarian instrumentalism can be.)

ishment,⁸ misunderstands those of us who pursue the equality problem. By talking about systemic procedures we are not disguising some other hidden argument against the death penalty. We are making an undisguised moral and political argument against it, based upon the requirements of equal treatment and allocation of risk of error entailed by the liberal commitment to the rule of law with its norm of equal treatment in relevantly like cases. Hubbard also claims we are arguing for perfect procedures, and since there are no such, we are really arguing against the death penalty; and he says that cannot be where moral argument ends up, because there is popular support, and judicial support, for death.⁹ Here he shows himself to be a pure conventionalist. He loses the thread of moral argument that tries to detach itself from mere superficial preference summation. If one accepts the common understanding that some opinions or preferences can be morally wrong, then "I want this" does not entail "This is morally justified," and neither does "We [some of us] want this." If the equal treatment required by the rule of law morally requires better procedures than are possible, then either execution or the rule of law must be given up.¹⁰ And nothing says that if there were perfect procedures, so that the sentencer really found herself in the position of God or the ideal observer and could judge accordingly, that anyone, in the absolute sense, can deserve to die. It is only that some of us have found it more important to argue about the comparative question because, for better or worse, we are stuck in a social world, a political order, with limited information and imperfect moral judgment. For better or worse, these are the circumstances of justice under which the liberal imperative to respect persons equally as persons must work itself out — or fail to work itself out.

The tragic dilemma that Professor Hubbard thinks he sees is based upon bad philosophy and bad reasoning. I understand a tragic dilemma as the "damned if you do, damned if you don't" situation. If we are morally required to provide dialysis treatment for all patients with kidney failure and also are morally required to provide food for all under-

⁸ Hubbard, "Reasonable Levels of Arbitrariness" in *Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113 (1985).

⁹ *Id.* at 1160-61.

¹⁰ The Supreme Court seems to have recognized this as early as *McGautha v. California*, 402 U.S. 183 (1971), holding that unfettered jury sentencing discretion did not violate due process. Justice Brennan, who in this context argued for the guided discretion approach (before it was tried and failed), said in dissent: "[E]ven if I shared the Court's view that the rule of law and the power of the States to kill are in irreconcilable conflict, I would have no hesitation in concluding that the rule of law must prevail." *Id.* at 249-50.

nourished children, and also are morally required to provide housing for those homeless through no fault of their own, etc., and there is just no way we can meet all these moral requirements, even by profound changes in the political order, then we are in a tragic dilemma. Similarly, we would indeed be in a tragic dilemma with respect to the death penalty if we were (1) morally required to execute some people, those deserving to die, and (2) morally required not to execute some people, those not deserving to die, and (3) had no way to tell one class from the other either practically or morally. But we are not in such a tragic dilemma, even though (2) and (3) are true, because (1) is not true: we are not morally required to execute anyone. Moreover, the reason that we are not morally required (nor permitted) to execute anyone is *precisely because* (2) and (3) are true. We are morally required not to execute people undeserving to die, and we have no way to separate the deserving and undeserving with certainty — not even ideally, and certainly not in the real world of mistakes, misinformation, prejudice, and evil. Because of the comparative view of proportionality and desert required by equal respect for persons, and because of the allocation of risk of error also required by equal respect for persons, no one can deserve to die when the issue of whether anyone can (ideally) deserve to die is morally uncertain and when in any event it is certain that we cannot select out all and only those who deserve to die. I think there are two reasons why Hubbard does not see this, and they are related: first, he thinks utilitarianism alone can render us morally required to execute; second, he thinks the judgments necessitated by the desert and risk of error inquiries are “subjective.”

Here is Hubbard’s utilitarian dilemma: *Either* to execute “six identifiable persons who have committed brutal murders” and perhaps incur “brutalization” costs, *or* not to execute them and perhaps incur the costs of murders that might have been deterred by the executions (but would not have been deterred by life imprisonment or some other social intervention).¹¹ Notice how the entire reality of the agonizing jurisprudence of death is finessed by that word “identifiable”! If only our problem were so simple as worrying about a utilitarian dilemma once those “deserving” were unerringly singled out. But Hubbard is inclined to bypass the problems of what counts as desert both in the ideal sense and under conditions of uncertainty — and thereby ignore the right of the accused to just punishment which could “trump” the utilitarian analysis and with it his dilemma — because he thinks these moral

¹¹ Hubbard, *supra* note 8, at 1141-44.

choices are “subjective,” hence “arbitrary,” hence not to be reasoned or reckoned with.

Hubbard is an inconsistent moral skeptic. A consistent moral skeptic could not find a moral imperative in utilitarian cost-benefit analysis either, hence no tragically conflicting moral requirements. Since many utilitarians assume that moral commitments are just “subjective” or “arbitrary” preferences each of us have, like the rest of our individual desires for ourselves and our world, perhaps it is natural for the utilitarian to assume that the government “ought” to implement whatever measures will maximize the sum of individual preference satisfaction — but this “ought” is not argued for as just the individual utilitarian’s “subjective” preference. Rather this “ought” is taken as an objective ethical imperative. If Hubbard wants to take the ethical imperative of utilitarianism seriously, then he should also take the Kantian ethical limitations upon it seriously.

On the other hand, Hubbard is not a fact skeptic. That is, apparently he thinks there can in principle be objective scientific truths about costs and benefits (and much else, like effects of racial discrimination) independent of the ethical commitments of the observers and of our underlying construal of the “real world.” This particular notion of fact-objectivity, like his value-subjectivity, is no longer viable in post-Kuhnian, post-Wittgensteinian thought. As Hilary Putnam and other modern philosophers have argued, the fact/value dichotomy is not a good way to understand and interpret our world.¹² Our perceptions of facts and values and the uses we make of them are inextricably intertwined. Putnam would say that both facts and values are objective (where objectivity means not naive philosophical realism but rather rational acceptability in terms of a shared concept of human flourishing). Richard Rorty would say that facts and values are neither objective nor subjective: the subjective/objective dichotomy is as useless as the fact/value dichotomy.¹³ Either way, the unthinking claim that the moral judgments involved in implementing a punishment system are “subjective” falls prey to the “Benthamite circle”: rationality is equivalent to cost-benefit analysis, which itself gives rise to the notion that values are individual and arbitrary.¹⁴ Once we realize that there is some kind of

¹² H. PUTNAM, *REASON, TRUTH AND HISTORY* (1981).

¹³ R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); Rorty, *Pragmatism, Relativism, and Irrationalism*, in *CONSEQUENCES OF PRAGMATISM* 160 (1982); see generally R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983).

¹⁴ H. PUTNAM, *supra* note 12, at 173.

collective commitment to notions of good and right that is on the same par with notions of the facts of the "real" world, it becomes rational to pursue what is right and good rather than cost-benefit analysis. It is just as wrong to believe that the judgment of desert and equal treatment is subjective and arbitrary as it is to believe that the facts underlying a cost-benefit analysis are objective in some sense divorced from the totality of our theory and experience. What we know is that we are uncertain our judgments are right, and that if we are committed to respect for persons and the rule of law, this matters very deeply. Rather than engaging in Hubbard's oxymoronic search for reasonable arbitrariness in carrying out sentences of death, we should be asking what *really* is fair and equal treatment, given what we know.

V. TRAGIC QUALMS

Though Hubbard's dilemma is not really a tragic dilemma, because attention to the justification of punishment of individual persons in the context of a punishment system escapes it, the reader has the right to know my response to his "tragic qualm": what if the unperformable cost-benefit analysis would show that the number of lives saved through deterrence is greater than the number of lives lost through execution? This means, what if the number of people whose nonmurder is directly causally attributable to the execution rather than the imprisonment or other disposition of some number of murderers exceeds the number of people whose murder is directly causally attributable to the nonexecution of some number of murderers, plus the number of people executed?¹⁵ For the life of me, I cannot take this "qualm" seriously. No regression analysis can be pure enough to separate out these causal chains; to keep believing in this kind of isolated cause and effect and to keep seeking the magic algorithm is to hold stubbornly to an instrumentalist myth. It is awful that people get murdered, and in such great numbers. But to think the death penalty will change that is dangerous wishful thinking and avoidance. The death penalty is a symptom, not a cure. There is no way to separate out murder from the violence of our

¹⁵ This assumes that deterrence theorists count them — as good utilitarians should, since for them all lives count equally. In general the complexity of these cost-benefit algorithms, while true to the spirit of Bentham, loses touch with popular views. The person-in-the-street who tries to justify execution on the basis of deterrence is probably thinking that execution deters, not that it deters more than some other method of social control, while simultaneously causing fewer other kinds of social costs. My view is that this divergence of proper Benthamite calculation from the popular view should help us see how mythological the deterrence idea really is.

society in general, and no way to separate out violence from other circumstances that might just as readily be seen as tragic: the persistence of racism, the persistence of a poverty-stricken underclass, and much else about our society. I am not afraid that I shall be murdered if we abolish capital punishment, but I am afraid that I shall be murdered if we can't abolish the everyday brutalities of what we euphemistically call maldistribution of wealth.

This leads me to one final thought. Though capital punishment is an atrocious, horrible, anachronistic thing, the degradation and loss of life because of racism and poverty is worse (if one may even compare such horrible pejoratives). Think of the suffering and death because of inadequate prenatal care, inadequate nutrition for children, inadequate shelter, etc. Think of the suicides as well as the homicides. The magnitude of social evil in our tolerance of these conditions our society could alleviate if it chose is far greater than the evils assumed by those on either side of the execution debate if the other side should prevail. Here is where "tragic qualms," and more, are appropriate. So why do I and my fellow symposium authors and our scholarly journals give so much energy to the death penalty? Maybe it distracts us from the real tragedy of widespread everyday suffering.

But maybe there is a reason that sounds less like a moral indictment. Maybe the death penalty symbolizes the arbitrary, alien power of government over life and death; the government as avenging God run amok; our relinquishment of social responsibility to the government to fix things for us by conveniently getting rid of some bad actors. Maybe by attacking this symbol we play a part in the struggle for a more humane political order. The rich aren't executed; the rich don't starve to death or die from lack of medical care either. If noticing that the rich aren't executed helps discredit the death penalty, maybe it will also help us put two and two together.

