
COMMENT

SIX UNCONSTITUTIONAL HOMICIDE STATUTES: RATIONAL BASIS REVIEW AND THE PROBLEM OF HARsher PUNISHMENT FOR LESS CULPABLE OFFENDERS

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INTRODUCTION

The correlation of punishment to culpability stands firmly as the bedrock principle upon which legislatures construct criminal codes.¹ Ordinarily, codes punish more culpable offenders more severely than less culpable offenders who are guilty of the same crime.² Occasionally, legislatures deviate from a perfect correlation. For example, legislatures might punish offenders whose extremely reckless conduct is the cause of a crime *as* severely as those offenders who commit the same crime purposely or knowingly.³ When, however, a code punishes offenders who commit a crime with a less culpable mens rea *more* severely than offenders who commit the same crime with a more culpable mens rea, the disparity may signal not only “unenlightened penology”⁴ but also constitutional impropriety.

¹ See 4 WILLIAM BLACKSTONE, COMMENTARIES *18 (“[A] scale of crimes should be formed, with a corresponding scale of punishments”); Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN’S L. REV. 429, 467 (1990) (“[T]he most fundamental policy of any system of graded punishments is that even the guilty should not be punished beyond their deserts. . . . [A]n offender’s deserts are inextricably connected with his subjective state as much as with the harmful consequences he caused or the circumstances in which he acted.”); James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396, 1403 (2002) (“[L]egislative assignment of degrees of culpability to the different elements [of a crime] is to be the product of a reasoned judgment based upon the fundamental principle that the criminal law should provide a graduated set of punishments to reflect graduated levels of blameworthiness.”).

² See, e.g., MODEL PENAL CODE §§ 210.2–3 (1962) (punishing reckless homicide less severely than purposeful or knowing homicide).

³ See, e.g., *id.* § 210.2 (punishing homicide “committed recklessly under circumstances manifesting extreme indifference to the value of human life” as severely as purposeful or knowing homicide).

⁴ JOHN HART ELY, DEMOCRACY AND DISTRUST 250 n.65 (1980).

Although the operation and precise statutory language⁵ of each code varies slightly, the homicide statutes of six states—Alaska,⁶ Kansas,⁷ Maine,⁸ Minnesota,⁹ New Jersey,¹⁰ and New York¹¹—provide the

⁵ Throughout this Comment, I refer to as “extreme recklessness” reckless conduct that (1) manifests an extreme indifference to the value of human life, ALASKA STAT. § 11.41.110(a)(2) (2008); KAN. STAT. ANN. § 21-3402(b) (2007); N.J. STAT. ANN. § 2C:11-4(a)(1) (West 2005); (2) manifests depraved indifference to the value of human life, ME. REV. STAT. ANN. tit. 17-A, § 201(1)(B) (2006); (3) is eminently dangerous to others and evinces a depraved mind without regard for human life, MINN. STAT. § 609.195(a) (2008); or (4) evinces a depraved indifference to human life, N.Y. PENAL LAW § 125.25(2) (McKinney 2009). Additionally, I will refer to as the “passion/provocation defense” proof that the defendant acted (1) in the heat of passion and upon serious provocation, ALASKA STAT. § 11.41.115(a) (2008); (2) in the heat of passion resulting from reasonable provocation, N.J. STAT. ANN. § 2C:11-4(b)(2) (West 2005); (3) upon a sudden quarrel or in the heat of passion, KAN. STAT. ANN. § 21-3403(a) (2007); (4) under the influence of extreme anger or extreme fear brought about by adequate provocation, ME. REV. STAT. ANN. tit. 17-A, § 201(3) (2006); (5) in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances, MINN. STAT. § 609.20(1) (2008); or (6) under extreme emotional disturbance for which there was a reasonable explanation or excuse, N.Y. PENAL LAW § 125.25(1)(a) (McKinney 2009). Although the statutory formulations of extreme-recklessness homicide and the passion/provocation defense differ from state to state, the unavailability of the latter as a defense to a charge of the former raises the same constitutional issue. State punishment schemes that provide the passion/provocation defense in the case of purposeful or knowing homicide but not for extreme-recklessness homicide may effectively impose a harsher punishment for a less culpable crime. *See infra* notes 6-12.

⁶ *See* ALASKA STAT. §§ 11.41.100–120, 12.55.125 (2008) (amended 2009) (establishing purposeful homicide as murder in the first degree, punishable by twenty to ninety-nine years in prison; extreme-recklessness homicide as murder in the second degree, punishable by twenty to ninety-nine years in prison; and passion and provocation as a defense to purposeful homicide but not extreme-recklessness homicide, punishable as manslaughter by not more than twenty years in prison).

⁷ *See* KAN. STAT. ANN. §§ 21-3401 to -3403, -4704, -4706 (2007) (amended 2009) (establishing purposeful homicide as murder in the first or second degree, punishable by life or 147 to 165 months in prison, respectively; extreme-recklessness homicide as murder in the second degree, punishable by 109 to 123 months in prison; and passion and provocation as a defense to intentional killings but not killings caused by extreme recklessness, punishable as voluntary manslaughter by fifty-five to sixty-one months in prison).

⁸ *See* ME. REV. STAT. ANN. tit. 17-A, §§ 201, 203, 1251–1252 (2006) (establishing purposeful homicide as murder, punishable by twenty-five years to life in prison; extreme-recklessness homicide as murder, punishable by twenty-five years to life in prison; and passion and provocation as a defense to purposeful homicide but not extreme-recklessness homicide, punishable as manslaughter by up to thirty years in prison).

⁹ *See* MINN. STAT. §§ 609.185–20 (2008) (establishing purposeful homicide as murder in the first or second degree, punishable by life or up to forty years in prison, respectively; extreme-recklessness homicide as murder in the third degree, punishable by up to twenty-five years in prison; and passion and provocation as a defense to intentional killings but not killings caused by extreme recklessness, punishable as manslaughter in the first degree by not more than fifteen years in prison, a fine of not more than \$30,000, or both).

most glaring examples of the “harsher punishment for less culpable offenders” problem. With respect to homicide committed in the heat of passion and upon reasonable provocation (passion/provocation homicide), each code fails so dramatically to correlate punishment to culpability as to call into question its compatibility with the constitutional guarantee of equal protection.¹² In these states, offenders who purposely or knowingly cause the death of another person, while in the heat of passion and upon reasonable provocation, are punished less harshly than offenders who cause the death of another person due to their extremely reckless conduct (extreme-recklessness homicide) while in the heat of passion and upon reasonable provocation. Consequently, the more culpable criminal class is subjected to less severe punishment for commission of the same crime—homicide committed in the heat of passion and upon reasonable provocation.

The “harsher punishment for less culpable offenders” problem cannot withstand equal protection scrutiny. Legislation that does not implicate a suspect class or impinge upon a fundamental right conforms to the Equal Protection Clause if the law bears a rational relation to some conceivable legitimate state interest.¹³ Courts often afford legislatures great discretion to develop solutions to targeted

¹⁰ See N.J. STAT. ANN. §§ 2C:11-3 to :11-4, :43-6(a)(2) (West 2005) (amended 2007) (establishing purposeful homicide as murder, punishable by thirty years to life in prison; extreme-recklessness homicide as aggravated manslaughter, punishable by ten to thirty years in prison; and passion and provocation as a defense to murder but not to aggravated manslaughter, punishable as manslaughter by five to ten years in prison).

¹¹ See N.Y. PENAL LAW §§ 70.00, 125.20–25 (McKinney 2009) (establishing purposeful homicide as murder in the second degree, punishable by up to life in prison; extreme-recklessness homicide as murder in the second degree, punishable by up to life in prison; and passion and provocation as a defense to purposeful homicide but not extreme-recklessness homicide, punishable as manslaughter in the first degree by up to twenty-five years in prison).

¹² In addition to the prison sentences outlined in the notes above, the sentencing guidelines of all six states systematically burden, especially with respect to subsequent offenses, offenders convicted of extreme-recklessness homicide. These offenders, who cannot assert the passion/provocation defense, are sentenced more severely than offenders who can assert the defense to a charge of purposeful or knowing murder. See ALASKA STAT. § 12.55.125 (2008) (amended 2009); KAN. STAT. ANN. § 21-4704 (2007); ME. REV. STAT. ANN. tit. 17-A, §§ 1251–1254, 1256–1259 (2006) (amended 2009); MINN. STAT. §§ 609.095–168 (2008); N.J. STAT. ANN. § 2C:43-6 (West 2005); N.Y. PENAL LAW § 70.00 (McKinney 2009).

¹³ See *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“[A] classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

problems “one step at a time, addressing [themselves] to the phase of the problem which seems most acute to the legislative mind.”¹⁴ Thus, not only does “harsher punishment for less culpable offenders” legislation bear no rational relation to any legitimate state interest traditionally associated with criminal lawmaking—deterrence, retribution, incapacitation, or rehabilitation—but it in fact undermines these goals. While victims of the punishment/culpability problem do not constitute a recognized suspect class,¹⁵ the problem presents compelling justifications for closer judicial scrutiny within the rational basis framework.¹⁶

The problem demands a theory and application of rational basis review that accounts for the unique political and institutional concerns surrounding the calibration of punishment to culpability. Such concerns are absent from consideration of most social or economic legislation and contradict the fundamental premise of the “one step at a time” paradigm. Civil legislation is often the product of compromise and competing factions. Criminal law, however, does not benefit from dynamic evolution, which disrupts the punishment/culpability equilibrium. Although legislatures establish general requirements of culpability that purport to govern the entirety of their criminal codes they lack the incentive to harmonize punishment and culpability over time. Most criminal codes are the product of myopic piecemeal legislation—influenced by political pressures, such as strong-on-crime initiatives—that blind legislators to how a specific enactment fits into a comprehensive statutory scheme.¹⁷

Judges are better suited than legislatures to holistically evaluate how well criminal codes calibrate punishment to culpability. Con-

¹⁴ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

¹⁵ See Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 489 (suggesting that criminals are not a suspect class but that, due to their political powerlessness, they nevertheless deserve judicial protection).

¹⁶ Although this Comment advocates heightened judicial scrutiny of punishment/culpability problems within the rational basis framework, it would be inaccurate to describe the argument as advocating for “rational basis with bite.” The Supreme Court’s “rational basis with bite” cases have struck down discriminatory classifications, without employing suspect-class or strict scrutiny language, on the basis of impermissible government *purpose*. Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 313-14 (1997). There is little reason to suspect that most punishment/culpability problems are intended by legislatures.

¹⁷ See, e.g., Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 644-45 (2005) (noting the general lack of constituencies opposed to crime legislation).

fronted with the problem *ex post* by a party prejudiced by an unjust correlation, most states' sentencing guidelines¹⁸ make judges primarily responsible for meting out just punishment. The political toxicity of any legislative attempt at harmonizing punishment and culpability means that judges must ensure that the legislature does not "step[] most harshly on those persons the state[] ha[s] systematically deemed less culpable," even when taking one step at a time.¹⁹

This Comment proposes justifications for critical judicial review of the "harsher punishment for less culpable offenders" problem. It argues that the problem's most glaring and prevalent incarnation—the denial of the passion/provocation defense to a charge of extreme-recklessness homicide—violates the Fourteenth Amendment's equal protection guarantee.

Part I provides a paradigmatic fact pattern illustrating the punishment/culpability problem and pinpointing the precise elements of comparative unfairness that implicate equal protection concerns. Part II evaluates the playing field of rational basis review and highlights the incompatibility of the doctrine's basic assumptions with the correlation of punishment to culpability. It argues that the "one step at a time" paradigm inadequately monitors legislatures' success in defining and applying culpability principles consistently to the entire body of criminal law—an *a priori* definitional commitment missing from the civil lawmaking enterprise. Part III, without suggesting that victims of the problem constitute a "suspect class," suggests the need for more searching judicial inquiry into the punishment/culpability problem. It draws on models of legislative default proposed by political-process theory and public-choice theory to underscore acute political and institutional concerns that the problem presents. These concerns highlight the ease with which the problem may crop up in criminal codes and the importance of equipping judges with an adequate framework both for remedying current infestations and preventing future ones.²⁰ Part IV applies the proposed approach to the most prevalent instance of the punishment/culpability problem—the

¹⁸ For examples of state sentencing guidelines, see *supra* note 12 and accompanying text.

¹⁹ *Fraternal Order of Police v. United States*, 152 F.3d 998, 1003 (D.C. Cir. 1998), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998), *rev'd on other grounds*, 173 F.3d 898 (D.C. Cir. 1999).

²⁰ Though examining a statutory and not a constitutional issue, the Supreme Court decided one case involving poorly correlated punishment and culpability this past Term. See *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009) (examining a federal criminal statute punishing aggravated identity theft with mandatory consecutive two-year prison terms).

denial of the passion/provocation defense to offenders convicted of extreme-recklessness homicide. Entertaining and rebutting counterarguments that the denial of the defense may justifiably survive rational basis review, Part IV argues that the denial of the defense does not rationally further any legitimate state interest but rather undermines the state's interests in deterrence and incapacitation. Part IV concludes by evaluating the analytically unsatisfactory attempts by courts in New York and New Jersey to grapple with the passion/provocation punishment/culpability problem. The Comment finally offers a brief conclusion.

I. THE "HARSHER PUNISHMENT FOR LESS CULPABLE OFFENDERS" PROBLEM: AN EXAMPLE

To illustrate the "harsher punishment for less culpable offenders" problem, consider the following hypothetical. Lenny Lessculpable arrives at his second-floor apartment only to find his unfaithful spouse in the midst of a sexual rendezvous—a provocation that a jury might easily deem "sufficient to arouse the passions of an ordinary person beyond the power of his or her control," thereby triggering the passion/provocation defense.²¹ In response, Lenny throws him out of his second-floor window and kills him. He defenestrates this adulterer not to purposely or knowingly kill him, or even to cause him severe bodily injury, but rather to disrupt the physical act of infidelity and remove the adulterer from his wife and home. Although it is not certain that the fall will kill the man, it is probable, and Lenny chooses to ignore this risk. If a jury finds that Lenny purposely or knowingly caused the man's death, it will next consider whether Lenny acted in the heat of passion and upon reasonable provocation.²² Undoubtedly, however, a jury may alternatively find that Lenny acted without intent to kill but rather recklessly or, even worse, recklessly under circumstances manifesting an extreme indifference to human life.²³ If the jury finds the latter, Lenny cannot invoke the passion/provocation defense in six states.²⁴

Now imagine a similar scenario unfolding in a twentieth-floor penthouse. When confronted with the same problem as Lenny,

²¹ See *State v. Oglesby*, 585 A.2d 916, 923 (N.J. 1991) (outlining the typical doctrinal framework for passion/provocation homicide).

²² See N.J. STAT. ANN. § 2C:11-4 (West 2005) (defining manslaughter).

²³ *Id.*

²⁴ See *supra* notes 6-12.

Maury Moreculpable screams, "I'm going to kill you!" and throws him through the penthouse window. Maury may invoke the passion/provocation defense because he purposely or knowingly caused the man's death, given that death would be practically certain to result in such a situation and those six states would allow the defense.²⁵ It is difficult to imagine why, when confronted with the same reasonable provocation, a defendant's punishment should depend on the distance between his apartment and the ground—a difficulty that implicates the Equal Protection Clause's command that "all persons similarly situated should be treated alike."²⁶

II. EQUAL PROTECTION AND THE CALIBRATION OF PUNISHMENT TO CULPABILITY

A. *Contemporary Rational Basis Review Doctrine and the "One Step at a Time" Rationale*

An equal protection challenge to legislation that creates a punishment/culpability problem triggers rational basis review. Of course, any legislative allocation of burdens and benefits creates discriminatory classifications that result in unequal protection of the law.²⁷ If, however, the legislation does not implicate a suspect class or impinge upon a fundamental right, courts will refuse to invalidate the law on equal protection grounds if the classification bears a rational relationship to a legitimate state interest.²⁸ A legislature need not articulate or produce evidence of the actual purpose of a discriminatory classification.²⁹ The legislation will withstand rational basis review so long as "any reasonably conceivable state of facts . . . provide[s] a rational basis for the classification,"³⁰ even if that set of facts is imagined post hoc for litigation purposes.

²⁵ See N.J. STAT. ANN. § 2C:2-2(b)(2) (West 2005) (defining the culpability level "knowingly").

²⁶ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); see also *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985) (noting that, like the Fourteenth Amendment, the New Jersey Constitution protects "against the unequal treatment of those who should be treated alike").

²⁷ See ELY, *supra* note 4, at 30-31 (illustrating how "we all order our lives" on legislative allocations of burdens and benefits).

²⁸ See *City of Cleburne*, 473 U.S. at 439-40.

²⁹ See *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992)).

³⁰ *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

Legislatures do not act irrationally for equal protection purposes by devising classifications that remedy certain elements of an identified problem and that neglect to remedy others.³¹ Rational basis review allows legislatures to move “one step at a time, addressing . . . the problem which seems most acute to the legislative mind.”³² For example, a state may combat environmental concerns by outlawing nonrefillable plastic milk containers while refusing to prohibit equally harmful nonrefillable paper containers.³³ The deference afforded by the “one step at a time” rationale acknowledges that “the give-and-take of the legislative compromise process is bound to make subtle, even apparently arbitrary distinctions as exceptions and exemptions are created to mollify opposition.”³⁴ If legislatures could not create such exemptions for fear of invalidation on equal protection grounds, “legislative reform in the face of close political battles and powerful lobbies,” such as efforts to enact antidiscrimination laws, “might not proceed.”³⁵ By allowing piecemeal development of exclusionary legislation, courts encourage creative legislative solutions to complex social, political, and economic problems.³⁶

B. *One Step at a Time and the Punishment/Culpability Problem*

The “one step at a time” rationale, ordinarily well-suited to review of most social and economic legislation,³⁷ fails to justify judicial restraint in the face of a punishment/culpability problem. Defenders of a poorly correlated punishment/culpability statutory scheme may

³¹ See, e.g., *City of New Orleans v. Duquesne*, 427 U.S. 297, 305-06 (1976) (per curiam) (upholding the exemption of pushcarts in operation for more than eight years from prohibition in the French Quarter); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109-10 (1949) (upholding a statute that forbids, so as to reduce visual clutter, truck owners from leasing advertisement space on their vehicles but allowing them to advertise their own products and services).

³² *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

³³ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-73 (1981).

³⁴ JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION* § 4:21 (2008).

³⁵ *Id.*

³⁶ See Note, *Reforming the One Step at a Time Justification in Equal Protection Cases*, 90 *YALE L.J.* 1777, 1784 (1981).

³⁷ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 229-30 (1982) (using rational basis review to invalidate a Texas statute denying funds to children of illegal immigrants); *Schilb v. Kuebel*, 404 U.S. 357, 364 (1971) (“The Court more than once has said that state legislative reform by way of classification is not to be invalidated merely because the legislature moves one step at a time.”); *Dandridge v. Williams*, 397 U.S. 471, 479-81 (1970) (applying the “one step at a time” rationale to hold that, so long as Maryland promptly furnished aid to eligible individuals under the Federal Aid to Families with Dependent Children program, it did not have to fully meet each individual’s standard of need).

employ the rationale to argue that legislatures are free to impose severe punishments on less culpable offenders before imposing them on more culpable offenders. Given the liberty interests of the offenders in question, however, criminal law strives to create a more just and cohesive system of allocating burdens and benefits than ordinary civil, social, and economic legislation. While judicial restraint encourages dynamism in the civil sphere, it endangers justice in the criminal sphere when disparities of punishment and culpability threaten core a priori principles. The glue that allows for a cohesive system of criminal justice, unavailable in the civil context, is the careful calibration of culpability to punishment. When “one step” is taken to dissolve that glue, the result is not reform but regression.

1. *Fraternal Order of Police I*

The incompatibility of the “one step at a time” rationale with the punishment/culpability problem emerged in *Fraternal Order of Police v. United States (FOP I)*.³⁸ The case presented a challenge to the “public interest” exception of the Gun Control Act of 1968.³⁹ The Act allows states “to arm police officers convicted of violent felonies, and even crimes of domestic violence *so long as those crimes are felonies*, while withholding this privilege with respect to domestic violence misdemeanors.”⁴⁰ The D.C. Circuit noted that the government failed to offer any reason “for imposing the heavier disability on the lighter offense.”⁴¹ Attempting to imagine a “conceivable justification” for the scheme, the government invoked the *Williamson* principle, claiming that Congress could punish the less culpable offenders (misdemeanants) as a first step.⁴² The court rejected this invocation of the “one step at a time” rationale, noting that it “would allow a rougher notion of justice than even ‘rational basis’ review allows.”⁴³ While conceding that “Congress may take one step at a time,” the court reasoned that the guarantee of equal protection could not allow Congress to “step[] most harshly on those persons the states have systematically deemed less culpable.”⁴⁴ This “systematic” assortment is unique to the criminal

³⁸ 152 F.3d 998 (D.C. Cir. 1998), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998), *rev'd on other grounds*, 173 F.3d 898 (D.C. Cir. 1999).

³⁹ 18 U.S.C. §§ 921, 923–928 (2006).

⁴⁰ 152 F.3d at 1002.

⁴¹ *Id.*

⁴² *Id.* at 1003.

⁴³ *Id.*

⁴⁴ *Id.* (internal quotation marks omitted).

sphere. Implicit in the court's reasoning is the conflict between the aims of the "one step at a time" rationale and the goals of a properly crafted criminal justice system. While the "one step at a time" rationale is meant to allow for the dynamic evolution of legal responses to social and economic problems, a criminal justice system should aim to treat like cases alike by means of a consistent correlation of punishment to culpability.

2. Fraternal Order of Police II

The D.C. Circuit reheard the case (*FOP II*) and vacated its holding in *FOP I* that the Gun Control Act's public interest exception violates the Equal Protection Clause.⁴⁵ However, it preserved its critique of the "one step at a time" rationale's application to the punishment/culpability problem. After taking a more comprehensive view of the legislative scheme, the court found that the public interest exception did not present a punishment/culpability problem. The court determined that, in its previous opinion, it had overlooked the nonlegal restrictions imposed by states, such as formal and informal hiring practices, that may prevent felons from obtaining firearms covered by the Act.⁴⁶ The aggregation of punishments imposed by both state and federal law, the court reasoned, offsets the Act's prima facie disparity between punishment and culpability.⁴⁷

The *FOP II* court's rationale is inapposite both to most manifestations of the punishment/culpability problem and to the denial of the passion/provocation defense to a charge of extreme-recklessness homicide.⁴⁸ The court interpreted the problematic legislation in *FOP I* and *FOP II* as incorporating state law and practice.⁴⁹ The punishment/culpability problem remains, however, when there is no offsetting congressional or state legislation—for example, when the only relevant punishment is a creature of state law. In those situations, the assumption underlying both *FOP I* and *FOP II* remains: a state violates the Equal Protection Clause by stepping most harshly on those offenders it systematically deems less culpable.

⁴⁵ Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999).

⁴⁶ *Id.* at 904.

⁴⁷ *Id.*

⁴⁸ See *infra* Part IV.

⁴⁹ 152 F.3d at 1003.

III. JUSTIFYING HEIGHTENED JUDICIAL SCRUTINY OF THE PUNISHMENT/CULPABILITY PROBLEM

Although *FOP I* and *FOP II* emphasize the intuition that legislatures should be required to conform their criminal laws to the foundational principles of culpability upon which they are built, the D.C. Circuit did not articulate a clear justification as to why more exacting judicial review should be the primary mechanism through which to guarantee such compliance. Courts have refused to extend suspect-class status to criminal law offenders.⁵⁰ Consideration of the institutional competencies and incentives of legislatures and judges, however, offers at least two broad justifications for heightened judicial review of the punishment/culpability problem within the context of rational basis review: (1) legislatures have strong incentives to create and subsequently avoid correction of punishment/culpability problems, even in the absence of any legitimate governmental reason to do so; and (2) legislatures explicitly task judges with meting out just punishment.

A. *Legislative Resistance to the Punishment/Culpability Problem*

Legislators are often unsympathetic to issues of criminal law that unjustly burden criminal defendants, such as the punishment/culpability problem. Two dominant theories—public-choice theory and Michael Klarman’s extension of John Hart Ely’s political-process theory—have emerged to explain the problem of “legislative default” in the criminal lawmaking enterprise.⁵¹ Coupled with the practical consequences of piecemeal legislation, application of both theories to the punishment/culpability problem justifies heightened judicial scrutiny of the rationality of any legislation that punishes a less culpable class of offenders more severely than a more culpable class guilty of the same crime.

1. Practical Consequences of Piecemeal Legislation

Inspired by the American Law Institute’s Model Penal Code, more than two-thirds of the states adopted reformed criminal codes in the

⁵⁰ For a collection of cases denying suspect-class status to prisoners, see *Twenty-Fifth Annual Review of Criminal Procedure* (pt. 6), 84 GEO. L.J. 1465, 1494 n.2975 (1996).

⁵¹ See Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 604 (“Academics have developed at least two theories (political process and public choice) to explain and predict ‘legislative default’ in the criminal procedure field.”).

1960s and early 1970s.⁵² Over the last thirty to forty years, most amendments to those recodified criminal laws have undermined the legislatures' earlier progress.⁵³ One result of this degradation has been the proliferation of "designer offenses," seemingly redundant crimes already addressed by general provisions of a code, such as the specification of library theft as an offense separate from general theft.⁵⁴ Another result has been the distortion of culpability and punishment within the gradation of specific offenses, such as homicide. As two scholars intimately involved in the process of reforming criminal codes have noted, "[T]he entire process of amendment by piecemeal legislation generally encourages changes without regard for their impact on the overall consistency or rationality of the code," with "ad hoc amendments tend[ing] naturally to distort grading judgments."⁵⁵

Although some punishment/culpability problems develop not over time but in the first instance, the evolution of New Jersey's homicide statute illustrates the vulnerability of a precisely regulated system of punishment and culpability to the warping effects of piecemeal legislation. As enacted in 1978, New Jersey's Code of Criminal Justice contained no provision for extreme-recklessness homicide.⁵⁶ Under the 1978 Code, criminal homicide constituted manslaughter—a crime of the second degree—when committed recklessly.⁵⁷ Similarly, criminal homicide otherwise qualifying as murder under the Code,⁵⁸ when committed in the heat of passion resulting from a reasonable provocation, also constituted manslaughter.⁵⁹ Under that version of the Code, a homicide committed under circumstances justifying a passion/provocation defense subjected a defendant to the same punishment regardless of whether it was committed purposely, knowingly, or with extreme recklessness. The 1978 manslaughter statute contained

⁵² Robinson & Cahill, *supra* note 17, at 634.

⁵³ *Id.*

⁵⁴ See, e.g., Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170 & n.6 (2003) ("For example, in Illinois, while there is a general theft offense, the Illinois General Assembly has nonetheless added by amendment a special offense for theft of delivery containers as well as other specific theft offenses." (footnotes omitted)).

⁵⁵ *Id.* at 172 (italics omitted).

⁵⁶ New Jersey Code of Criminal Justice, ch. 95, 1978 N.J. Laws 482.

⁵⁷ *Id.* § 2C:11-4(a)(1), 1978 N.J. Laws at 541 (codified as amended at N.J. STAT. ANN. § 2C:11-4(b)(1) (West 2005)).

⁵⁸ That is, a homicide committed purposely, knowingly, or during the course of certain felonies.

⁵⁹ New Jersey Code of Criminal Justice, ch. 95, § 2C:11-4(a)(2), 1978 N.J. Laws 482, 541 (codified as amended at N.J. STAT. ANN. § 2C:11-4(b)(2) (West 2005)).

no disparate treatment of offenders who caused death under passion and provocation and therefore did not suffer from a punishment/culpability problem.

The Code was to take effect on September 1, 1979, but, before it did, the legislature created the offense of aggravated manslaughter. The legislature provided that criminal homicide constituted aggravated manslaughter, a crime of the first degree, upon the presence of "circumstances manifesting extreme indifference to human life."⁶⁰ By creating the offense of aggravated manslaughter, a crime that would not "otherwise be murder [under the Code],"⁶¹ the legislature denied those defendants who cause death by extreme recklessness the same opportunity for mitigation afforded to those who cause death purposely or knowingly, thereby subjecting the former class to a harsher penalty. In 1986, the legislature further exacerbated the disparate treatment by upgrading the ordinary term of imprisonment for aggravated manslaughter from between ten and twenty years to between ten and thirty years and the extended term of imprisonment from between twenty years and life imprisonment to between thirty years and life imprisonment.⁶² Ultimately, the evolution of New Jersey's homicide statute demonstrates that the process of piecemeal legislation poses grave risks to a legislature's fidelity to its definitional hierarchy of culpability and punishment.

2. Public-Choice Theory

Public-choice theory explains why, in addition to the problems inherent in any attempt at piecemeal lawmaking, legislatures lack any incentive to maintain a well-calibrated system of punishment and culpability. The theory envisions "the legislative process as a microeconomic system in which 'actual political choices are determined by the

⁶⁰ Act of Aug. 29, 1979, ch. 178, 1979 N.J. Laws 685 (codified as amended at N.J. STAT. ANN. § 2C:11-4 (West 2005)). The 1979 amendment defined aggravated manslaughter as a criminal homicide committed by an actor who "other than purposely or knowingly causes death under circumstances manifesting extreme indifference to human life." *Id.* A 1981 amendment substituted "recklessly" for "other than purposely or knowingly." Act of Sept. 24, 1981, ch. 290, 1981 N.J. Laws 1108 (codified as amended at N.J. STAT. ANN. § 2C:11-4 (West 2005)).

⁶¹ N.J. STAT. ANN. § 2C:11-4(b)(2) (West 2005).

⁶² Act of Dec. 8, 1986, ch. 172, 1986 N.J. Laws 876 (codified as amended at N.J. STAT. ANN. § 2C:11-4 (West 2005)).

efforts of individuals and groups to further their own interests.”⁶³ For example, proposing or voting for a penalty enhancement, even though it may result in a punishment/culpability problem for a particular offense, can further a legislator’s own interest by bolstering her tough-on-crime profile.⁶⁴ Such proposals “often sail through the legislature with little public complaint, even though privately legislators recognize they contain serious flaws.”⁶⁵ One legislator laments the “enormous, almost hydraulic pressure to pass any criminal law bill that is offered, unless you don’t care about [keeping] the job.”⁶⁶

The self-serving function of criminal law proposals makes seeking a remedy to punishment/culpability problems in the legislature entirely futile. Public-choice theory posits that legislators, when considering questions of criminal law, “will be motivated by what consumers of this legislation are willing to pay for it, in such political currency as votes, volunteer time, and campaign contributions, either provided to the legislator or withheld from an opponent.”⁶⁷ With respect to homicide legislation, for example, even if the legislation presents a punishment/culpability problem, prosecutors and those voters fearful of crime will inevitably “outbid” any other coalition and succeed in influencing legislators.⁶⁸ It is difficult even to imagine any viable coalition that could enter a competing bid. Most citizens simply imagine themselves as potential crime victims and not as potential suspects.⁶⁹ As Dripps explains, “[I]t is perfectly rational for legislators to perceive that there is considerable political risk, and very little return, to taking the side of the suspect. . . . The few beneficiaries of such a courageous political stand for the most part do not even know who they are.”⁷⁰

⁶³ WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 52 (2d ed. 1995) (quoting Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983)).

⁶⁴ Robinson & Cahill, *supra* note 17, at 634.

⁶⁵ *Id.*

⁶⁶ *Id.* (alteration in original) (internal quotation marks omitted) (quoting Interview by Stephen Haedicke with Dawn Clark Netsch, former Ill. State Senator, in Chi., Ill. (Mar. 18, 2001)).

⁶⁷ Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993).

⁶⁸ *See id.* (explaining that there are more potential crime victims and members of the law-enforcement bureaucracy than potential criminals).

⁶⁹ Lerner, *supra* note 51, at 610.

⁷⁰ Dripps, *supra* note 67, at 1094.

3. Political-Process Theory

When the political process does not afford meaningful participation to those classes burdened by legislative classifications, John Hart Ely's political-process theory advocates heightened judicial review of those classifications. Believing that "the Constitution is overwhelmingly concerned . . . with ensuring broad participation in the processes and distributions of government,"⁷¹ Ely argues that "it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."⁷² As an outgrowth of the framework espoused by Justice Stone in footnote four of *United States v. Carolene Products Co.*,⁷³ Ely's theory empowers judges to protect "the chronic losers in the give-and-take of the political process," usually minority groups subject to widespread hostility, from "majoritarian institutions['] . . . frustrat[ion] [of] the genuine democratic will."⁷⁴

Although Ely did not envision the criminal class as a potential beneficiary of heightened scrutiny, the punishment/culpability problem presents a compelling justification for its inclusion. Under the political-process theory, widespread hostility toward a disadvantaged class establishes a prima facie case for its classification as a suspect class.⁷⁵ If, however, such hostility furthers a substantial and permissible legislative goal, the prima facie case is rebutted.⁷⁶ So while burglars may be subject to great societal hostility, laws criminalizing burglary and imposing on burglars a comparative disadvantage are legitimate, as they advance a clearly substantial goal: the promotion of public safety.⁷⁷ The suspicion that usually accompanies the disadvantaging of a class subject to widespread hostility "is allayed so immediately it doesn't even have time to register."⁷⁸

While some scholars have argued for broad application of the political-process theory to criminal rights and procedure, a narrow ap-

⁷¹ ELY, *supra* note 4, at 87.

⁷² *Id.* at 76.

⁷³ 304 U.S. 144, 152 n.4 (1938).

⁷⁴ Lerner, *supra* note 51, at 606.

⁷⁵ ELY, *supra* note 4, at 153-54.

⁷⁶ *Id.* at 154.

⁷⁷ *Id.*

⁷⁸ *Id.*; see also Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 165 n.138 (2007) ("Criminal status is a choice and a socially disfavored one at that. Criminal laws burden criminals, but we do not subject them to strict scrutiny.").

plication suffices to justify heightened scrutiny of the punishment/culpability problem. Applying Ely's theory to the sphere of criminal procedure, Michael Klarman writes that "[b]ecause the political process does not adequately represent the interests of those societal groups largely populating the criminal class, political-process theory demands judicial superintendence."⁷⁹ Though the argument for broad judicial vigilance over criminal lawmaking may be quite compelling, one rationale for judicial scrutiny of the punishment/culpability problem can be gleaned from Ely's basic "immediately allayed suspicion" framework. For example, there are myriad reasons to immediately allay any suspicion raised by imposing burdens on murderers that are harsher than those imposed on nonmurderers. Such suspicion, however, is not immediately allayed by imposing burdens on murderers that are harsher than those imposed on other, more culpable murderers. Because no substantial governmental interest is furthered by burdening less culpable criminals with more severe punishment, the concerns at the core of political-process theory reverse the traditional posture of complacency toward laws that target criminal behavior.⁸⁰

B. *Legislative Contemplation of Judges as Primarily Responsible for Just Sentencing*

The comparative institutional competencies of judges and legislatures often dictate the degree of judicial deference granted to legislation challenged under the Equal Protection Clause. With most legislation, the investigatory power of legislatures coupled with their democratic accountability make them the more appropriate allocators of benefits and burdens.⁸¹ The "sentencing function," however, "long has been a peculiarly shared responsibility among the Branches."⁸² With respect to sentencing, legislatures not only lack the incentive to correct punishment/culpability problems, but they often delegate this responsibility to judges in recognition of the judiciary's relatively su-

⁷⁹ Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991).

⁸⁰ Cf. Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1229-30 (2006) (noting that the inherently unsuspecting nature of criminal laws disappears when ex-offenders are burdened more severely than nonoffenders).

⁸¹ See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.")

⁸² *Mistretta v. United States*, 488 U.S. 361, 390 (1989).

perior institutional competence.⁸³ Although legislatures occupy the primary role in determining punishment,⁸⁴ many legislatures also contemplate that judges will serve as the crucial mechanism in assuring just sentencing.⁸⁵

As evidenced by most state sentencing guidelines, the sentence an offender receives is more often a function of judicial, rather than legislative, determination.⁸⁶ For example, under the New Jersey sentencing guidelines, when a defendant has been convicted of a first- or second-degree offense, a judge may sentence the defendant as if he had been convicted of a crime one degree below that of the actual conviction if the judge finds that specified mitigating factors “substantially outweigh” specified aggravating factors and “*the interest of justice demands*” a downgrade.⁸⁷ Such discretion would seem to be an easy fix to punishment/culpability problems, especially to the denial of the passion/provocation defense to extreme-recklessness homicide. Two obstacles stand in the way. First, discretionary statutory authority cannot cure a constitutional defect. If a particular punishment/culpability problem does violate the Equal Protection Clause, the decision to remedy that violation—for example, by imposing a

⁸³ See, e.g., Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 97 (1999) (explaining that Congress delegated the particulars of the new sentencing system to the judiciary because it realized that legislatures are not the best “primary sentencing lawmakers”).

⁸⁴ See, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003) (“Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not . . . courts.”).

⁸⁵ The issue of whether judges or legislatures are better equipped to correct punishment/culpability problems is distinct from the Sixth Amendment concerns surrounding sentencing that the Court has recently addressed. In *Jones v. United States*, the Court stated that

the constitutional proposition that drives our concern in no way “call[s] into question the principle that the definition of the elements of a criminal offense is entrusted to the legislature.” The constitutional guarantees that give rise to our concern in no way restrict the ability of legislatures to identify the conduct they wish to characterize as criminal or to define the facts whose proof is essential to the establishment of criminal liability. The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof.

526 U.S. 227, 243 n.6 (1999) (alteration in original) (citation omitted).

⁸⁶ See, e.g., *supra* note 12.

⁸⁷ N.J. STAT. ANN. § 2C:44-1(f) (2) (West 2005) (amended 2007) (emphasis added).

sentence one degree lower—cannot be discretionary.⁸⁸ Second, judicial interpretation of the grant has imposed requirements that make correction of certain punishment/culpability problems very difficult. For example, the doctrinal requirements of the dropping-a-degree provision make it ill-equipped to cure New Jersey's own punishment/culpability problem regarding the denial of the passion/provocation defense to extreme-recklessness homicide.⁸⁹ Though the dropping-a-degree provision may not remedy punishment/culpability problems by its own force, it nevertheless reveals a recognition by legislatures that the criminal classifications they make must be subjected to final review by judges "where the interest of justice demands."⁹⁰

IV. THE BIG CULPRIT: THE DENIAL OF THE PASSION/PROVOCATION DEFENSE TO CHARGES OF EXTREME-RECKLESSNESS HOMICIDE

Having critiqued the incompatibility of the "one step at a time" rationale with the punishment/culpability problem, and having developed institutional justifications for more searching judicial inquiry, this Comment can now consider whether a concrete manifestation of the problem violates the guarantee of equal protection. Specifically, it examines the problem of denying the passion/provocation defense to charges of extreme-recklessness homicide. Imposing a more severe burden on some offenders, those who in the heat of passion and upon reasonable provocation unintentionally cause the death of another person through extremely reckless conduct, than the burden imposed on other offenders, those who in the heat of passion and upon reasonable provocation purposely or knowingly cause death, bears no rational relation to any legitimate state interest.

⁸⁸ See U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

⁸⁹ Because "[t]he reasons justifying a downgrade must be 'compelling,' and something *in addition to and separate from* . . . the mitigating factors that substantially outweigh the aggravating factors," *State v. Megargel*, 673 A.2d 259, 269 (N.J. 1996) (emphasis added), a judge cannot remedy the equal protection violation by simply considering whether "[t]he defendant acted under a strong provocation" (a mitigating factor) or whether "[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense" (a mitigating factor), N.J. STAT. ANN. § 2C:44-1(b)(3)–(4) (West 2005) (amended 2007). With respect to extreme-recklessness homicide, the downgrade requires "more compelling reasons" than those required to downgrade an ordinary first-degree crime. *Megargel*, 673 A.2d at 267.

⁹⁰ N.J. STAT. ANN. § 2C:44-1(f)(2) (West 2005) (amended 2007).

A. *Common Law Understandings of the Availability of the
Passion/Provocation Defense to a Charge of
Extreme-Recklessness Homicide*

When considering the rationality of the relationship between punishment/culpability disparities and legitimate state interests—such as deterrence, retribution, and incapacitation—an appreciation of the common law understanding of the offenses involved, though certainly not dispositive, aids a great deal. Both the academic literature and the case law interpreting statutes that adopt common law rules resoundingly agree that common law conceptions of culpability demand the availability of the passion/provocation defense to a charge of extreme-recklessness homicide.⁹¹

The common law defined murder as killing another with “malice aforethought.”⁹² The concept of malice aforethought, as judicially interpreted, encompassed both harboring intent to kill as well as wanton recklessness.⁹³ Regardless, however, of the particular mental culpability that existed in a given case, “both judges and commentators [at common law] agreed: if the accused were seriously provoked and lost control of himself in a heat of passion, he did not act with malice aforethought.”⁹⁴ The heat of passion negates malice, according to the common law understanding;⁹⁵ therefore, a homicide committed through wanton or extreme recklessness must be deemed worthy of mitigation when committed in the heat of passion.⁹⁶

Common law notions of passion/provocation and extreme recklessness still resonate among most courts confronted with the punishment/culpability problem. At least one commentator has argued that since the passion/provocation defense was equally applicable to intentional murder and extreme-recklessness murder under the

⁹¹ One commentator suggests that

[m]ost killings which constitute voluntary manslaughter are of the intent-to-kill sort But if [the killer], in the . . . [heat of] passion . . . should intend instead to do his tormentor serious bodily injury short of death, or if he should, without intending to kill him, endanger his life by very reckless (depraved heart) conduct, the resulting death ought equally to be voluntary manslaughter [T]he great majority of modern statutes . . . take this broad view.

² WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 7.10(a) (1986).

⁹² 4 WILLIAM BLACKSTONE, *COMMENTARIES* *195.

⁹³ *But see* Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 *YALE L.J.* 537, 545 (1934) (arguing that malice aforethought included only intentional wrongdoing).

⁹⁴ Gegan, *supra* note 1, at 450.

⁹⁵ 2 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 155 (15th ed. 1994).

⁹⁶ Gegan, *supra* note 1, at 456.

common law, an express statutory reference to the defense's availability to charges of extreme-recklessness murder would be superfluous.⁹⁷ Although the New York Court of Appeals has rejected this argument as a matter of statutory construction,⁹⁸ the courts of most states whose statutes employ common law language adhere to the common law understanding. The Supreme Court of California has held that "a killer who acts in a sudden quarrel or heat of passion lacks malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill."⁹⁹ Therefore, common law understanding dictates that a killer who "acts with conscious disregard for life, knowing such conduct endangers the life of another"—i.e., a killer who acts with extreme recklessness—is entitled to the mitigation of the passion/provocation defense.¹⁰⁰

B. *The Disparity's Irrational Relation to Legitimate State Interests*

By providing the passion/provocation defense to charges of purposeful homicide and denying it to charges of extreme-recklessness homicide, legislatures fail to rationally serve any legitimate state interest and instead "step[] most harshly on those persons the state[] ha[s] systematically deemed less culpable."¹⁰¹ Courts ordinarily allow legislatures great discretion to further the traditional goals of criminal law-making—deterrence, retribution, incapacitation, and rehabilitation.¹⁰² However, the denial of the passion/provocation defense in this in-

⁹⁷ See *id.* at 456-57 (arguing that an extreme emotional disturbance defense to depraved mind murder should be implied under the New York statute).

⁹⁸ *People v. Fardan*, 628 N.E.2d 41, 42-44 (N.Y. 1993).

⁹⁹ *People v. Lasko*, 999 P.2d 666, 671 (Cal. 2000).

¹⁰⁰ *Id.* at 668; see also *id.* at 671 ("Under the Attorney General's approach, one who shoots and kills another in the heat of passion and with the intent to kill is guilty only of voluntary manslaughter, yet one who shoots and kills another in the heat of passion and with conscious disregard for life but with the intent merely to injure, a less culpable mental state than intent to kill, is guilty of murder. This cannot be, and is not, the law.").

¹⁰¹ *Fraternal Order of Police v. United States*, 152 F.3d 998, 1003 (D.C. Cir. 1998), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998), *rev'd on other grounds*, 173 F.3d 898 (D.C. Cir. 1999).

¹⁰² See *Ewing v. California*, 538 U.S. 11, 25 (2003) ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'" (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment))). This Comment does not argue that since the punishment/culpability problem does not square with the most prevalent penological theories, it is a constitutional issue. Rather, the argument is that the punishment/culpability problem squares neither with *any* penological theory nor with *any* legitimate state interest.

stance irrationally undermines these, or any other, legitimate legislative goals.

Consider two possible arguments that the passion/provocation punishment/culpability problem is rationally related to a legitimate state interest. One possible argument is that there is no punishment/culpability problem in the first place. States may rationally rank extremely reckless conduct committed in the heat of passion above intentional conduct committed in the heat of passion in their culpability hierarchy, with correspondingly disparate penalties. What legitimate state interest is served by this ordering? It is difficult to speak of deterrence of conduct committed in the heat of passion and upon reasonable provocation. As one commentator has noted, "persons who temporarily lose self-control under the stress of great provocation are both less likely to be deterred by the threat of punishment and present less of a threat of further harm than those who commit the same acts as an unforced expression of their normal characters."¹⁰³ To the extent that persons subject to passion and provocation are susceptible to any deterrent effect, they will have more of an incentive to act purposely under the current regime (i.e., to intentionally cause death) than to act in a way that merely creates a high risk of death (i.e., to act with extreme recklessness). In other words, Lenny Lessculpable¹⁰⁴ would be better served by shooting his victim in the head than by tossing him out of his second-story window and insisting that he harbored no intent to kill. Implementing such perverse incentives does not rationally further the state's interest in deterrence.

Perhaps the ordering may be justified as furthering the state's interest in incapacitating more "dangerous" criminals. Those who act with extreme recklessness may present a greater danger to society than those who act intentionally. Certainly, criminal law may further the legitimate interest of "remov[ing] dangerous persons from the rest of society and incapacitat[ing] them from doing further harm."¹⁰⁵ In the absence of passion and provocation, however, no state ranks extremely reckless conduct above intentional conduct, although some rank them equally.¹⁰⁶ From an incapacitation perspective, it would be difficult to speak of Lenny's conduct as somehow more dangerous or potentially more harmful than Maury's. With respect to Maury's conduct, one death is certain to result. With respect to Lenny's conduct,

¹⁰³ Gegan, *supra* note 1, at 461-62.

¹⁰⁴ See *supra* Part I.

¹⁰⁵ Gegan, *supra* note 1, at 461.

¹⁰⁶ See *supra* notes 6-11.

no death is certain to result.¹⁰⁷ If states did punish extremely reckless homicide more severely than intentional homicide, the argument would have greater force. Because no state operates this way, however, the incapacitation argument makes sense only if passion and provocation somehow change the hierarchy calculus. While passion and provocation do change the calculus, their effects are as applicable to intentional conduct as to extremely reckless conduct.¹⁰⁸ If the mitigating effects were not equally applicable, another perverse result would follow: mitigation would go “to those who intentionally do the greatest harm known to the law but [would be] den[ied] . . . to those who, however reckless, did not actually intend the harm.”¹⁰⁹ The punishment/culpability problem inherent in the denial of the passion/provocation defense to charges of extreme-recklessness homicide presents a rare instance of legislatures’ irrational pursuit of legitimate state interests in the enterprise of criminal lawmaking.¹¹⁰

A second argument that the legislative scheme rationally furthers a legitimate state interest may challenge the logical compatibility of extremely reckless conduct and conduct committed in the heat of passion upon reasonable provocation. This argument rests upon two irrational assumptions: (1) offenders who act with extreme recklessness upon passion and provocation retain a mastery of their understanding lost by those who act purposely and (2) sufficiently “hot” passion and provocation inevitably draws forth only the most criminal and willful acts. In consideration of the first argument, recall once again the example of Lenny Lessculpable and Maury Moreculpable.¹¹¹ Although Maury behaved more dangerously than Lenny, both men’s actions crossed the threshold of reason and sound judgment. Whether this threshold has been crossed, not how far past the threshold one travels, determines the availability of the passion/provocation defense. This

¹⁰⁷ As to other innocent third parties—for example, pedestrians walking below—Maury’s conduct is as potentially dangerous as Lenny’s conduct.

¹⁰⁸ See Gegan, *supra* note 1, at 462 (“The policy [of passion/provocation mitigation] is similarly applicable to those who kill intentionally or through gross recklessness.”).

¹⁰⁹ *Id.*

¹¹⁰ An argument can be made that the perversity Gegan identifies stems from the legislation’s failure to achieve its own tautological purposes. For example, defense lawyers in Lenny’s case will have an incentive not to contest the issue of intent so as to take advantage of the passion/provocation defense to purposeful, heat-of-passion homicide. Therefore, the practical consequences of the scheme will incentivize false concessions of purpose in the hope of receiving a lesser sentence. See generally Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128 n.34 (1972) (defining a statute’s “tautological purpose” as that “suggested by its terms”).

¹¹¹ See *supra* Part I.

threshold is understood as a “concession to the frailty of man” and as the point at which “the average person can understandably react violently to a sufficient wrong and hence some lesser punishment is appropriate.”¹¹² A variation of the Lenny/Maury hypothetical also disposes of the second irrational presumption regarding passion and provocation: that the heat of passion and a reasonable provocation will inevitably inspire only the most willful criminal acts. Suppose that, instead of throwing the man out his second-floor window with no intent to kill him, Lenny had reached into his nightstand, pulled out a revolver, and fired three shots into the man’s head, thereby entitling himself to the passion/provocation defense. Once Lenny crosses the threshold of self-control, reason, and judgment, there is no reason to believe that the latter response is any more likely to occur than the former. As such, one toils to imagine a reason why the former, more constrained response warrants a more severe penalty than the latter, more malicious response.

C. *The New York and New Jersey Cases*

The courts that have considered the issue have struggled to reconcile the promotion of legitimate penological goals with the seemingly irrational denial of the passion/provocation defense to those who commit extreme-recklessness homicide. As of this writing, the Appellate Division of the New York Supreme Court is the only court in the nation that has considered an equal protection challenge to this particular punishment/culpability problem.¹¹³ The court devoted one sentence of its four-sentence opinion to the argument:

Since the “heat of passion” killer ordinarily focuses on one person and the depraved and reckless murderer usually acts more indiscriminately, as in this case, we cannot say that the legislative prerogative to authorize a mitigation-type defense to one crime and not the other is without a rational relationship to the purpose to be served.¹¹⁴

The court reasoned that the differing patterns of violence underlying the disparate treatment justify its existence.

The court’s justification for the disparity, however, is weak. The *Wingate* court seems to equate focus (whether the killer had a particular target in mind) with culpability (whether the killer acted purposefully, knowingly, or recklessly): a depraved and reckless killer is unlikely

¹¹² *State v. Guido*, 191 A.2d 45, 55 (N.J. 1963).

¹¹³ *People v. Wingate*, 422 N.Y.S.2d 245, 246 (N.Y. App. Div. 1979) (mem.).

¹¹⁴ *Id.*

also to be a heat-of-passion killer, says the court, because the former generally has a more indiscriminate focus than the latter. Factually, this is clearly not always true. A depraved and reckless murderer can act in a discriminating manner in the heat of passion and upon reasonable provocation, focusing his attack on one particular person. One such instance of an extremely reckless killer acting in the heat of passion and upon reasonable provocation, but with a discrete target in mind, is Lenny Lessculpable.¹¹⁵ The court's reasoning in *Wingate*, therefore, provides no answer to the question of why Lenny should be punished more severely than Maury.

Even if the *Wingate* court were correct (depraved and reckless killers act more indiscriminately than most "heat of passion" killers, who act with a specific target in mind, and therefore should be punished more severely), its reasoning would contradict the traditional culpability hierarchy established by most criminal codes. Leaving aside the issue of passion and provocation, even if a depraved and reckless killer acts more indiscriminately than a killer who acts purposely or knowingly, no state punishes the former killer more severely than the latter killer, though some states, like New York, punish the former as severely as the latter.¹¹⁶ Consider, for example, an extremely reckless driver who drives ninety miles per hour the wrong way down a one-way residential street and kills a pedestrian. This individual clearly acts more indiscriminately than someone who purposely shoots that pedestrian in the head. Nevertheless, no state punishes the more indiscriminate crime more severely than the less indiscriminate crime. For the reasons discussed earlier, the introduction of passion and provocation provides no reason for altering this culpability calculus.¹¹⁷

The important issue for the court in *Wingate* should not have been whether a heat-of-passion killer kills indiscriminately but rather whether a heat-of-passion killer kills unintentionally. Other courts and commentators, consistently with the example of Lenny and Maury and the arguments advanced by this Comment, have noted that a heat-of-passion killer may act with extreme recklessness, as opposed to intent to kill, and have concluded that the passion/provocation defense should be equally applicable to both culpability levels.¹¹⁸

¹¹⁵ See *supra* Part I.

¹¹⁶ See *supra* notes 6-11.

¹¹⁷ See *supra* notes 105-110 and accompanying text.

¹¹⁸ See *United States v. Paul*, 37 F.3d 496, 499 n.1 (9th Cir. 1994) ("While most [passion/provocation] cases involve intent to kill, it is possible that a defendant who killed unintentionally but recklessly with extreme disregard for human life may have

The Supreme Court of New Jersey has examined the availability of the passion/provocation defense to a charge of extreme-recklessness homicide as a statutory, rather than a constitutional, issue with equally unpersuasive results. The court reasoned in *State v. Grunow* that “[t]he Legislature could have concluded, on the basis of common experience, that passion/provocation usually causes an intentional reaction and that it is rare for passion/provocation to lead to recklessness.”¹¹⁹ The court further postulated that the legislature did not make the passion/provocation defense available to a charge of extreme-recklessness homicide, perhaps due to a legislative compromise.¹²⁰ Because a killing that resulted from extremely reckless conduct was treated as murder at common law, the legislature “would rest content,” the court imagined, with simply downgrading the offense to aggravated manslaughter.¹²¹ In other words, the court’s response to the argument that an offender such as Lenny Lessculpable is being subjected to disparate treatment forbidden by the Equal Protection Clause is simply, “It could have been worse.” Although Lenny, having caused the death of another person through extremely reckless conduct in the heat of passion and upon reasonable provocation, faces ten to thirty years in prison rather than five to ten years, if the passion/provocation defense were available, the New Jersey Supreme Court rests content that the guarantee of equal protection is met since the severity of the unfairness could be greater. Lenny should be satisfied serving ten to thirty years, the argument goes, since the Legislature could well have imposed a sentence of thirty years to life. While this reasoning may explain why the legislature chose not to provide the defense to a charge of aggravated manslaughter, it fails to account for the rationality of the resulting disparate punishment.

The New Jersey Supreme Court’s faulty comparative statutory analysis in *Grunow* illustrates the difficulties courts have faced in recognizing punishment/culpability problems as violations of equal protection. Dissection of the court’s analysis reveals its focused attention on the Code’s language and structure and its neglect of the constitutional problem at hand. To illustrate that New Jersey’s Code of Crim-

acted in the heat of passion with adequate provocation.”); 2 LAFAYE & SCOTT, *supra* note 91, § 7.10(a) (“Most killings which constitute voluntary manslaughter are of the intent-to-kill sort But if [a defendant] should intend instead to do his tormentor serious bodily injury short of death . . . the resulting death ought equally be voluntary manslaughter rather than murder or no crime.”).

¹¹⁹ 506 A.2d 708, 714 (N.J. 1986).

¹²⁰ *Id.* at 712-13.

¹²¹ *Id.* at 713.

inal Justice is “not without precedent,” the New Jersey Supreme Court pointed to similar provisions of three other states’ criminal codes (New York, Connecticut, and Oregon) that also prohibit the mitigation of extreme-recklessness homicide via the passion/provocation defense.¹²² Discussing Oregon’s passion/provocation statute, the court noted that, like New Jersey’s, it does not provide for the mitigation of first-degree manslaughter, a criminal homicide “committed recklessly under circumstances manifesting extreme indifference to the value of human life,”¹²³ to second-degree manslaughter upon proof of the requirements of the passion/provocation defense.¹²⁴ This is an accurate reading of both the Oregon and New Jersey statutes’ language and structure.

The court, however, overlooked another subsection of the Oregon statute that highlights a crucial distinction between the states’ laws—a distinction rendering Oregon’s Code in harmony with the Equal Protection Clause and New Jersey’s Code resoundingly in discord. While the Oregon Code does not allow the passion/provocation defense to mitigate what would be extreme-recklessness homicide under the New Jersey Code to a second-degree offense, the Oregon Code does not allow the passion/provocation defense to mitigate a purposeful or knowing killing to a second-degree offense.¹²⁵ Under the Oregon Code, the passion/provocation defense only mitigates criminal homicide committed purposely or knowingly from murder to first-degree manslaughter and not from murder to second-degree manslaughter, as the New Jersey Code does.¹²⁶ The Oregon statute therefore does not violate the Equal Protection Clause because the mitigating effect of the passion/provocation defense is not needed for those offenders who act with extreme recklessness in response to passion and provocation. An offender who, in the heat of passion and upon reasonable provocation, recklessly causes death under circumstances manifesting an extreme indifference to human life is subject to the same punish-

¹²² *Id.*

¹²³ OR. REV. STAT. § 163.118(1)(a) (2007).

¹²⁴ *Grunow*, 506 A.2d at 713.

¹²⁵ OR. REV. STAT. § 163.118(1)(b) (2007).

¹²⁶ *Compare* N.J. STAT. ANN. § 2C:11-4 (West 2005) (“Criminal homicide constitutes manslaughter when: . . . A homicide which would otherwise be murder . . . is committed in the heat of passion resulting from a reasonable provocation. . . . Manslaughter is a crime of the second degree.”), *with* OR. REV. STAT. §§ 163.118(1)(b), 163.135(1) (2007) (“[E]xtreme emotional disturbance . . . [is] a mitigating circumstance reducing the homicide that would otherwise be murder to manslaughter in the first degree . . .”).

ment as an offender responding to an identical passion and provocation who purposely or knowingly causes death.¹²⁷ Oregon's statutory scheme is identical to Connecticut's statutory scheme.¹²⁸ Therefore, two of the three state codes cited by the court in *Grunow* do not share the constitutional infirmities of New Jersey's Code. While the New Jersey Supreme Court is the only state's highest court to have been presented with the passion/provocation punishment/culpability problem, the court in *Grunow* not only failed to offer an explanation for the Code's disparate treatment, but also failed to grasp the extent of the disparate treatment and New Jersey's outlier status as compared to its sister states.

CONCLUSION

A criminal code that fails to calibrate punishment to culpability not only deviates from established principles of criminal law but also raises constitutional concerns. A code that punishes less culpable offenders *more* severely than more culpable offenders guilty of the same crime violates the Equal Protection Clause. Like any governmental classification that does not implicate a suspect class or impinge upon a fundamental right, legislation that creates a punishment/culpability problem must be rationally related to a legitimate state interest. The few courts that have considered the issue have failed to articulate a principled basis for deviating from the usual deference afforded by rational basis review. The "one step at a time" rationale often employed in rational basis review has proven incompatible with criminal law's attempt to create a carefully calibrated system of punishment and culpability. The institutional and political challenges that accompany the correction of disparities between punishment and culpability justify heightened judicial review and reduced deference to the legislative process.

Six states deny the passion/provocation defense to charges of extreme-recklessness homicide, while offering the defense to those who commit purposeful or knowing homicide. The high courts in at least six states have an opportunity to develop coherent equal protection jurisprudence to be applied to the punishment/culpability problem. To be sure, victims of the punishment/culpability problem resemble the traditional beneficiaries of Equal Protection Clause scrutiny in

¹²⁷ OR. REV. STAT. § 163.118 (2007).

¹²⁸ See CONN. GEN. STAT. §§ 53a-54a to 53a-55 (2008) (establishing purposeful homicide under the influence of extreme emotional disturbance as manslaughter in the first degree).

very few ways. Nevertheless, the Fourteenth Amendment entrusts courts with the responsibility to develop coherent doctrine to protect all classes of persons, sympathetic or not, against injustice and unequal treatment.