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2010]

GILBERT & SULLIVAN AND SCALIA: PHILOSOPHY,
PROPORTIONALITY, AND THE EIGHTH AMENDMENT

IAN P. FARRELL*

“My object all sublime I shall achieve in time—
To let the punishment fit the crime—
The punishment fit the crime.”
—Gilbert & Sullivan, *The Mikado*¹

“[T]hose who framed and approved the Federal Constitution chose, for
whatever reason, not to include within it the guarantee against
disproportionate sentences.”
—Justice Scalia, *Harmelin v. Michigan*²

I. INTRODUCTION

PROPORTIONALITY—“the notion that the punishment should fit the
crime”³—is one of the most fundamental ingredients of our sense of
just punishment. Most people would agree that punishment should be
proportional to the gravity of the crime committed: there should be some
correlation between the moral gravity of the crime and the suffering im-
posed via punishment, and more serious crimes should be punished more
severely than less serious crimes. In addition to its intuitive appeal, the
“principle of proportionality” is reflected in philosophical justifications of
punishment and has an impressive pedigree in Anglo-American legal his-
tory. The principle traces back in England to the Magna Carta, the First
Statute of Westminster, and the 1689 Bill of Rights. Additionally, the
United States Supreme Court has recognized the principle as part of the
Eighth Amendment’s prohibition on “cruel and unusual punishments” for
nearly a century.⁴ Since the Supreme Court resuscitated the American
death penalty in 1976, the principle of proportionality has, if anything,
taken on increased importance. The Court has subsequently invoked the
principle to hold that the death penalty is prohibited for the rape of an

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1. W.S. GILBERT, *The Mikado*, in *THE MIKADO AND OTHER PLAYS* 42 (1885).
2. 501 U.S. 957, 985 (1991) (plurality opinion).
3. *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).
4. *See, e.g., Weems v. United States*, 217 U.S. 349, 367 (1910); Anthony F. Gran-
nucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL.
L. REV. 839 (1969).

adult woman, offenders who did not form the intent to kill, juveniles, and offenders who are mentally retarded.⁵

The principle of proportionality, as an aspect of the Supreme Court's Eighth Amendment jurisprudence, is an issue of continuing contemporary importance. The prominence of the principle was recently reaffirmed in the 2008 decision *Kennedy v. Louisiana*,⁶ where the Supreme Court struck down a Louisiana statute on the grounds that the death penalty is disproportionate to the crime of raping a child.⁷ State courts and lower federal courts have since invoked the proportionality principle reaffirmed in *Kennedy* in the non-death penalty context, holding certain long prison sentences unconstitutional by reason of gross disproportionality.⁸

While nearly a century has passed since the Court first relied on the proportionality principle, the Court has by no means spoken with one voice on the issue.⁹ Rather, the Court's Justices have demonstrated chronic disagreement about the precise contours of the principle and about its application in specific cases and classes of cases.¹⁰ But despite this ongoing disagreement about what "proportionality" means, there has been near consensus about the more basic issue: namely, that the Eighth Amendment does in fact require proportionality—whatever that may be—between punishment and the crime for which it is imposed.¹¹ Of the Jus-

5. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (juveniles); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (mentally retarded); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (offenders who formed no intent to kill); *Coker v. Georgia*, 433 U.S. 584, 598-99 (1977) (rape of adult woman).

6. 128 S. Ct. 2641 (2008).

7. *See id.* at 2650 ("[A] death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.").

8. *See, e.g.*, *United States v. Farley*, No. 1:07-CR-196-BBM, 2008 U.S. Dist. LEXIS 104437 (N.D. Ga. Sept. 2, 2008) (holding thirty-year mandatory minimum sentence for crossing state line with purpose of engaging in sexual conduct with person under twelve years of age to be grossly disproportionate and in violation of Eighth Amendment); *Bradshaw v. State*, 671 S.E.2d 485 (Ga. 2008) (concluding that sentence of life imprisonment for second failure to register as sex offender is grossly disproportionate to crime and therefore unconstitutional).

9. Although the proportionality principle was referred to by a dissenting Justice in the earlier case of *O'Neil v. Vermont*, *Weems* was the first Court decision to base its holding upon a requirement of proportionality. *See O'Neil v. Vermont*, 144 U.S. 323 (1892) (Field, J., dissenting); *see also Weems*, 217 U.S. at 367.

10. For example, members of the Court have disagreed about whether the principle of proportionality applies only to unusual modes of punishment (such as capital punishment or torture), whether it also applies to terms of imprisonment, whether the Eighth Amendment prohibits only grossly disproportionate punishments, and about the appropriate objective factors for determining whether the punishment is proportional to the crime. For a more detailed discussion of these issues, *see infra* notes 13-57 and accompanying text.

11. The Supreme Court's jurisprudence on this issue is notoriously lacking in clarity. *See Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("[O]ur precedents in this area have not been a model of clarity."); *see also Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) ("Though our decisions recognize a proportionality principle, its precise contours are unclear."). For a helpful propo-

tices who have occupied seats on the Court over the last century, only Justices Scalia and Thomas have maintained that the Eighth Amendment does *not* contain any requirement that punishment be proportionate to the offense committed. Only Justice Scalia has outlined an argument in support of this position.

This Article is a critique of Justice Scalia's argument. In particular, I address the crucial, but surprisingly somewhat overlooked, *philosophical* claim upon which Justice Scalia's argument hinges: that once we acknowledge deterrence, rehabilitation, and incapacitation as constitutionally legitimate goals of punishment, a requirement of proportionality is unintelligible. By grounding his constitutional argument in a philosophical claim, Justice Scalia has invited us to engage with him on philosophical ground. In this Article, I accept his invitation. I argue that a requirement of proportionality is consistent with the penological goals of deterrence, incapacitation, and rehabilitation—and therefore, that Justice Scalia's argument about the meaning of the Eighth Amendment collapses.

The body of this Article has four parts. Following this Introduction, Part II begins with a brief description of the long line of decisions in which the Supreme Court has held the Eighth Amendment to contain a requirement of proportionality between crime and punishment. Justice Scalia claims that these holdings cannot be intelligently applied.¹² I describe Justice Scalia's (philosophical) justification for this claim—that the proportionality principle is inconsistent with the constitutionally permissible penal goals of deterrence, incapacitation, and rehabilitation—at the end of Part II.

The argumentative bulk of the Article, contained in Part III, consists of a critique of Justice Scalia's philosophical claim. I demonstrate that, contrary to Justice Scalia's assertion, the proportionality principle *is* consistent with the consequentialist goals of punishment. In doing so, I draw upon a large body of philosophical literature in support of "hybrid" or "mixed" justifications of punishment—justifications that combine principles such as desert and proportionality with consequentialist objectives. This philosophical analysis has two functions. First, it demonstrates the falsity of Justice Scalia's philosophical claim. Second, it prepares the ground for my further arguments in Part IV about the nature of the proportionality principle. The effort that theorists such as Jeremy Bentham

sal to make sense of the jurisprudence by recourse to concepts in the philosophy of punishment, see Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005). Professor Lee assumes for the purpose of his article that "the Eighth Amendment contains a proportionality limitation," but acknowledges that this "is not an uncontroversial assumption." *Id.* at 678 n.16. The purpose of my Article is to resolve this "long-running dispute" not addressed by Lee. See *id.*; see also Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1517 n.183 (2001) ("Justices and scholars continue to disagree as to whether the Framers, when modeling the Cruel and Unusual Punishments Clause upon the English Declaration of Rights of 1689, had proportionality in mind.").

12. See *Harmelin*, 501 U.S. at 985 (plurality opinion).

and John Rawls have expended to generate the proportionality principle from a utilitarian framework demonstrates the tenacity with which non-retributivists retain their intuitive belief in the requirement of proportionality, even in the face of apparent tension between this requirement and their general theoretical commitments.

In Part IV, I draw on both aspects of the preceding philosophical analysis. First, I return to Justice Scalia's interpretation of the Cruel and Unusual Punishment Clause. I conclude that the preceding analysis should lead us to reject Justice Scalia's argument that the Clause contains no requirement that punishment be proportional to the crime for which it is imposed. I then suggest that a number of broader conclusions can be drawn from the philosophical analysis undertaken in Part III, specifically the reluctance, on the part of theorists of all stripes, to let go of the notion that the punishment should fit the crime. I suggest that it is misleading to characterize the proportionality principle as "inherently retributivist." The principle is not merely the by-product of this one particular theoretical approach to punishment. Rather, the proportionality principle is better understood as a deeply held and widely shared theoretical independent conviction about the requirements of justice in punishment, a principle essential to *any* morally acceptable understanding of just punishment. I conclude Part IV by briefly sketching how understanding the extent of our commitment to the proportionality principle further bolsters its Eighth Amendment credentials. At the very least, the fundamental moral importance we attach to the principle of proportionality must give us pause before we construe the Constitution in a manner that leads to its exclusion.

II. A BRIEF HISTORY OF EIGHTH AMENDMENT PROPORTIONALITY

A. *The Requirement of Proportionality*

That the Eighth Amendment requires punishment be proportional to the offense for which it is imposed was first suggested by a member of the Supreme Court in the 1892 decision of *O'Neil v. Vermont*.¹³ As the Eighth Amendment had not yet been applied to the states, the majority of the Court did not address whether the sentence violated the Cruel and Unusual Punishment Clause.¹⁴ In a dissent to which Justices Harlan and Brewer concurred, however, Justice Field stated that the Clause prohibited not only modes of treatment such as torture, but also "all punishments

13. 144 U.S. 323 (Field, J., dissenting). O'Neil was convicted of 307 offenses of selling intoxicating liquor without authority. *See id.* at 327. He was fined \$6,638.72 and required to "stand committed" until the fine was paid, with the proviso that if the fine was not paid in full by a certain date, "he should be confined at hard labor . . . for the term of 19,914 days" (approximately fifty-four and a half years). *Id.* at 330.

14. The Eighth Amendment was not applied to the states until the decision in *Robinson v. California*, 370 U.S. 660 (1962).

which by their excessive length or severity are greatly disproportioned to the offenses charged.”¹⁵

A majority of the Court first invoked the requirement of proportionality to invalidate a sentence eighteen years later in *Weems v. United States*.¹⁶ Weems, a U.S. government official in the Philippines, was found guilty of falsifying a public document and was subjected to a form of punishment known as *cadena temporal*.¹⁷ Specifically, Weems’s punishment consisted of fifteen years of “hard and painful labor” together with certain “incidents,” including being chained at the wrist day and night and deprivation of parental and property rights.¹⁸ The Court held that the punishment was cruel and unusual because it was disproportionate to the offense for which Weems was convicted. Writing for the Court, Justice McKenna stated that the prohibition on cruel and unusual punishment did not merely rule out methods of punishment (such as torture) that are always “cruel,” “barbarous,” or “inhuman”.¹⁹ Rather, the prohibition on cruel and unusual punishment incorporated the “precept of justice that punishment for crime should be graduated and proportioned to the offense.”²⁰

For many years after *Weems*, the Court rarely relied on the proportionality principle to invalidate a punishment. There are several cases, however, in which the principle appears implicit in the Court’s reasoning. In *Trop v. Dulles*,²¹ for instance, the Court held the penalty of denationalization for desertion during wartime to be cruel and unusual despite the fact that it was *not* disproportionate.²² Nonetheless, neither the majority opinion nor the dissent rejected the principle of proportionality. Rather, they

15. *O’Neil*, 144 U.S. at 339-40 (Field, J., dissenting).

16. 217 U.S. 349 (1910).

17. *See id.* at 357-63 (presenting facts of case). Weems was a disbursement officer for the Bureau of Coast Guard and Transportation stationed in the Philippine Islands. *See id.* at 357. The falsification of public documents consisted of two false entries in a wages book, stating that the sums of 208 and 408 pesos had been paid out. *See id.* at 358. *Cadena temporal*, a punishment unknown to Anglo-American law, was employed in the Philippines under the Penal Code of Spain. *See id.* at 363. Weems argued that *cadena temporal* violated the cruel and unusual punishment clause of the Philippine Bill of Rights, which the Court held “must have the same meaning” as the corresponding clause in the U.S. Constitution. *See id.* at 367.

18. *See id.* at 364, 367. The “incidents” of *cadena temporal* also included permanent deprivation of the right to vote, hold office, and receive retirement pay, as well as requiring written permission before any change in domicile after release. *See id.* at 365.

19. *Id.* at 370.

20. *Id.* at 367. The *Weems* dissent, in contrast, denied that the Cruel and Unusual Punishment Clause contains a requirement of proportionality. After discussing the historical understanding of “cruel and unusual,” Justice White (with Justice Holmes concurring) concluded that the clause forbids only “inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture.” *Id.* at 409 (White, J., dissenting).

21. 356 U.S. 86 (1958).

22. *See id.* at 99 (concluding that, because of the peculiar nature of denationalization, such punishment offended “principle of civilized treatment guaranteed by the Eighth Amendment”).

applied the principle but concluded that the punishment could not be considered disproportionate to the crime for which it was applied.²³ Four years later in *Robinson v. California*,²⁴ the Court held that a ninety-day sentence for the crime of being “addicted to the use of narcotics” was cruel and unusual (and in so doing applied the Eighth Amendment to a state punishment for the first time).²⁵ The Court’s opinion, penned by Justice Stewart, did not refer to proportionality by name, but pointed out that whether a punishment is cruel and unusual depends on its relationship to the offense for which the punishment was imposed: “[t]o be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be answered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”²⁶

Following the Court’s resurrection of capital punishment in *Gregg v. Georgia*²⁷ in 1976, the proportionality principle quickly became a central plank in the Court’s death penalty jurisprudence. In *Coker v. Georgia*,²⁸ the Court held that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”²⁹ In so holding,

23. *Id.* (“Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime.”) (Warren, C.J.) (majority opinion).

24. 370 U.S. 660 (1962).

25. *See id.* at 660.

26. *Id.* at 667. Justice Douglas’s concurrence invoked proportionality more directly:

The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present. A punishment out of all proportion to the offense may bring it within the ban against “cruel and unusual punishment” [T]he principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

Id. at 676 (Douglas, J., concurring) (internal citations omitted).

27. 428 U.S. 153 (1976).

28. 433 U.S. 584 (1977).

29. *Id.* at 592 (plurality opinion). While there were a number of differences of opinion among the Justices, no member of the Court resisted the view that the Eighth Amendment included a requirement of proportionality. Justice White announced the judgment of the Court and Justices Stewart, Blackmun, and Stevens joined his opinion. *See id.* at 586. Justices Brennan and Marshall concurred in the judgment on the ground that the Eighth and Fourteenth Amendments per se prohibited the death penalty. *See id.* at 600 (Brennan, J., concurring). Justice Powell concurred in the Court’s judgment and agreed that “ordinarily death is disproportionate punishment for the crime of rape of an adult woman.” *Id.* at 601 (Powell, J., concurring). He added the caveat, however, that “it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape.” *Id.* at 603. In a dissent joined by Justice Rehnquist, Chief Justice Burger “accept[ed] that the Eighth Amendment’s concept of disproportionality bars the death penalty for minor crimes,” but pointed out that “rape is not a minor crime.” *Id.* at 604 (Burger, C.J., dissenting).

the Court reaffirmed that the Eighth Amendment bars not only “barbaric” punishments, but also punishment that is “grossly out of proportion to the severity of the crime.”³⁰ In like vein, the Court held in *Enmund v. Florida*³¹ that the death penalty was disproportionate when imposed upon a person guilty of felony murder “who does not himself kill, attempt to kill, or intend that a killing take place.”³² Three more recent cases have also applied the principle of proportionality in the death penalty context. In *Atkins v. Virginia*³³ the Court declared the death penalty disproportionate and excessive when applied to mentally retarded persons, while in *Roper v. Simmons*³⁴ the Court held that execution was a disproportionate punishment for juvenile offenders. In the Court’s latest word on this matter, *Kennedy v. Louisiana*, the death penalty was recently declared unconstitutionally disproportionate for the crime of raping a child less than twelve years of age.³⁵

B. *The Scope of the Proportionality Principle*

Although the Court has embedded the principle of proportionality in its death penalty jurisprudence, a number of its opinions suggest that the requirement of proportionality applies only to modes of punishment other than fines or imprisonment. In *Rummel v. Estelle*,³⁶ the Court upheld a life sentence imposed under a Texas recidivism statute against a challenge that it was grossly disproportionate.³⁷ The Court did not go so far as to state a categorical rule denying proportionality review for any term of imprisonment, but it did not fall far short. Writing for the Court, Justice Rehnquist noted that the Court had “on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime.”³⁸ None of those cases, though, invalidated a sentence that involved only imprisonment:

30. *Id.* at 592 (plurality opinion).

31. 458 U.S. 782 (1982).

32. *Id.* at 797. The dissent in *Enmund* also acknowledged that the Eighth Amendment precludes disproportionate punishment. *See id.* at 811 (O’Connor, J., dissenting). Nevertheless, the dissenting Justices determined that “the death penalty is not disproportionate to the crime of felony murder.” *Id.* at 827.

33. 536 U.S. 304 (2002).

34. 543 U.S. 551 (2005).

35. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008) (providing that “in cases of crimes against individuals,” the death penalty is only proportionate punishment “for crimes that take the life of the victim”).

36. 445 U.S. 263 (1980).

37. The statute imposed a mandatory life sentence on persons found guilty of a third non-capital felony. *See id.* at 264. Rummel’s three felonies were fraudulent use of a credit card in the amount of \$80, passing a forged check for \$28.36, and obtaining \$120.75 by false pretenses. *See id.* at 265-66.

38. *Id.* at 271. Chief Justice Burger, as well as Justices Stewart, White, and Blackmun, joined Justice Rehnquist’s opinion. *See id.* at 264. Justice Powell, joined by Justices Brennan, Marshall, and Stevens, dissented on the ground that “the penalty for a non-capital offense may be unconstitutionally disproportionate,” and the

Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative.³⁹

Interestingly, Justice Rehnquist conceded that a proportionality principle might “come into play in the extreme example mentioned by the dissent, if a legislature made overtime parking a felony.”⁴⁰

The Court followed the *Rummel* approach two years later in *Hutto v. Davis*.⁴¹ The Court changed track only a year later, however, in *Solem v. Helm*.⁴² Once again, at issue was a life sentence issued under a state recidivism statute.⁴³ In an opinion by Justice Powell, the Court held (over the

mandatory life sentence at issue was just such a case. *Id.* at 286-87 (Powell, J., dissenting).

39. *Id.* at 274 (majority opinion). In support of the view that the Court should not invalidate terms of imprisonment on proportionality grounds, Justice Rehnquist argued that objective application of the proportionality principle was clearer with respect to modes of punishment (such as torture or the death penalty) than with respect to differences of degree (such as prison terms of different lengths). *See id.* at 275.

40. *Id.* at 274 n.11 (internal citations omitted). This concession is a response to Justice Powell’s example in dissent of a prison sentence that would be struck down as disproportionate: “[a] statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.” *Id.* at 288 (Powell, J., dissenting). Although Justice Rehnquist gave no explanation for why proportionality comes into play when reviewing “extreme cases” of prison terms, but not others, one possible explanation would be that only “extremely disproportionate” sentences are unconstitutional. But this approach is akin to saying that a proportionality principle *does* apply to sentences of imprisonment (namely that “extremely” disproportionate sentences are cruel and unusual) and Justice Rehnquist gives no reason as to why in such cases the length of sentence is *not* a matter of legislative prerogative. Another explanation could be that overtime parking cannot properly be classified as a felony, but Justice Rehnquist fails to give any reason as to why this is the case. The difficulties of reconciling this concession (that a life sentence for overtime parking would be so disproportionate as to constitute cruel and unusual punishment) with Justice Rehnquist’s general position suggest an important point. That is, even a Justice committed to the view that proportionality should not apply to sentences of imprisonment could not escape the strength of the intuition that *some* prison terms would be undeniably disproportionate to *some* offenses and that in such cases the Eighth Amendment would prohibit the punishment. For a more detailed discussion of this point, see *infra* notes 84-166 and accompanying text.

41. 454 U.S. 370 (1982). The Court upheld a sentence of two consecutive twenty-year terms and two fines of \$10,000 for intent to distribute and the distribution of nine ounces of marijuana. *See id.* at 376.

42. 463 U.S. 277 (1983).

43. The relevant South Dakota statute provided that if a person convicted of a felony had at least three prior felonies, the maximum penalty was life imprisonment without the possibility of parole and a \$25,000 fine. *See id.* at 281. Prior to his felony conviction for uttering a “no-account” check for \$100, Helm had ac-

strong dissent of Chief Justice Burger and Justices White, Rehnquist, and O'Connor) that the sentence was constitutionally disproportionate.⁴⁴ Justice Powell declared that “[t]here is no basis for the . . . assertion that the general principle of proportionality does not apply to felony prison sentences.”⁴⁵

It should come as no surprise that the dissenters decried the majority Justices’ failure to respect precedent.⁴⁶ Within a decade, the Court, in what was becoming an increasingly impressive impersonation of a yacht race, again altered course. In *Harmelin v. Michigan*,⁴⁷ the Court held that a mandatory life sentence without the possibility of parole, imposed for possession of 672 grams of cocaine, did not violate the Eighth Amendment.⁴⁸ No single rationale for this holding commanded majority support. Justice Scalia announced the judgment of the Court, and asserted that “*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.”⁴⁹ Rather, only certain *modes* or *methods* of punishment were prohibited.⁵⁰

Only Chief Justice Rehnquist agreed with this proposition. Justice Kennedy, joined by Justices O’Connor and Souter, argued that the Cruel and Unusual Punishment Clause did encompass a “narrow” proportionality principle that applied to both capital and non-capital punishments.⁵¹ According to this narrow principle, sentences were prohibited if “greatly” or “grossly” disproportionate to the crime.⁵² Nonetheless, the latter three Justices concurred in the Court’s judgment because Michigan’s mandatory life sentence was not greatly disproportionate to the “serious crime” of possessing at least 650 grams of cocaine.⁵³

crued six felony convictions and was consequently sentenced to life imprisonment. *See id.*

44. In *Solem*, the majority consisted of the remaining three Justices from the dissent in *Rummel* (Justice Stewart having retired in the interim), together with the recently appointed Justice O’Connor and Justice Blackmun, who had voted with the majority in *Rummel*. The other members of the *Rummel* majority made up the (understandably rigorous) *Solem* dissent.

45. *Solem*, 463 U.S. at 288.

46. *See id.* at 304 (Burger, C.J., dissenting).

47. 501 U.S. 957 (1991).

48. *See id.* at 996 (majority opinion).

49. *Id.* at 965 (plurality opinion).

50. *See id.* at 979, 981, 983. According to Justice Scalia, the death penalty was not among the prohibited modes of punishment. *See id.* at 981.

51. *See id.* at 997 (Kennedy, J., concurring).

52. *See id.* at 1001 (citations omitted).

53. *See id.* at 997, 1008-09. On the other hand, Justice White, with Justices Marshall and Stevens, dissented on the ground that the punishment in question was grossly disproportionate to the crime. *See id.* at 1027 (White, J., dissenting).

Similarly, in *Ewing v. California*,⁵⁴ the Court upheld that state's "three strikes" recidivism statute against an Eighth Amendment challenge.⁵⁵ Three Justices reiterated that the Eighth Amendment contained a narrow proportionality principle, but held that the life sentence imposed was not grossly disproportionate, given the state's public safety interest when the defendant had a long and serious criminal record.⁵⁶ Both Justices Scalia and Thomas, however, expressed the stronger view that the prohibition against cruel and unusual punishment contained no proportionality principle whatsoever.⁵⁷

C. Justice Scalia's Position

As the above discussion demonstrates, there has been near-consensus for just shy of a century that the Eighth Amendment contains *some* requirement of proportionality, *some* demand that the punishment fit the crime. To be sure, the Court has vacillated on whether this principle applies to non-capital crimes and what it means for a punishment to "fit" a crime. The Justices have routinely disagreed about whether particular punishments are proportionate to particular crimes. In the years since 1910, however, only Justices Scalia and Thomas have expressed the view that the Eighth Amendment's prohibition against cruel and unusual punishment contains no requirement of proportionality whatsoever.⁵⁸ Of the two, only Justice Scalia has provided substantial reasons in support of this reading of the Eighth Amendment.⁵⁹

Justice Scalia's argument for his view that the Eighth Amendment contains no principle of proportionality has three components, which I shall refer to as his interpretive methodology, his historical claim, and his philosophical claim. The latter of these three is, of course, the focus of

54. 538 U.S. 11 (2003) (plurality opinion).

55. *See id.* at 15-16. The law in question provided that a person found guilty of a felony that had two or more prior "serious" or "violent" felony convictions must receive "an indeterminate term of life imprisonment." *Id.* at 16. Ewing received a life sentence after he was convicted of stealing golf clubs worth \$399. *See id.* at 18. Ewing's numerous prior convictions included theft, grand theft auto, burglary, appropriating lost property, battery, possessing drug paraphernalia, trespassing, and unlawfully possessing a firearm. *See id.* at 18-19.

56. *See id.* at 24-25, 29-30. Justice O'Connor announced the opinion of the Court, with Chief Justice Rehnquist and Justice Kennedy concurring. *See id.* at 13. Note that in *Harmelin*, Chief Justice Rehnquist joined Justice Scalia in claiming that the Eighth Amendment contained no proportionality principle, but joined Justice O'Connor's assertion in *Ewing* that the Eighth Amendment did contain a narrow proportionality principle, applicable to both capital and non-capital punishments. *See id.*; *Harmelin*, 501 U.S. at 960.

57. *See id.* at 31-32 (Scalia, J., concurring); *see also id.* at 32 (Thomas, J., concurring).

58. While Chief Justice Rehnquist joined Justice Scalia's opinion in *Harmelin*, he also joined Justice O'Connor's contrary claim in *Ewing*, and authored no opinion himself denying a requirement of proportionality in the Eighth Amendment.

59. Justice Thomas has given no argument in support of his view. *See Ewing*, 538 U.S. at 32 (Thomas, J., concurring).

this Article, but I shall briefly outline the methodology and historical claim to demonstrate the pivotal role the philosophical claim plays in Justice Scalia's broader argument about the meaning of the Eighth Amendment.

1. *Interpretive Methodology*

As every reader is no doubt aware, Justice Scalia claims to be an "originalist" in matters of constitutional interpretation. But originalism comes in many different flavors and it is important to recognize which of these is being brought to bear.⁶⁰ Justice Scalia's originalism is characterized by two factors. First, Justice Scalia claims that contemporary interpreters of the Constitution owe fidelity not to the intentions or to the "concrete expectations" of the Framers, but rather to the *original public meaning* of the Constitution.⁶¹

More importantly for the subject of this Article, Justice Scalia is a self-described "faint-hearted originalist."⁶² He concedes that "[i]n its undiluted form at least, [originalism] is medicine that seems too strong to swallow."⁶³ Strict adherence to the originalist philosophy would sometimes render consequences so unpalatable as to be repudiated by every contemporary judge.⁶⁴ The maintenance of originalism "as a practical theory of exegesis," therefore, requires that the original public meaning must give way when this meaning would conflict with other deeply held values.⁶⁵ For example, the value of recognizing the doctrine of stare decisis requires that an important precedent (or significant line of precedent) should stand even if it is inconsistent with the Constitution's original meaning.⁶⁶ Similarly, the original meaning should be rejected if its application would yield a result completely unacceptable to current social mores, such as holding "public lashing, or branding of the right hand" to be constitutionally permitted.⁶⁷ Justice Scalia's pragmatic, faint-hearted originalist methodology therefore requires two steps: determining the original public meaning and addressing whether stare decisis or other concerns require this meaning to be rejected.

60. For an insightful recent discussion of the different versions of originalism, see Mitchell N. Berman, *Originalism Is Bunk*, 83 N.Y.U. L. REV. 1 (2009).

61. See Antonin Scalia, *Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 144 (Amy Gutmann ed., 1997).

62. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

63. *Id.* at 861.

64. *See id.*

65. *Id.*

66. *See id.* According to Justice Scalia, "almost every originalist would adulterate it with the doctrine of stare decisis—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong." *Id.*

67. *Id.* These punishments should not be sustained against an Eighth Amendment challenge, Justice Scalia asserts, "[e]ven if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them." *Id.*

2. *The Historical Claim*

Applying Justice Scalia's methodology to interpretation of the Eighth Amendment first requires determining "what its meaning was to the Americans who adopted the Eighth Amendment."⁶⁸ A large part of Justice Scalia's *Harmelin* opinion consists of arguing that, at the time the Eighth Amendment was adopted, the prohibition on cruel and unusual punishment was *not* understood as incorporating a requirement that punishment be proportional to the crime for which it was imposed.⁶⁹

On Justice Scalia's analysis, "all available evidence of contemporary understanding" confirms that the Eighth Amendment was not understood by those who framed and approved the Constitution as prohibiting disproportionate punishment.⁷⁰ The sources to which Justice Scalia refers for evidence of this contemporary understanding include: the debates during the state ratifying conventions (that prompted the Bill of Rights); the floor debates of the First Congress (which proposed the Bill of Rights); the actions of the First Congress in imposing severe penalties on a range of offenses; early commentary on the Clause; and early judicial constructions of the Eighth Amendment and its state counterparts.⁷¹ Justice Scalia asserts that this evidence demonstrates that "those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences."⁷² Rather, the Cruel and Unusual Punishment Clause, by Justice Scalia's lights, precluded only certain *methods* of punishment being imposed for *any* crime.⁷³

3. *The Philosophical Claim*

The above historical claim alone does not, according to Justice Scalia's interpretive methodology, determine the contemporary meaning of the Eighth Amendment. As mentioned above, Justice Scalia accepts that when there is sufficient precedent to the contrary, the original meaning must give way out of respect for *stare decisis*, along with other pragmatic concerns.⁷⁴ In *Ewing*, Justice Scalia acknowledged the Court's long

68. *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991) (plurality opinion).

69. *See id.* at 985. Parts I, II, and III of Justice Scalia's opinion in *Harmelin*, which failed to gain support of a majority of the Justices, focus on historical material. *See id.* at 962-94.

70. *Id.* at 978.

71. *See id.* at 979-85.

72. *Id.* at 980.

73. *See id.* at 979, 983. It is not my purpose at this point in the Article to assess the conclusions Justice Scalia draws about the meaning of the Eighth Amendment at the time of its adoption. For present purposes, I am agnostic on this point and will content myself with pointing out that other commentators and judges have drawn different conclusions from the historical material. *See, e.g., id.* at 1009-11 (White, J., dissenting); *Weems v. United States*, 217 U.S. 349, 367-80 (1910). For further discussion of this issue, see *infra* notes 167-98 and accompanying text.

74. *See* Scalia, *supra* note 62, at 861. Justice Scalia accepts that, "[i]n its undiluted form, at least, [originalism] is medicine that seems too strong to swallow.

line of holdings “that the Eighth Amendment contains a narrow proportionality principle”—holdings contrary to his conclusion as to the original meaning.⁷⁵

We might therefore be forgiven for expecting Justice Scalia to concede that the original meaning must yield to the line of contrary precedent. Instead, Justice Scalia rejects the non-originalist precedent—not for its historical shortcomings, but for its philosophical failings. He states in *Ewing* that, “[o]ut of respect for the principle of *stare decisis*, I might nonetheless accept the contrary holding of *Solem v. Helm*—that the *Eighth Amendment* contains a narrow proportionality principle—if I felt I could intelligently apply it.”⁷⁶

The Eighth Amendment retains its original meaning, Justice Scalia argued, because the alternate meaning (supported by decisions such as *Solem*) cannot be intelligibly applied.⁷⁷ The *reason* that holdings declaring the Eighth Amendment to contain a proportionality principle are impossible to intelligibly apply, Justice Scalia continued, is that such a position is *theoretically* incoherent:

Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution. “It becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given significant weight,”—not to mention giving weight to the purpose of California’s three strikes law: incapacitation. In the present case, the game is up once the plurality has acknowledged that “the Constitution does not mandate adoption of any one penological theory,” and that a “sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.”⁷⁸

Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*.” *Id.* But acceptance of *stare decisis* is not the only compromise the faint-hearted judge must make in order to sustain originalism “as a practical theory of exegesis.” *Id.* For example, contemporary courts should not sustain practices as distasteful to modern sensibilities as public flogging and hand branding—“[e]ven if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them.” *Id.*

75. *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

76. *Id.* (internal citations omitted). Justice Scalia does not definitely declare that he *would* accept the contrary precedents if they could be intelligently applied, but merely that he *might*. See *id.* Justice Scalia, however, gives no other reason for rejecting the contrary precedents and the possibility that there could be other reasons is remote. See *id.* at 31-32. Indeed, the other pragmatic considerations that Justice Scalia claims ought to dilute originalism—such as inconsistency with modern sensibilities—also weigh in favor of rejecting the original understanding of the Eighth Amendment, rather than in favor of rejecting precedents to the contrary. See Scalia, *supra* note 62, at 861.

77. See *Ewing*, 538 U.S. at 31 (Scalia, J., concurring).

78. *Id.* (quoting *Harmelin*, 501 U.S. at 989 (plurality opinion)).

In other words, proportionality for Justice Scalia is solely a retributive concept, a concept intrinsically tied to the notion that punishment is justified because it involves giving wrongdoers what they *deserve*. This theory of retribution is fundamentally incompatible, so his argument goes, with utilitarian or consequentialist theories of punishment—theories that claim punishment is justified because it generates beneficial consequences such as deterrence, incapacitation, and rehabilitation.⁷⁹ Consequently, requiring proportionality between crime and punishment is irreconcilable, says Justice Scalia, with a system of punishment that contains the goals of incapacitation, deterrence, and rehabilitation.⁸⁰ As the Constitution does not mandate any one penological theory, moreover, it is constitutionally permissible for legislatures to adopt a consequentialist model of punishment. Because proportionality is unintelligible in light of such a (constitutionally permissible) system of punishment, Justice Scalia concludes that the Eighth Amendment *cannot* include a requirement of proportionality.⁸¹

This is an intriguing argument, for several reasons. First, it involves a claim about the theoretical justifications of punishment and therefore invites a philosophical response.⁸² Second, it is a very strong claim: that a particular principle is *incompatible* with certain theories or goals of punish-

79. In this Article, I shall use the terms “consequentialism” and “utilitarianism” interchangeably. Strictly speaking, the latter is a subset of the former. Consequentialist theories generally assess the moral rightness or wrongness of actions in terms of their consequences, with the value of the consequences measured in a variety of ways. Utilitarianism is the most familiar school of consequentialist theories, in which consequences are assessed in terms of the overall balance of utility, as measured for example by reference to pleasure and pain.

80. See *Ewing*, 538 U.S. at 31 (Scalia, J., concurring). Justice Scalia provides no justification for this assertion, either in the form of argument or authority. Rather, he seems to consider the proposition self-evident.

81. See *id.* at 32.

82. The only plausible interpretation of Justice Scalia’s reasoning in *Harmelin* and *Ewing* is that he is making a claim of philosophical or theoretical unintelligibility. Taken in isolation, Justice Scalia’s declaration that he will not adopt the proportionality principle in *Solem* because he cannot intelligently apply it could be read as a claim about doctrinal inconsistency or about the difficulty in applying the principle of proportionality to particular cases. Members of the Court have acknowledged the lack of clarity and consistency in its proportionality decisions, as well as in its guidance with respect to the manner in which the principle ought to be applied. See, e.g., *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003); *Harmelin*, 501 U.S. at 996, 998 (Kennedy, J., concurring). The plausibility of this understanding of Justice Scalia’s claim, however, dissolves in light of his opinion in *Ewing*. Justice Scalia argues that the proportionality principle is unintelligible *because* it “becomes difficult even to speak intelligently of ‘proportionality’” if consequentialist goals are considered constitutionally valid. *Ewing*, 538 U.S. at 31 (Scalia, J., concurring). This language is not consistent with a claim about doctrinal incoherence or difficulty in application to particular cases. Nor does this language suggest concern for institutional competence or judicial deference to legislative decisions. In any event, concerns of this nature suggest applying a deferentially “narrow” proportionality principle, or that the Court decided not to fully enforce the proportionality principle. See *id.*; see also Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1241 (1978). Such concerns do not justify a conclusion that the Eighth Amendment, properly under-

ment. Third, it makes no reference to a significant body of philosophical literature on this very point—a literature that spans decades, includes well-known work by renowned theorists, and demonstrates a clear consensus for the view that the proportionality principle *can* be intelligently applied as part of a theory in which deterrence, incapacitation, and rehabilitation are recognized as justifying goals of punishment. In the next Part of this Article, I shall argue that not only is the proportionality principle compatible with a theory that justifies punishment by the goals of deterrence, rehabilitation, and incapacitation, but also that *any* plausible theory of punishment must include a requirement that punishment be proportional to the crime for which it is imposed.

Before moving on, it is worth identifying a point of significant tension between Justice Scalia's historical claim, on the one hand, and his philosophical claim, on the other. His historical claim is that the Eighth Amendment originally prohibited (and therefore currently prohibits) only particular barbaric *modes* of punishment—such as the rack, the stake and the gibbet, breaking on the wheel, flaying alive, and “rending asunder with horses.”⁸³ Justice Scalia is surely correct that the Eighth Amendment both prohibits and prohibited at least these practices (whether or not he is also correct that it prohibits *only* such practices). It is surely also true that, at the time of the Eighth Amendment's adoption, deterrence was one of the accepted goals of punishment. So how do we make sense of the prohibition on torturous modes of punishment, methods that presumably would be especially effective at deterring would-be criminals? The usual explanation is that such practices are inhumane, offend human dignity, and therefore ought to be rejected regardless of whether they are effective deterrents. But this explanation is no more compatible with consequentialist theories of punishment than is the principle of proportionality. These barbaric modes of punishment are incontestably unconstitutional, as Justice Scalia agrees, despite their (presumably impressive) deterrent effect. It is difficult, then, to see why it is intelligible to ban inhumane modes of punishment, once deterrence is given significant weight, but unintelligible to even speak of a requirement of proportionality.

III. PROPORTIONALITY AND THEORIES OF PUNISHMENT

Justice Scalia's insistence on fidelity to the original understanding of the Eighth Amendment is only justified—even by his own interpretive methodology—if his philosophical claim is correct. In a nutshell, this claim is that proportionality is an inherently retributivist concept and therefore incompatible with consequentialist justifications of punishment. Given the historical connection between retributive theories of punish-

stood, contains *no* proportionality principle. I am grateful to Lawrence Sager and Jordan Steiker for these suggestions.

83. See *Harmelin*, 501 U.S. at 979 n.2, 981 (plurality opinion) (quoting BENJAMIN OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 186 (1832)).

ment and the proportionality principle, Justice Scalia's claim has some initial plausibility. This plausibility, however, has a short half-life. A thoughtful analysis of the relevant concepts, as well as application of the extensive philosophical literature, demonstrates that the claimed incompatibility (or unintelligibility) is false.

In this Part, I address more precisely what the principle of proportionality means and its relationship to theories of punishment. I first consider the relationship between proportionality and retributivism, drawing attention to the fundamental role the requirement of proportionality plays in retributive theories. I then address the specific issue raised by Justice Scalia's claim: whether proportionality is consistent with consequentialist goals of punishment, such as deterrence, incapacitation, and rehabilitation.

I also consider the considerable efforts of philosophers such as Jeremy Bentham and John Rawls to *derive* a strict requirement of proportionality from utilitarian principles and conclude that these efforts are ultimately unsuccessful: a strict requirement that punishment be proportional to the crime cannot be generated from concern for utility alone. While the arguments of Bentham and Rawls ultimately fail, a close analysis of these arguments is valuable for two reasons. First, the effort expended by both Rawls and Bentham in attempting to demonstrate that utility entails proportionality demonstrates the strength of their commitment to proportionality as essential to just punishment (a theme to which I shall return in Part IV below). Second, Rawls's approach to deriving proportionality via a rule-utilitarian model of punishment, while not ultimately persuasive, nonetheless contains insights that, in the hands of other theorists such as H.L.A. Hart, lead to the development of mixed or hybrid theories of punishment. These theories not only reconcile consequentialist aims with the principle of proportionality, but also represent the most convincing justifications of the institution of punishment.

I conclude, therefore, that neither the role of proportionality in retributive theory nor the inability to derive proportionality from utilitarianism justifies the claim that proportionality is *unintelligible* once credence is given to consequentialist justifications of punishment. That proportionality *does* remain an intelligible requirement of punishment, even when consequentialist goals are given significant weight, is demonstrated by the emergence of hybrid theories of punishment as the most compelling model for justified punishment.

A. *Proportionality and Retributivism*

The principle of proportionality is the proposition that punishment ought to fit the crime. The strictest version of "fit" is the *lex talionis* of the Old Testament—"an eye for an eye, and a tooth for a tooth."⁸⁴ The mod-

84. See *id.* at 989. Justice Scalia states that "perfect proportionality is the talionic law." *Id.* For an illuminating discussion of the connection between *lex ta-*

ern notion of proportionality does not demand that the punishment be *identical* to the crime. Rather, the punishment ought to reflect the degree of moral culpability associated with the offense for which it is imposed. Trivial offenses should attract only minor punishment and the most despicable offenses should be punished severely, with punishment appropriately graduated for offenses that fall between these extremes.

It is easy to see the appeal of the principle of proportionality: to require that people who do worse things be punished more severely than people who commit lesser offenses captures an important aspect of our intuitive notion of justice. Nor is it difficult to understand Justice Scalia's assertion that "[p]roportionality is inherently a retributive concept."⁸⁵ According to retributive theories, punishment is justified because wrongdoers *deserve* the suffering that punishment entails.⁸⁶ But desert is not a binary concept whereby you simply either deserve suffering or you do not. We think of desert as admitting of degrees, so that those who have committed a greater wrong deserve greater suffering and hence more severe punishment. The degree of wrongfulness is described variously as the "moral culpability," "gravity," or "depravity" associated with the offense.⁸⁷

lionis and the modern conception of proportionality, see MORRIS J. FISH, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57, 57 (2008) (arguing that "the *lex talionis* of the Old Testament marked a turning point in the evolution of lawful punishment" as it "introduced a policy of restraint and it sanctified proportionality as a moral principle of punishment").

85. *Harmelin*, 501 U.S. at 989 (plurality opinion).

86. See, e.g., H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 9 (1968) (defining retribution "simply as the application of the pains of punishment to an offender who is morally guilty"); Richard Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193, 195 (1982) (retributivism is "the idea that the offender, in committing an offense, deserves to be punished"); David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 541-42 (1991) (describing "a retributivist as a person who explains either the rational justification of punishment, or its moral justification, or both, by appealing to the notion that criminals deserve punishment rather than to the consequentialist claim that punishing offenders yields better results than not punishing them").

87. See, e.g., JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 101, 116 (1974); Burgh, *supra* note 86, at 197; Michael Moore, *The Moral Worth of Retributivism*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179, 180 (Ferdinand Schoeman ed., 1987); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4-5 (1955). This notion of the gravity of the offense is sometimes treated as a "fundamental moral factor," akin to "the natural rights invoked by some political theorists" and therefore requiring no further rationale. See JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 164-65 (1990). Other theorists flesh out the gravity (or depravity, or culpability) associated with the offense by some combination of the harm caused by the offense, and the mental state of the offender. See J. ANGELO CORLETT, *RESPONSIBILITY AND PUNISHMENT* 61 (2001) (stating that punishment is based on offender's "degree of responsibility and in proportion to the harm caused by her wrongful act, omission or attempt"); FEINBERG, *supra*, at 116-18 (stating that culpability reflects both harm caused by offense and offender's degree of "subjective wickedness" or "motive"); HART, *supra* note 86, at 14-15 (stating that severity of punishment is determined in part by offender's mental state, such

Justice, therefore, requires a principle of proportionality in addition to (or as part of) the basic retributive principle of desert. As Richard Burgh puts it:

[I]n order to render punishment compatible with justice, it is not enough that we restrict punishment to the deserving, but we must, in addition, restrict the degree of punishment to the degree that is deserved. The idea is that, in committing an offense, we do not think of the offender as deserving unlimited punishment; rather we think of him as deserving a degree of punishment that is proportional to the gravity of the offense he committed. . . . Justice, in other words, not only requires a principle of desert, but also requires a principle of proportionality between the gravity of the offense and the punishment deserved.⁸⁸

The closeness of the connection between proportionality, desert, and retributivism (and the distinction between retributivism and utilitarianism) is amply demonstrated by the following passage from John Rawls's famous article, *Two Concepts of Rules*:

What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.⁸⁹

The principle of proportionality, then, is a retributivist concept in the following sense. It is treated by almost all retributive theorists as a necessary corollary of the principle of desert: moral wrongdoing determines *who* should be punished and the degree of wrongdoing determines the *amount* of that punishment.⁹⁰ As Burgh has put it, *any* retributivist theory “must

as whether “he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or weakened”); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363 (1981) (noting that degree of punishment deserved is proportional both to harm caused by wrong act and person's degree of responsibility for wrongful act).

88. Burgh, *supra* note 86, at 197-98.

89. Rawls, *supra* note 87, at 4-5; *see also* FEINBERG, *supra* note 87, at 116 (describing retributive theory as insisting that “the ultimate justifying purpose of punishment is to match off moral gravity and pain, to give to the offender exactly that amount of pain the evil of his offense calls for, on the alleged principle of justice that the wicked should suffer pain in exact proportion to their turpitude”).

90. *See* Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”*, 25 ISRAEL L. REV. 549, 549-51 (1991). On von Hirsch's account, the principle of desert explains *why* people should be punished, and the principle of proportionality determines *how much* people should be pun-

be evaluated in terms of whether it generates results consistent with the principle of proportionality.⁹¹ It is true that some retributivists have explained why offenders' wrongdoing provides the state with a good or sufficient reason for punishing them in a way that does not generate proportional punishment.⁹² But in such cases, the lack of such a requirement of proportionality is taken as a decisive objection to the theory: the theory is evaluated and found fatally flawed.

For example, in Jeffrie Murphy's version of retributivism, a wrongdoer *deserves* to be punished because, in committing an offense, the wrongdoer has gained a benefit not enjoyed by his or her law-abiding peers. Specifically, the wrongdoer gains more freedom by renouncing the burden of self-restraint that other members of society bear.⁹³ The law-abiding members of society may *want* to commit some offense or other, but restrain themselves from doing so. Such mutual self-restraint makes living in a community possible. By breaking free from the shackles of self-restraint and acting based on desires, the wrongdoer has more freedom and so gains a benefit that his or her law-following fellows do not share. This benefit is *unfair* because the wrongdoer continues to enjoy the benefits of other people's self-restraint while not shouldering his or her share of the burden. The wrongdoer has become a self-restraint free rider.

ished. *See id.* This explicit separation of "Why?" and "How much?" mirrors the points made by John Rawls and H.L.A. Hart regarding the different levels at which we can ask the question, "is punishment justified?" Each of the three, however, distinguishes the "levels" in different ways. For a discussion of the view of both Rawls and Hart, see *infra* notes 130-63 and accompanying text.

91. Burgh, *supra* note 86, at 198.

92. One of the challenges for retributivism is to bridge the gap between desert and the imposition of punishment. It is one thing to say that wrongdoers deserve to suffer for their wrongs. It is quite another to say that because wrongdoers deserve to suffer, the state is justified in meting out such suffering in the form of punishment. The state does not, as a general rule, give people what they deserve by rewarding the kind and thoughtful while censuring the rude and callous. *See, e.g.,* Dolinko, *supra* note 86, at 542. Much of retributivist theory is concerned with explaining why the state is justified in dishing out desert, in the form of punishment, to the particular case of offenses against the criminal law. For a discussion of the various forms of retributivism, see John Cottingham, *Varieties of Retribution*, 29 *PHIL. Q.* 238, 238-46 (1979). For influential versions of retributivism, see G.W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* 70-71 (F. M. Knox trans., Oxford Univ. Press 1942) (1820); IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 101-07 (John Ladd trans., MacMillan 1965) (1797); GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* (Cambridge Univ. Press 1962) (1903). Immanuel Kant is "usually considered to be the philosopher whose view on punishment most exemplifies retributivism." CORLETT, *supra* note 87, at 32. But there is some disagreement among theorists as to whether Kant's theory of punishment is "purely retributive," or a hybrid of retributivist and utilitarian concerns. *See id.* at 30-48.

93. *See generally* JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW* (Keith Lehrer & Wilfried Sellars eds., 1979). John Finnis put forward a similar view when he described the unfair advantage obtained by the criminal as "permitting himself an excessive freedom in choosing" rather than acting in self-restraint. John Finnis, *The Restoration of Retribution*, 32 *ANALYSIS* 131, 132 (1972).

To maintain justice, the law must prevent the wrongdoer from retaining the benefit of his or her wrongdoing. Punishing the wrongdoer restores the appropriate balance among society's members by removing the unfair benefit the wrongdoer has gained, namely freedom from the burden of self-restraint.⁹⁴ To achieve this, the punishment must be of a quantity that cancels out the wrongdoer's unfair benefit. That benefit is freedom from a burden of self-restraint, so the *extent* of the benefit is measured by the *weight* of the burden shirked. Freedom from a heavy burden is a greater benefit than freedom from a light burden. Moreover, the weight of the burden of self-restraint depends on the strength of the inclination to commit the offense: "[t]he stronger the inclination, the greater the burden one undertakes in obeying the law."⁹⁵ The stronger the inclination, the greater the advantage gained by violating the law.

On Murphy's account, then, punishment will be graduated according to the offense, with offenses involving the *strongest inclinations* being punished most severely. As Burgh points out, however, this would often "require a degree of punishment incompatible with that required by the principle of proportionality."⁹⁶ This is because the proportionality principle requires offenses to be punished according to their *moral* gravity rather than the strength of the inclination to commit each offense.

Suppose, quite plausibly, that most of us do not have an inclination to murder anyone; we have "internalized the prohibition" against killing.⁹⁷ The burden placed upon us by the law to refrain from murdering is not particularly onerous; there is no strong temptation we have to resist. If the benefit gained by the offender is measured in terms of the freedom from restraint, a person who commits murder has gained only a small advantage over us. But compare murder to tax evasion. As Burgh suggests, it is surely plausible that most people have a stronger inclination to cheat on their income taxes than to commit murder.⁹⁸ On Murphy's account, a greater burden is renounced by the tax cheat than the murderer. Murphy's theory would therefore require the tax evader to be punished more severely than the murderer.

In general, a person who renounces self-restraint when the inclination to commit the offense is strong gains a greater advantage than a person who renounces self-restraint when the inclination is weak. According to Murphy's theory, the former wrongdoer therefore deserves greater punishment than the latter. But the offenses people are most strongly inclined to commit will not always be those involving the greatest degree of moral wrongdoing; indeed, there will often be an inverse correlation between the two because we are more likely to have internalized prohibitions

94. See MURPHY, *supra* note 93, at 77.

95. *Id.*

96. Burgh, *supra* note 86, at 209.

97. *Id.*

98. See *id.*

on the morally grave offenses. Murphy's theory would often require that more severe punishment be imposed on wrongdoers who commit tempting, less morally grave offenses (such as tax evasion) than less tempting crimes of greater moral turpitude (such as murder). This result is inconsistent with the requirement that the severity of punishment should be proportional to the *moral gravity* of the offense, and Burgh concludes we should consequently reject the theory:

It thus appears that, if desert is analyzed in terms of reciprocity, we must give up the rather central intuition that punishment must be proportional to the gravity of the crime. In fact, if this analysis yields the result that the tax evader deserves a greater punishment than the murderer, then I think most would be inclined to reject the analysis.⁹⁹

Murphy's theory, then, is retributive in the sense that it incorporates the principle of desert: punishment is justified because wrongdoers *deserve* to be punished. Moreover, the conception of desert that Murphy employs generates punishment that is graduated according to the offence. We may be tempted to say that the punishment generated is *proportional* to the degree of self-restraint associated with each particular crime. But Murphy's theory is nonetheless implausible from a retributivist perspective. This demonstrates two important points. First, the principle of proportionality (and not just the principle of desert) is a necessary component of a retributive theory of punishment. The lack of a requirement that punishment be proportional to the moral gravity of the crime committed is treated as a fatal flaw in Murphy's theory, as well as in other similar theories.¹⁰⁰ Second, the proportionality principle means something quite specific to retributivists—punishment must be proportional to not just any feature of an offense, but rather must be proportional to the *moral gravity* of the offense committed.¹⁰¹ In summary, then, the principle of proportionality—understood specifically as the rule that the amount of punishment be proportional to the *moral gravity* of the crime committed—is a necessary element of any plausible retributive theory of punishment.

99. *Id.* at 210. The same point is made by David Dolinko, critiquing not only Murphy's theory but also the similar retributivist theories of Herbert Morris and George Sher, which also explain a wrongdoer's desert by reference to the resulting unfair distribution of benefits and burdens among members of society. See Dolinko, *supra* note 86, at 544-46. After arguing that Morris's theory seems to produce a ranking of crimes in which murder is more serious than speeding or tax evasion, Dolinko declares, "[t]his, of course, is a most unwelcome result, which must be avoided if Morris's approach is to be tenable." *Id.* at 546.

100. *See id.*

101. I would further suggest that our *intuitive* understanding of just punishment accords with the principle of proportionality understood in this way. That is, our felt sense of justice is that punishment should be proportional to the moral culpability of the offense and not some other feature or measure of the seriousness of the offense. I shall return to this point below when addressing utilitarian conceptions of proportionality.

B. *Proportionality and Utilitarianism*

So far, we have seen that the proportionality principle is entirely consistent with, and indeed required by, retributivist theories of punishment. Justice Scalia's claim, however, is not merely that the proportionality principle is a necessary element of retributivism, but also that the principle's retributivist connection renders it *incompatible* with the consequentialist goals of deterrence, incapacitation, and rehabilitation. For Justice Scalia, "inherently retributivist" means "inherently inconsistent with consequentialism."

Retributivism and utilitarianism are often cast as diametrically opposed alternatives to justifying punishment. Consequently, there is some initial plausibility to the suggestion that because proportionality is an element of retributivist theories, then proportionality is unintelligible within utilitarian theories. Even so, we cannot, of course, simply assume that proportionality is alien to the latter theories because it is a necessary element of the former. A principle may be necessary under one theory, and still be *consistent* with—indeed, even *necessary* under—a different theory. For example, the principle of desert—that we restrict punishment to those who have committed a wrong—is also inherently retributivist. No theory of punishment lacking the principle of desert could be described as retributivist. But it would be absurd to claim that we therefore cannot intelligibly speak of a prohibition on punishing the innocent once we accept the utilitarian goals of punishment.

There are several possible ways in which a requirement of proportionality between crime and punishment may be intelligible within a justifying framework that gives significant weight to deterrence, incapacitation, and rehabilitation. One might argue that a requirement of proportionality can be inferred from classic utilitarian principles, or from more recent variants of this approach, such as rule-utilitarianism. Or, even if not generated from utilitarian principles, proportionality might be regarded as a necessary side-constraint imposed on achieving the goals of deterrence, incapacitation, and rehabilitation. As the following discussion demonstrates, the latter is the more compelling model for justifying punishment.

1. *The Utility of Proportionality*

As a general theory of morality, utilitarianism may be defined as the position that one ought to act in such a way that, on balance, maximizes the balance of beneficial over detrimental consequences. Utilitarians therefore claim that punishment is justified if and only if such punishment secures benefits for society that outweigh the harm imposed on the wrongdoer via the imposition of punishment. The primary benefit to which utilitarians commonly refer is the reduction in crime, and therefore the protection of citizens, by: (a) deterring people in general—and wrongdoers specifically—from committing future crimes (general and specific deterrence); (b) physically preventing wrongdoers from offending again

(incapacitation); and (c) rehabilitating offenders, so that they internalize the prohibition against wrongdoing.

When the utilitarian justification of punishment is stated in this way, we can see immediately that the goals of deterrence, incapacitation, and rehabilitation are not a license to impose unlimited punishment. Punishment is justified only to the extent that the positive consequences outweigh the negative. Punishment inherently involves some form of harsh treatment and the state is only justified in imposing such pain or deprivation if it can thereby secure *greater* benefits for society as a whole.¹⁰² Some limitation on the degree of punishment that can be imposed is, in this way, inherent in utilitarianism. In general, determining the appropriate punishment for crimes will, for the utilitarian, involve weighing the harm imposed upon the wrongdoer against the benefits secured for society. The appropriate punishment for any crime will therefore depend upon the benefit secured: the greater the benefit, the more severe the punishment that can be imposed. As greater benefits will usually flow from punishing—and therefore deterring—more harmful crimes, utility demands that more harmful crimes be punished more severely. It is natural to think of this as a *utilitarian principle of proportionality*, whereby the punishment must fit the crime in a utilitarian sense.

In other words, retributive proportionality requires that punishment fit the seriousness of the offense (as measured by *moral gravity*). Similarly, the seriousness of a particular offense (as measured by the *harm caused*) will be among the factors relevant to determining severity of punishment within a utilitarian framework.¹⁰³ The greater the harm involved in a crime, the greater the benefit to society when potential offenders are deterred from committing that crime—and therefore the greater the punishment that may justifiably be inflicted to create that deterrence. To borrow Justice Powell's example, punishing overtime parking with life imprisonment would certainly have an impressive deterrent effect, but the societal benefit gained from fewer overtime parking violations may not outweigh the harm imposed (life prison terms) on individual offenders.¹⁰⁴ In contrast, deterring potential murderers saves the lives of would-be victims, presumably a much greater benefit to society than proper use of parking spaces. Long prison terms for murder may therefore be justified from the

102. For influential definitions of punishment (including the requirement that punishment necessarily involves some form of deprivation or harsh treatment), see HART, *supra* note 86, at 114; Stanley I. Benn, *Punishment*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29 (Paul Edwards ed., MacMillan Company & The Free Press 1967); Antony G.N. Flew, *The Justification of Punishment*, 29 PHILOSOPHY 291, 293-95 (1954).

103. The harm caused by the offense will not be the only factor relevant to determining the punishment imposed. For a more detailed discussion of this point, see *infra* notes 112-20 and accompanying text.

104. See *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting) ("A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.").

utilitarian perspective even if a relatively small number of potential offenders are deterred.

This claim that utilitarian goals generate a requirement of proportionality between crime and punishment is by no means new. Indeed, the founding father of modern utilitarianism, Jeremy Bentham, included a grand total of thirteen specific canons of proportionality between punishments and offenses in his seminal work, *An Introduction to the Principles of Morals and Legislation*, published in 1789.¹⁰⁵ According to Bentham, these canons of proportionality are “subservient” to the utilitarian purpose of preventing “mischief.”¹⁰⁶ Bentham’s canons include both an upper limit¹⁰⁷ and a lower limit¹⁰⁸ on the punishment to be inflicted for each offense. The canons also include the requirement that “the greater the mischief of the offense,” the more severely the offender should be punished, and that similar offenders should be given punishment involving a similar quantity pain.¹⁰⁹ John Rawls summarized Bentham’s proportionality argument:

[I]f utilitarian considerations are followed penalties will be proportional to offenses in this sense: the order of offenses according to seriousness can be paired off with the order of penalties according to severity. Also the absolute level of penalties will be as low as possible. This follows from the assumption that people are rational (i.e. that they are able to take into account the “prices” the state puts on actions), the utilitarian rule that a penal system should provide a motive for preferring the less serious offense, and the principle that punishment as such is an evil. All this was carefully worked out by Bentham¹¹⁰

105. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165-86 (J.H. Burns & H.L.A. Hart eds., Univ. of London, Althone Press 1970) (1823). An incomplete earlier version of this work was printed in 1780; the editors’ introduction provides a detailed description of the history of the work. See *id.* at xxvii-xxxix.

106. See *id.* at 165.

107. See *id.* at 166. Bentham’s first rule states that “punishment must not be less in any case than what is sufficient to outweigh the profit of the offence.” *Id.* at 166.

108. See *id.* at 169. Bentham’s fifth rule requires that “punishment ought in no case to be more than what is necessary” to achieve its objects. *Id.* at 169.

109. *Id.* at 168-69 (describing second rule of proportionality). Bentham gives the following example: “if it can ever be worth while to be at the expence of so horrible a punishment as that of burning alive, it will be more so in the view of preventing a crime such as that of murder or incendiariism, than in the view of preventing the uttering of a piece of bad money.” *Id.* at 168 n.i.

110. Rawls, *supra* note 87, at 12-13 & n.14. H.L.A. Hart has made similar claims about the utility of proportionality:

A utilitarian will for example exclude in principle punishments the infliction of which is held to cause more suffering than the offense unchecked, and will hold that if one kind of crime causes greater suffering than another, then a greater penalty may be used, if necessary, to repress it. He will also exclude degrees of severity which are useless in the sense that

As J. Angelo Corlett notes, at least some of Bentham's proportionality rules seem acceptable—even essential—in order to determine “proper proportional punishment” in the retributivist sense described above.¹¹¹ It should be noted, however, that the utilitarian conception of proportionality is not identical to the retributive conception of proportionality. The seriousness of the offense will be measured differently in each case. Retributive proportionality demands that the punishment fit the *moral gravity* of the *offense committed*, whereas utilitarian proportionality demands that the punishment fit the *beneficial consequences* that flow from *punishing the offense*.

Justice Scalia therefore has two avenues of response available to the argument that proportionality between crime and punishment achieves the goals of deterrence, rehabilitation, and incapacitation. First, he may argue that the claim is simply wrong, or at least overstated: that in at least some cases, utilitarianism would allow or even require disproportionate punishment. Second, Justice Scalia could respond that the conception of proportionality relevant to the Court's Eighth Amendment jurisprudence is *retributive proportionality* (with punishment proportional to moral gravity), and the existence of a utilitarian principle carrying the same moniker in no way undermines his claim that proper, *retributive* proportionality is unintelligible once utilitarian goals are given weight. I shall consider these potential responses in reverse order.

a. Two Concepts of Proportionality

We should not assume the utilitarian and retributive conceptions of proportionality will produce equivalent results. The retributive and utilitarian barometers of “seriousness” may produce different orderings of offenses, from “least serious” to “most serious.” The application of the principle of proportionality, in the utilitarian sense, may allow or require punishments to be imposed on crimes in a manner inconsistent with retributivist proportionality.

As mentioned above, utilitarians require that punishment be proportional to the offense for which it is imposed, in the sense that the beneficial consequences of imposing the punishment must outweigh the harm involved in punishing the offender. The most commonly cited benefit is a reduction in future instances of the offense punished, via the mechanisms of deterrence, incapacitation, and rehabilitation. There will be several factors relevant to the value of these consequences (and therefore the severity of punishment that can be imposed). The most obvious is the degree of harm caused by the offense in question. The more harmful the offense committed, the greater the benefit garnered by reducing future like of-

they do no more to secure or maintain a higher level of law-observance or any other valued result than less severe penalties.

HART, *supra* note 86, at 14-15.

111. See CORLETT, *supra* note 87, at 55.

fenses. Presumably, punishing rapists is meant to deter potential rapists, not potential thieves. Likewise, keeping a rapist incapacitated (behind prison bars) is valuable because of our worry that the offender would otherwise commit another rape, not because we fear he may steal. Even though utilitarianism is forward-looking, then, the gravity of the original offense (in terms of the harm caused) is reflected in the benefit gained. To this extent, utilitarian proportionality mirrors retributive proportionality: the degree of harm caused by the offense committed is also (not surprisingly) an important factor for many retributivists in determining the moral gravity of an offense.¹¹² The same applies to our moral intuitions, our moral common sense: the amount of harm done is an important component of the moral gravity of an offense (and hence the degree of punishment deserved).

The harmfulness of the offense, however, is not the only factor relevant to the benefit gained by deterrence, incapacitation, and rehabilitation. Other factors may influence the extent to which punishment is effective in achieving these goals. Different types of offenses and offenders may be more or less easily deterred, and may be more or less obdurate to rehabilitation. These factors will sometimes have divergent implications for utilitarian and retributive proportionality. Justice Scalia himself makes essentially the same point in *Harmelin*:

Moreover, even if “similarly grave” crimes could be identified, the penalties for them would not necessarily be comparable, since there are many other justifications for a difference. For example, since the deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties. Grave crimes of the sort that will not be deterred by penalty may warrant substantially lower penalties, as may grave crimes of the sort that are normally committed once in a lifetime by otherwise law-abiding citizens who will not profit from rehabilitation.¹¹³

The expectation that punishment deters, and that more severe punishment has a greater deterrent effect than less severe punishment, is premised on the notion that potential offenders are rational decision-makers. On this view, people tempted to commit crimes engage in a cost-benefit analysis—weighing up (among other things) the potential benefit to be gained by committing the offense, the chances of getting caught and con-

112. *See id.*

113. *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (plurality opinion). Economic analyses of punishment address these myriad factors that contribute to the rate of deterrence in great detail. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 14 (Gary S. Becker & William M. Landes eds., 1974), available at <http://www.nber.org/chapters/c3625.pdf>.

victed, and the punishment likely to be inflicted. But of course, not all potential offenders fit this model. For instance, some people have less control over their actions than others—some even to the extent of acting “involuntarily”—whether due to mental illness, provocation, coercion, some other impairment, or weakening of the ability to control their actions.¹¹⁴

A retributivist would say that impairment of the offender’s ability to control his or her actions decreases the responsibility or culpability of the offender and therefore reduces (either wholly or partly) the punishment deserved.¹¹⁵ Utilitarians have toiled to create detailed arguments to show that utilitarian principles *also* require punishment to be restricted to those who have voluntarily committed offenses.¹¹⁶ Chief among these arguments is Bentham’s position. He argues that no benefit can come from punishing crimes committed involuntarily because only voluntary actors are susceptible to deterrence.¹¹⁷ Punishing persons who had no control over their actions will not deter others similarly situated, as such people do not have the capacity to alter their behavior in light of the threat of punishment. The harm imposed therefore profits nothing, and so offends the principle of utility.

Bentham is incorrect, however, to conclude that punishing offenders who lack control over their actions will produce *no* benefit. His argument merely demonstrates that punishing such people will produce no benefit on *other like individuals*, other persons who similarly suffer from a lack of control. But punishing such people will have a benefit. If the law admits of excusing conditions, some “normal persons” will believe they can, by dissembling, convince a court that they satisfy one of the excusing conditions and so escape punishment.¹¹⁸ Similarly, in the case of voluntary intoxication, punishing those who lack capacity at the time the offense is committed can deter people from engaging in activities that lead to temporary impairment in the first place. If the law does not admit of such excusing conditions, but instead punishes offenders who suffer a defect of control, this response will deter those otherwise emboldened to commit offenses in hope of relying on the relevant excusing condition. It is surely plausible that the benefit gained will outweigh the harm of punishing individuals who suffer from a defect of control over their actions. A similar response can be made to the argument that utility requires that the degree

114. See HART, *supra* note 86, at 15.

115. For a discussion of varying degrees of culpability, see *supra* notes 106-09 and accompanying text.

116. See HART, *supra* note 86, at 18.

117. See BENTHAM, *supra* note 105, at 160-62. Bentham’s list of situations in which punishment will be “inefficacious” includes extreme infancy, insanity, intoxication, unintentional and unconscious actions, mistake, threatened mischief, involuntary physical movement, and physical restraint. See *id.*

118. See HART, *supra* note 86, at 19.

of punishment be mitigated (rather than wholly excused) when control over one's actions is partially impaired.¹¹⁹

Many people will be uncomfortable with this conclusion. It is tempting to respond that the benefit of deterrence does *not* justify the harm imposed on persons who did not voluntarily commit an offense—because these persons do not *deserve* to be punished. But this response is not open to utilitarians *qua* utilitarians; to respond in this way is to allow retributivist factors to trump utility. To utilitarians, pain is pain and is given the same weight in calculating utility whether deserved or not. The application of utilitarian principles, then, will produce results inconsistent with the *retributive* principle of proportionality, such as punishing mentally ill persons or not taking sufficient account of some mitigating factors in determining the severity of punishment.

Whether this difference in outcome is so great as to justify dismissing proportionality as unintelligible in the context of utilitarianism is dubious. Even so, it may be a sufficient basis for the claim that there are two different principles at play, each bearing the name “proportionality.”¹²⁰

b. Utilitarianism, Disproportionality, and Innocence

The above discussion includes examples of situations in which the utilitarian and retributivist conceptions of proportionality will produce disparate results, as the gravity of crimes are calculated differently under each conception. To the extent that our intuitive sense of justice accords with the retributive conception of proportionality, we will consequently hesitate to endorse utilitarian proportionality. But the critique of utilitarianism extends beyond the suggestion that there are two slightly different versions of proportionality. Critics have argued that utilitarianism would sometimes allow, even demand, punishment that must be described as disproportionate on *any* plausible understanding of that term. Such critics

119. *See id.* at 15-16.

120. The suspicion that different groups of scholars use “proportionality” to refer to markedly different concepts is confirmed by the literature applying economic analysis to punishment. Economists accept the principle that punishment must be proportional to crime. *See, e.g.,* Jean Ginter, *Principle of Proportionality in Sentencing and Economic Approach in Criminology*, 4 *JURIDICA INT'L* 142, 142 (1999), available at http://www.juridicainternational.eu/public/pdf/ji_1999_1_142.pdf (“There is totally unanimous support for the idea that there must be proportionality between the crime committed and the sentence to be served.”). The economic conception of proportionality, however, concerns proportionality between resources expended and benefits obtained, and so on. The economic approach to proportionality is often seen, at least by economists, as a more sophisticated version of Bentham's utilitarian approach. *See id.* Economists are under no illusions, however, that this notion of proportionality matches the retributive conception. In the classic article of this genre, Becker rejects the requirement that the punishment fit the (moral gravity of) the crime. He argues that we should go beyond “catchy phrases” and instead utilize a criterion that “gives due weight to the damages from offenses, the cost of apprehending and convicting offenders, and the social cost of punishments.” Becker, *supra* note 113, at 14.

claim that utility will be maximized, in some circumstances, by imposing serious penalties on individuals who have committed crimes that are trivial—and even on individuals who have committed no offense at all.

Let us reconsider Justice Powell and Justice Rehnquist's straightforward example of making overtime parking offenders subject to mandatory life imprisonment. I noted above that the benefit obtained—less "vehicular lawlessness"—would be unlikely to outweigh the detriment of imposing life prison terms on offenders.¹²¹ There is a counterargument to this assertion, however, that begins with the insight that it is the *plausible threat* of punishment that deters, not punishment itself.¹²² The *threat* that overtime parking will be punished with mandatory life imprisonment may deter so effectively that the offense of overtime parking is rarely, if ever, committed.¹²³ Suppose the threat of life in prison is so great that for many years, not a single offense is committed. The government maintains the plausibility of the threat by constantly restating their determination to impose the punishment should an offense occur and by sustaining a perfect record of always imposing the relevant punishment for all other offenses.

In this case, the benefit obtained would be universal compliance with parking regulations and the resultant efficient use of parking resources. The detriment associated with the overtime parking penalty would be the negative effect of threatening such a severe punishment. Parking would become extremely stressful: imagine being held up at an important faculty meeting knowing that your parking meter was about to expire. It is at least arguable, though, that the benefits to society could outweigh the emotional distress caused by the threat of punishment.¹²⁴ We might even be forced to concede that the sanction of life imprisonment produces net benefits, even if universal compliance cannot be achieved.¹²⁵ The cumulative parking-related benefits across a state could outweigh the detrimental consequences of imprisoning a small handful of violators over a large number of years. If so, a utilitarian would have to concede that the state was justified in making overtime parking punishable by life imprisonment—even though describing this as "proportionate" punishment would stretch the term beyond the breaking point.¹²⁶

121. See HART, *supra* note 86, at 15-16.

122. For a fascinating justification of punishment based on the idea that *threatening* punishment is justified, see Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 329 (1985).

123. See HART, *supra* note 86, at 25.

124. Even the most demanding of faculty members would surely understand a colleague's rushing out before the meeting concluded when a life sentence was at stake.

125. The deterrent effect is likely to ebb over time, however, if the punishment is not being imposed. See, e.g., Quinn, *supra* note 122, at 340.

126. A similar point is regularly made, albeit with more mathematical precision, in the literature on the economics of punishment. See *generally* Becker, *supra* note 113.

Other criticisms of utilitarianism have famously been directed at demonstrating that utility would in some circumstances allow, even require, purposefully punishing an innocent person. The most familiar scenario involves officials of the system fabricating evidence to frame an innocent person in order to avoid a social disaster, such as an imminent race riot or the lynching of many people.¹²⁷ Imprisoning one (innocent) person, even executing that person, would be justified if doing so averted many other deaths.¹²⁸ Another example involves the vicarious punishment of an offender's friends or family members. There would certainly be cases in which potential offenders would be deterred from committing serious crimes by the threat that their (innocent) family members would be punished—such that the value of that deterrent effect would outweigh the harm done to innocent persons.¹²⁹ Utilitarianism is agnostic as to who gets punished, provided the consequences are the same. If the anticipation of punishment being meted out to a wrongdoer's family member creates the same beneficial consequences (most notably a deterrent effect) as the anticipation that the wrongdoer himself will be punished, there is no reason sounding in utility to prefer the latter to the former. It can hardly be doubted that for a significant number of potential wrongdoers, the prospect of a parent, spouse, or child being punished would have *at least* as great a deterrent effect as the prospect of being punished themselves. In such cases, just as in averting a social catastrophe, a utilitarian would have to concede that punishing the innocent party is justified.

2. *Justifying Punishment at Different Levels*

Unless refuted, the criticism that utilitarianism allows punishing the innocent in some circumstances is devastating. Even so, utilitarians have, of course, gone to great lengths to show (or attempt to show) that utilitarianism does *not* condone punishing the innocent. The arguments marshaled on this front will also point the way towards reconciling utilitarianism with retributive-style proportionality.

One prominent response to both the challenges to utilitarianism relating to innocence—and those regarding proportionality—begins by pointing out that the question, “Is punishment justified?” can be asked at two different levels. First, we may ask whether a certain *instance* of punishment is justified by presenting questions of the form: “Are we justified in

127. See, e.g., E.F. CARRITT, *ETHICAL AND POLITICAL THINKING* 165 (1947); HART, *supra* note 86, at 12 (“We can of course imagine that a negro might be sent to prison or executed on a false charge of rape in order to avoid widespread lynching of many others.”); Rawls, *supra* note 87, at 10.

128. The usual response to this criticism, most notably by John Rawls, is that an institution that practiced systemic fraud of this kind would not, in the long-term, maximize utility. See Rawls, *supra* note 87, at 12-13. For a more detailed discussion of this argument, see *infra* notes 130-42 and accompanying text.

129. Note that, in a utility calculus, the pain of an innocent person is given the same weight as the pain of an offender—just as the pain of those who commit crimes voluntarily and involuntarily are given equal weight.

punishing Fred for stealing from Ginger?” Second, we may ask whether the *practice* or *institution* of punishment is justified, and if so, how it is justified. John Rawls describes these different levels as the “distinction between justifying a practice and justifying a particular action falling under it.”¹³⁰ The logical basis of this distinction, and its importance in justifying institutional practices, are the motivating conceits of Rawls’s *Two Concepts of Rules*.¹³¹

According to Rawls, the distinction between justifying a practice and justifying a particular application of that practice is important because the two may be justified in quite different ways. With respect to punishment, Rawls argues that the *institution* is justified by *utilitarian* arguments, while individual *application* of the rules of punishment is justified by *retributive* arguments. After describing the retributive and utilitarian approaches to punishment, Rawls points out that “one feels the force of *both* arguments and one wonders how they can be reconciled.”¹³² The key to such a resolution lies in distinguishing the different levels of justification: “*utilitarian* arguments are appropriate with regard to questions about practices, while *retributive* arguments fit the application of particular rules to particular cases.”¹³³

Rawls invokes this distinction to refute the challenge from retributivists that utilitarians would condone punishing an innocent person when doing so would create an overall benefit for society: “[t]heir fundamental criticism of the utilitarian account is that, as they interpret it, it sanctions an innocent person’s being punished (if one may call it that) for the benefit of society.”¹³⁴ Specifically, Rawls responds to the following example: “if some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty.”¹³⁵ Much of the force of an example such as this one, Rawls argues, derives from ambiguity as to which level of justification the challenge is aimed, and at which level it ought to be aimed. When we consider the example as a one-off occurrence related to an *instance* of punishment, it seems quite plausible that the benefit of averting social disaster could outweigh the sacrifice of a single life. But as a criticism of utilitarian justifications of punishment, this misses the mark—*application* of the particular rules of punishment is justified *retributively*. Utilitarianism is only relevant to justifying the institution as a whole. If we consider the question of utilitarian justification at the institutional level,

130. Rawls, *supra* note 87, at 3 (internal citation omitted).

131. *See id.* Rawls discusses the implications of this distinction for two institutions: the institution of punishment, and the social institution of creating obligations by making promises.

132. *Id.* at 5 (emphasis added).

133. *Id.* (emphasis added).

134. *Id.* at 7.

135. *Id.* at 10 (quoting CARRITT, *supra* note 127, at 65).

says Rawls, the force of the challenge presented by the averting social disaster hypothesis is substantially diminished.

Rawls asks us to imagine an institution that as a matter of course provides for framing and punishing innocent persons whenever the relevant officials consider that such action would advance the best interests of society. Such an institution would have many problems.¹³⁶ For instance, it would be difficult to prevent officials from abusing their power. Knowledge of the (fraudulent) practice would inevitably leak out, creating fear and uncertainty among law-abiding citizens who might be subjected to punishment at any time.¹³⁷ We would no longer feel confident that criminals were guilty of the crimes for which they were convicted and respect for the legal system would diminish. Any short-term benefits gained by an individual act of punishing an innocent person would be outweighed in the long-term by the institution's detrimental consequences. "If one pictures how such an institution would work, and the enormous risks involved in it," says Rawls, "it seems clear that it would serve no useful purpose. A utilitarian justification of this institution is most unlikely."¹³⁸

Rawls's defense of the utilitarian justification of punishment at the *institutional* level has substantial persuasive force, but is limited in four ways. First, Rawls only defends utilitarian justifications of punishment against the *one* set of arguments that utilitarianism allows punishing innocent persons—namely, those of the averting social disaster variety. He offers no defense against the claim that utilitarianism allows vicarious punishment of a wrongdoer's innocent family members. Unlike an institutionalized practice of framing innocent people when expedient, a system whereby innocent family members are punished in certain circumstances *could* be sustainable in the long-term. While not a system that the governed would be favorably disposed towards, it would not be self-defeating in the manner of an institution that routinely *frames* innocent people.¹³⁹

Second, Rawls responds only to the criticism that utilitarianism allows punishment of innocent people. He does not address the claim that it also allows wrongdoers to be punished disproportionately to the moral

136. *See id.* at 11.

137. *See* HART, *supra* note 86, at 12.

138. Rawls, *supra* note 87, at 12.

139. The vicarious-punishment system would not create the same degree of uncertainty and sense of powerlessness as the frame-innocents-when-expedient system. Under the latter system, anyone could be framed at any time, and individuals could do nothing to avoid that possibility. How would you plan your life so as to avoid situations in which being framed would be an overall benefit to society? You would have at least some ability to avoid being punished under the vicarious-punishment system—such as by taking measures to prevent your family members from committing offenses. Indeed, this additional enforcement of the law by one's family members would be *another* benefit of the vicarious-punishment system (in addition to being at least as effective a deterrent as normal punishment), hence strengthening the claim that such a penal system would satisfy the requirements of utilitarianism.

gravity of their offense. Nor would his appeal to the nature of rules aid him in defending utilitarianism against this claim. While the fact that the institution of punishment consists of a system of rules may go some way towards requiring the principle of desert—that only those guilty of an offense should be punished—it cannot generate a requirement of proportionality. Nothing about following rules precludes a person convicted of overtime parking from being punished by life imprisonment. Quite the opposite is true when the penalty is declared in advance.

Third, Rawls argues that a system of punishment with *rules* allowing an innocent person to be punished when such punishment would prevent greater harm, would not be in society's best interests. Even if Rawls is correct about the overall consequences of *formally* allowing an innocent person to be punished in these circumstances, his argument does not apply to a system in which no formal exception is provided, but under which officials occasionally violate the rules by punishing innocent individuals (when it benefits society) and are subsequently indemnified for the violation (if discovered).¹⁴⁰ As Hart points out, such an institutional arrangement "might save many lives and so be thought to yield a clear surplus of value."¹⁴¹ Nothing in Rawls's argument effectively refutes this.

Finally, even with respect to the institutionalized framing of innocent people, Rawls fails to capture our felt sense of *why* such a practice is wrong. Our sense of justice goes beyond mere inefficacy: we believe that punishing innocent people is wrong not because it does not reap sufficient rewards, but *regardless* of the rewards obtained. I strongly suspect that, for most of us, it would not matter how much persuasive evidence could be mustered to show that a practice of punishing innocent people creates more benefits than detriments over the long-term. We would still reject such a practice—just as we would reject an institution under which parking offenders were given life prison terms, *even* if the practice were conclusively shown to achieve, on balance, the best interests of society. Utilitarian concerns alone cannot capture our sense of the injustice of imposing punishment on the innocent or of imposing punishment that is disproportionate to the relevant offense. A prohibition on disproportionate punishment, like a prohibition on punishing the innocent, cannot be generated from utilitarian justifications alone, even once we are sensitive to the "distinction between justifying a practice and justifying a particular action falling under it."¹⁴²

C. *Hybrid Theories of Punishment*

While Rawls ultimately fails to defend utilitarianism from the charge that it allows punishment of innocent persons, the above distinction is nonetheless crucial to understanding the relationship between propor-

140. See HART, *supra* note 86, at 12.

141. *Id.*

142. Rawls, *supra* note 87, at 3.

tionality and utilitarianism. This distinction, as Rawls described and H.L.A. Hart employed, leads to two important realizations. The first is that inherently retributive requirements such as desert and proportionality *are* consistent with the utilitarian goals of deterrence, incapacitation, and rehabilitation. The second is that the most persuasive justifications of punishment are precisely those hybrid theories that combine limitations based on desert and proportionality with utilitarian goals.

1. *Utilitarian Goals and Proportionality Reconciled*

Rawls concedes that both utilitarian and retributivist justifications of punishment provide forceful arguments. He also acknowledges the appearance of conflict between the two: one approach looks forward to the anticipated benefits of punishment, the other looks back to the moral wrong of committing the offense, and so on. Ideally, then, we would like to reconcile the two approaches in such a way as to “account for what both sides have wanted to say.”¹⁴³ The resolution Rawls proposes is, of course, to claim that utilitarian arguments justify the practice of punishment, while retributive arguments justify application of particular rules of punishment to particular cases. As Rawls puts it, “[o]ne reconciles the two views by the time-honored device of making them apply to different situations.”¹⁴⁴

a. Rawls and the Nature of Rules

If the practice of punishment in general is justified by utilitarian concerns, then *why is it* that particular applications of this practice are justified retributively? Why do non-utilitarian concerns govern the application of an institution designed to achieve utilitarian goals? According to Rawls, the answer lies in the *form* of institution chosen to achieve these ends—specifically, in the nature of a system of *rules*. “It is part of the concept of the criminal law as a system of rules,” states Rawls, “that the application and enforcement of these rules in particular cases should be justifiable by arguments of a retributive character.”¹⁴⁵ The kind of justifications a judge gives, for instance, for imposing punishment on an individual wrongdoer reflects retributive sensibilities: “[t]hat a man is to be punished, and what his punishment is to be, is settled by its being shown that he broke the law and that the law assigns that penalty for the violation of it.”¹⁴⁶ While the institution of punishment is aimed at achieving social benefits, the fact that we have chosen a system of legal rules means that the institution will be applied in a manner best justified from a retributive perspective. As

143. *Id.* at 8.

144. *Id.* at 7.

145. *Id.* at 6-7.

146. *Id.* at 6.

Rawls puts it, “if one decides to have laws then one has decided on something whose workings in particular cases is retributive in form.”¹⁴⁷

Rawls’s reconciliation of utilitarian and retributive justifications of punishment directly refutes Justice Scalia’s claim that “the game is up” for proportionality once weight is given to deterrence, incapacitation, and rehabilitation. Rawls’s argument, however, is not without its flaws. To demonstrate these flaws, let us return to the scenario in which punishing an innocent person would avert a social disaster. Suppose the defendant waives his right to a jury and that the judge knows he is innocent. Suppose further that the judge realizes that finding the defendant guilty and executing him will save many lives. The judge could justify his application of punishment in this particular case by reasoning as follows: The morally right action to take is that which produces the best overall consequences. In this case, the best overall consequences require conviction of the innocent defendant, despite the fact that this will violate the legal rules. Maximizing utility is more important than following rules—especially when the rules are created to maximize utility. Following the rule in this particular case would defeat the purpose of the rule.

The judge’s justification is, at the very least, coherent. Further, it is difficult to see what reason a utilitarian could give for criticizing this justification.¹⁴⁸ If the purpose of the practice of punishment is to maximize the beneficial consequences, the mere fact that the practice consists of a system of rules is not a sufficient reason for not violating the rules when such a violation would better achieve the goals of the practice. Nor is it valid for a utilitarian to criticize the judge for violating the *rule of law* (in addition to violating the particular laws relating to the case). For a utilitarian, the rule of law is only worth adhering to if it achieves beneficial consequences; the rule of law and universal rule following have no inherent moral value. Rules are merely the handmaidens of utility.

b. Hart and Value Pluralism

If the practice of punishment is justified by reference to its utilitarian goals, the mere fact that the practice consists of a system of rules does not require that application of particular rules to particular cases be justified retributively. In some instances, punishing disproportionately or punishing *sans* desert can still be justified on utilitarian grounds. Strict adherence to the principles of desert and proportionality is only justified by reference to some moral principle other than utility.

This is the approach Hart takes to justifying punishment. Hart follows Rawls by distinguishing between justifying the practice of punishment and justifying its application in particular cases. He agrees with Rawls that

147. *Id.* at 7.

148. I shall put to one side the argument that punishing innocent people would not prove beneficial in the long-term, for the simple reason that it has already been addressed.

the institution of punishment is justified by utilitarianism and that the application of punishment in specific cases is justified retributively. He departs from Rawls, however, in his rationale for invoking retributivism at the level of application. While Rawls relies on the nature of a system of rules, Hart points to the fact that many (if not all) of our social institutions involve “a compromise between distinct and partly conflicting principles.”¹⁴⁹

Like Rawls, Hart notes that when confronted by a complex institution consisting of legal rules—such as criminal punishment, property, or contract—we must be careful to distinguish the question of whether the institution is worthwhile from questions about how the institution’s rules apply to particular cases. Hart refers to the former as the “General Justifying Aim” of the institution, and the latter as the question of “Distribution.” The question of Distribution is divided, in turn, into questions of “Title” (to whom?) and “Amount” (how much?).¹⁵⁰ For example, questions such as which individuals are entitled to property, how they become entitled to property, and how much property they are entitled to, should be distinguished from questions about “why and in what circumstance [property] is a *good* institution to maintain.”¹⁵¹ It is impossible, says Hart, to answer all these different questions by reference to a single notion—such as Locke’s labor-desert theory.¹⁵²

The same is true of contract. The General Justifying Aim of contract law is “the principle that the law enforces contracts in order to give effect to the joint wishes of the contracting parties.”¹⁵³ But this General Justifying Aim cannot explain all the myriad rules of contract law. Many of the rules of contract *restrict* the legal effect of the joint wishes of contracting parties. They form part of the institution of contract law because giving effect to the joint wishes of the contracting parties is not the *only* principle we care about. Contract law therefore consists of a compromise between the General Justifying Aim and other principles we deem worthy of respect. Consider, for example, rules preventing claims for breach of contract because a limitation period has expired, or because the contract is contrary to public policy or illegal. In each case, the rule limits the degree to which the law gives effect to the joint wishes of the contracting parties because of other important but conflicting considerations, such as finality in commercial dealings, the general public well-being, or that courts not

149. HART, *supra* note 86, at 1.

150. *Id.* at 4. With respect to punishment, the questions of Title and Amount correspond to the principles of desert (whom ought we punish?) and proportionality (how much ought they be punished?).

151. *Id.*

152. *See id.*

153. *Id.* at 10-11.

be instruments of illegality. These principles act as a side-constraint on achieving the General Justifying Aim of contract.¹⁵⁴

Hart frames his general point as follows:

The most general lesson to be learnt from this . . . is, that in relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value. Just because the pursuit of any single social aim always has its restrictive qualifier, our main social institutions always possess a plurality of features which can only be understood as a *compromise* between partly discrepant principles.¹⁵⁵

What is true of social institutions in general is true of punishment in particular. The primary aim of the criminal law, and of providing punishment for criminal offenses, is “to encourage certain types of conduct and discourage others.”¹⁵⁶ The reason why certain kinds of conduct are criminalized is to “announce to society that these actions are not to be done and to secure that fewer of them are done.”¹⁵⁷ In other words, the General Justifying Aim of the institution of criminal punishment is its beneficial consequences, namely, less of the undesirable conduct we designate as crime. This benefit is achieved via the familiar mechanisms of deterrence, incapacitation, and rehabilitation.¹⁵⁸

In addition to designating what conduct counts as crime, the rules of the system of crime and punishment address what Hart calls the two questions of “Distribution”: who may be punished and how much punishment may be imposed? The answers to these questions are, respectively: “only an offender for an offence” and “an amount proportional to the gravity of the offence.”¹⁵⁹ In other words, the principles of desert and proportional-

154. Hart uses the “principles of ‘estoppel’ or doctrines of ‘objective sense’” as his examples of rules that *prevent* and *qualify* the General Justifying Aim of contract because they reflect the competing aim of *fairness*. *Id.* I find these examples unhelpful. It is by no means clear to me that these rules conflict with the aim of giving effect to the joint wishes of the contracting parties. Rather, they can be understood as ensuring that the law will only give effect to the joint wishes of the contracting parties *as properly understood*.

155. *Id.* at 10 (emphasis added).

156. *Id.* at 6.

157. *Id.*

158. *See id.* Hart acknowledges that many people claim the purpose of criminal law—and hence punishment—is merely to enforce natural moral law. *See id.* at 8. Hart is willing to concede *arguendo* that retribution “may figure among the conceivable justifying aims of a system of punishment.” *Id.* at 9. He insists, nonetheless, that the beneficial consequences of punishment form at least part of the general aim. For if you believe that murder, for instance, is made a crime because it is contrary to the law of God or nature, “it would be paradoxical to look upon the law as designed not to discourage murder at all.” *Id.* at 8.

159. *Id.* at 11.

ity constrain the application of the rules of punishment. Hart refers to this as “Retribution in Distribution.”¹⁶⁰

As discussed above, in some circumstances the beneficial consequences of punishment will be maximized by punishing an innocent person or by punishing a wrongdoer disproportionately. Nor can these limiting principles be generated from the combination of a general utilitarian goal and the nature of rule following. Indeed, the criminal law includes many exceptions to the general rule that a person who violates a law is to be punished and punished to the extent stated by that law. A detailed analysis of the doctrines of justification, excuse, and mitigation demonstrates that the role of *moral culpability* in the application of criminal law can only be explained by framing the principles of desert and proportionality as *independent* moral values.¹⁶¹ We adhere to the principles of desert and proportionality not because they contribute to the beneficial consequences of punishment, but *despite* the fact that they can *interfere* with achieving these consequences. We nonetheless consider these principles as necessary “in any morally acceptable account of punishment” because we value them as “distinct principles of Justice which restrict the extent to which general social aims may be pursued at the cost of individuals.”¹⁶²

Many of the central disagreements relating to the justification of punishment evaporate in light of the realization that just punishment can be seen as a compromise between achieving the social benefits of deterrence, incapacitation, and rehabilitation, on the one hand, and the principles of desert and proportionality, on the other. As Hart puts it:

Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that *it is perfectly consistent* to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be *qualified* or *restricted* out of deference to principles of Distribution which require that punishment should be only of an offender for an offence.¹⁶³

In other words, proportionality and desert are side-constraints on fulfillment of the utilitarian goals of punishment. Punishment should *only* be imposed on wrongdoers—and *only* in proportion to their wrong—even if punishing otherwise would advance the general aims of the institution.

160. *Id.* at 9.

161. *See id.* at 13-21.

162. *Id.* at 3, 17. It is not only in the realm of punishment that we are restrained from pursuing social benefits at the cost of individuals. A well-known example of this principle is the surgeon who is prohibited from killing one person to harvest the organs and save the lives of five others.

163. *Id.* at 9 (emphasis added).

2. *Other Hybrid Theories*

Hart's mixed or hybrid theory of punishment, building as it does on the insights of Rawls, has in turn proved extremely influential. This model has spawned many similar approaches to justifying punishment, described variously as "negative retributivism," "side-constrained consequentialism," "retributivism as a side-constraint," and, most recently, Mitch Berman's "integrated dualism."¹⁶⁴ The dominance of mixed theories of punishment among contemporary theorists has led Doug Husak to conclude that almost all philosophers of punishment "appreciate the need to construct hybrid syntheses of retributive and consequentialist elements."¹⁶⁵ Indeed, the adherents to hybrid justifications of punishment may extend beyond the current philosophical cohort. J. Angelo Corlett further suggests that Plato, David Hume, and—perhaps most controversially—Kant may be best understood as advancing mixed theories of punishment.¹⁶⁶

IV. PROPORTIONALITY AND THE EIGHTH AMENDMENT REVISITED

A. *Hybrid Theories and Justice Scalia's Interpretation of "Cruel and Unusual"*

Recall from Part II.C that Justice Scalia employs an originalist interpretive methodology characterized by pragmatic faint-heartedness. Respect for *stare decisis* requires Justice Scalia—by his own methodological lights—to reject what he understands to be the original meaning of the Constitution when there is significant precedent to the contrary. As I demonstrated in Part II.A, there is indeed a long line of Supreme Court decisions, stretching back almost a century, that support the view that the Eighth Amendment contains a requirement of proportionality. Justice Scalia's sole justification for refusing to give precedence to these decisions in the context of proportionality and the Eighth Amendment is what I have referred to as his philosophical claim. As my discussion of the relevant philosophy in Part III shows, Justice Scalia's philosophical claim—that a requirement of proportionality is incoherent in the context of consequentialist goals of punishment—is false. The pre-eminence of hybrid theories of punishment in contemporary philosophy belies Justice Scalia's claim that it becomes difficult to even speak intelligently of proportionality once deterrence, rehabilitation, and incapacitation are given significant

164. See, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 11 (2001); Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 259 (2008); Lee, *supra* note 11, at 699; J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 3 (1982).

165. Douglas Husak, *Why Punish the Deserving?*, 26 NOÛS 447, 452 (1992).

166. See CORLETT, *supra* note 87, at 26 n.23, 31-32; see also Paul Russell, *Hume on Responsibility and Punishment*, 20 CAN. J. OF PHIL. 539, 539-64 (1990). For further versions of the hybrid model of punishment, Corlett points us toward W.D. Ross, *THE RIGHT AND THE GOOD* 56-64 (1965) and Michael Lessnoff, *Two Justifications of Punishment*, 21 PHIL. Q. 141, 141-8 (1971); see also Granucci, *supra* note 4, at 844 (suggesting that Aristotle expressed "concern for equality between the offense and the punishment of the offender").

weight. There is a consensus among philosophers that qualifying consequentialist goals with retributive restraints is not only intelligible, but is indeed the keystone of any convincing account of just punishment.

The falsity of Justice Scalia's philosophical claim is therefore fatal to his argument that the Cruel and Unusual Punishment Clause contains no requirement of proportionality. With the crucial theoretical claim rebutted, Justice Scalia's broader constitutional argument collapses.

B. *Proportionality as a Theoretically Independent Conviction*

In Part III, I argued that while the principle of proportionality is an essential feature of any effective retributive theory, it is nonetheless intelligible in light of consequentialist goals. In doing so, I considered the great efforts consequentialists have expended to argue that the principles of proportionality and desert can be *generated* from consequentialist principles. While concluding that these arguments are ultimately unsuccessful, I nonetheless concluded that the principles of desert and proportionality *are* intelligible as side-constraints on a system of punishment whose overall goals are consequentialist in character.

That proportionality can be intelligibly combined with consequentialist goals is sufficient to rebut Justice Scalia's philosophical claim. Yet the preceding philosophical analysis and, in particular, the tenacity of consequentialists in arguing that their theories incorporate proportionality, suggests an additional, more fundamental conclusion. Specifically, it suggests that the principle of proportionality should be thought of not as a *retributive* principle, not as a product of or generated by retributive theory, but instead as a theoretically universal commitment—a requirement of just punishment that theorists of all stripes strive to incorporate and account for. Thinking of the proportionality principle as retributivist is misleading, incorrectly suggesting that the principles only make sense in the context of retributive theory.¹⁶⁷

We have seen that retributive theorists consider proportionality (in the sense of proportionality between severity of punishment and the moral gravity of an offense) to be an essential requirement of just punishment and reject purportedly retributivist theories that do not include this principle. But the demand for proportionality is not merely—indeed, not primarily—retributive infighting. One of the primary criticisms retributivists level at utilitarians is that the latter's theories do not capture the essential requirement of proportionality.

The response to this challenge is illuminating. Defenders of utilitarianism *could* say, "Yes, you're right. Our theories do not require that punishment fit the moral gravity of the crime, but that is not an effective criticism of our theory. Punishment need not be proportional in order to be just, so long as it maximizes utility." Instead of biting the proportional-

167. Terms such as "retributivism as a side-constraint" used to refer to hybrid theories are likewise misnomers.

ity bullet, utilitarians have often gone to great lengths to argue that their justifications of punishment incorporate the principle of proportionality, whether by reference to the conditions required for *effective* deterrence, by correlating moral gravity with harm, or by recourse to rule-utilitarianism. When these mechanisms have proven unsatisfying, theorists have proposed hybrid theories of punishment. In fact, Rawls later acknowledged the strength of criticisms of his position and later disavowed the argument of *Two Concepts of Rules*.¹⁶⁸ This, too, is telling. When Rawls became convinced that his model of just punishment failed to generate a requirement of proportionality (and a requirement that only offenders may be punished), Rawls disavowed his model of punishment—not his insistence that just punishment must be proportional to the crime committed.

The reason for this response is, of course, that our intuitions of just punishment include the requirement that the punishment fit the crime. Whether we characterize it as an intuition about justice, as part of our “felt sense of justice,” as a considered conviction, or a common-sense notion of justice, it can hardly be doubted that the vast majority of people—including people who are attracted to utilitarian understandings of morality—are strongly committed to the belief that punishment ought to be proportional to the crime for which it is imposed.¹⁶⁹ That the requirement of

168. See JOHN RAWLS, A THEORY OF JUSTICE 211-12, 276-77 (1971).

169. See *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., concurring). It has often been suggested that, while there is a consensus that just punishment requires proportionality, individual beliefs vary greatly when it comes to *applying* the proportionality principle: people disagree about which crimes are most grave and what the appropriate punishment is for any particular crime. Disagreement about the proper application of the proportionality principle explains why democratically accountable legislatures authorize or require, and elected judges impose, sentences that others consider disproportionate. It is *not* the case, for instance, that the California legislature or Congress rejected the principle that punishment must be proportional to the crime committed. Rather, the California legislature considered a mandatory twenty-five-year prison term *proportionate* for a third felony conviction, and thus passed legislation to that effect. See *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring). Similarly, that Congress enacted 18 U.S.C. § 2241(c) indicates that it considers a mandatory thirty-year term *proportional* to certain sexual offenses against children. See 18 U.S.C. § 2241(c) (2006 & Supp. I 2007); see also *United States v. Farley*, No. 1:07-CR-196, 2008 U.S. Dist. LEXIS 104437 (N.D. Ga. Sept. 2, 2008).

Recent empirical studies suggest, moreover, that individual beliefs about what punishment is proportional for various crimes are more convergent than conventional wisdom would have us believe. According to these studies, individual views on culpability and punishment are surprising consistent—even when comparing individuals from different countries. See generally Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007). Robinson and Darley demonstrate that assessments converge dramatically when individuals are given specific examples of offenses and asked to describe the level of culpability and appropriate punishment. The more detailed the description of the offense, the greater the convergence of individual views. See *id.* Justice Rehnquist’s treatment of the overtime parking example may be an instance of this phenomenon at work: while rejecting the application of proportionality (as a constitutional restraint) to prison terms in general, Justice Rehnquist, when faced with a specific example of a life term for overtime parking, concedes

proportionality has been incorporated into such a wide range of punishment theories is testament to the depth of our commitment to the proportionality requirement.

The notion of proportionality, as a widely held belief about the requirements of justice, is an aspect of the phenomenon that a theoretical justification of punishment attempts to explain. We do not, however, reject or modify a theory every time it conflicts with a prior belief intuition: our extant considered convictions do not always trump theory. If they did, there would be little point to constructing theories. Just as theoretical considerations must often give way to our pre-existing beliefs, so too do we revise or reject many of our prior intuitions in light of the theories we develop.

Rawls famously refers to this process as the method of “reflective equilibrium.”¹⁷⁰ We start with our considered convictions as “provisional fixed points.”¹⁷¹ When we develop a set of principles—about what constitutes just punishment, for instance—we test whether the principles match our considered convictions of just punishment.¹⁷² In many cases, there will be discrepancies between our pre-theoretical judgments and the outcomes generated from the theoretical principles. “In that case,” says Rawls, “we have a choice. We can either modify our proposed principles, or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision.”¹⁷³ By going back and forth between our intuitions and principles, pruning and adjusting each in light of the other, we will eventually reach a state of affairs in which “our principles and judgments coincide.”¹⁷⁴

The extent to which we are willing to modify or reject our considered judgments in light of our principles, and vice versa, depends of course on the strength of our commitment to each. What is striking about the response of so many proponents of utilitarian theories of punishment is the degree to which they have held on to the considered judgment that punishment must be proportional, despite the problems it appears to raise for their broader theoretical principles. Some have argued that there is no conflict between proportionality and utility; others have modified or sup-

that the sentence must be constitutionally disproportionate. For a more detailed discussion of Justice Rehnquist’s views, see *supra* notes 56 and 58.

170. RAWLS, *supra* note 168, at 17.

171. *Id.* at 18.

172. *See id.*

173. *Id.*

174. *Id.* It is not my purpose to defend Rawls’s methodology. I refer to it merely as a plausible *description* of the deliberative process of creating and evaluating a theory. For criticisms of reflective equilibrium, and of the role of intuitions in moral philosophy generally, see RICHARD BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979); Norman Daniels, *Reflective Equilibrium*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward Zalta ed., 2008), available at <http://plato.stanford.edu/archives/fall2008/entries/reflective-equilibrium/>; Richard M. Hare, *Rawls’ “Theory of Justice,”* 23 *PHIL. Q.* 144 (1973).

plemented the principles associated with utilitarianism. Yet, hardly any have dismissed the requirement of proportionality. Like the requirement of desert, proportionality has shown remarkable obduracy.

The same commitment to proportionality is true, less surprisingly, with respect to retributivism. The commitment to proportionality, however, is also evident in relation to theories of punishment that cannot neatly be described as consequentialist or retributivist (or as a combination of the two). To demonstrate the ubiquity of proportionality, I shall very briefly outline two theories of punishment that contain a proportionality requirement that is not justified on traditional retributive or consequentialist grounds. The first theory, a paternalistic model of punishment, has more in common with retributivism than consequentialism, while the opposite is arguably the case with the second theory of punishment as self-protection.¹⁷⁵

1. *The Paternalistic Model of Punishment*

In his essay, *A Paternalistic Theory of Punishment*, Herbert Morris proposes that punishment can be justified by its beneficial consequences to the wrongdoer.¹⁷⁶ According to Morris, punishment is justified to a substantial extent because it “furthers the good of potential and actual wrongdoers” by promoting the wrongdoer’s “identity as a morally autonomous person attached to the good.”¹⁷⁷ Unlike other, superficially similar therapeutic or rehabilitative models of punishment, Morris’s theory justifies only such harsh treatment that “promotes the good of actual and potential wrongdoers,” not punishment that merely benefits society in general.¹⁷⁸ The paternalistic theory also differs from other rehabilitative theories by confining punishment to practices that engage “the human capacity for reflection, understanding, and revision of attitude” that mark the wrongdoer as a moral agent.¹⁷⁹ Other therapeutic models of punishment have been criti-

175. As with my reference to Rawls’s reflective equilibrium, my purpose is not to defend the theories that follow. Rather, I provide them as representative examples of influential theories outside the retributive and utilitarian traditions, in which the requirement of proportionality is acknowledged.

176. See Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1971).

177. *Id.* at 264-65. Opinion is divided on the extent to which Morris’s paternalistic theory is orthogonal to retributivism. David Dolinko appears to treat it as a repudiation of Morris’s earlier defense of retributivism. See David Dolinko, *Morris on Paternalism and Punishment*, 18 LAW & PHIL. 345, 346 (1999). Warren Quinn, on the other hand, refers to the paternalistic theory as “quasi-retributive,” while Morris himself asserted that retributivism and his paternalistic justification “were compatible, indeed that retributivism was a constituent element in the theory.” Compare Quinn, *supra* note 122, at 374, with Herbert Morris, *Some Further Reflections on Guilt and Punishment*, 18 LAW & PHIL. 363, 373 (1999). It is important to point out, however, that the requirement of proportionality derives from the paternalistic rather than (or perhaps more accurately, in addition to) the retributive elements of the theory. See Morris, *supra*, at 374.

178. Morris, *supra* note 176, at 264.

179. *Id.* at 265.

cized because they allow wrongdoers to be subjected to coercive conditioning for the greater good, which in turn could allow disproportionate punishment.¹⁸⁰ On Morris's account, if the good of promoting the wrongdoer's moral autonomy through punishment "was to be fully realized, it was essential for an individual to acquire," *inter alia*, "a sense of proportionality in punitive responses."¹⁸¹

2. *Threatening to Punish as a Form of Self-Defense*

Warren Quinn draws our attention to the fact that there are "two temporally distinct components of the practice of punishment."¹⁸² The first is "creating serious threats of punishment designed to deter crime."¹⁸³ The second is "the actual punishing of those who have ignored the threats."¹⁸⁴ According to Quinn, "the standard theories of punishment err in assuming the right to threaten punishment derives from the anticipation of an independently intelligible right to punish."¹⁸⁵ Quinn boldly advocates reversing the conceptual and normative priority of punishment and the threat of punishment. The central idea of Quinn's proposal is that "the right to establish the real threat of punishment is the moral *ground* of the right to punish."¹⁸⁶ The actual punishing of wrongdoers is not justified directly, but rather as the fulfillment of a justified threat to punish. The right to threaten punishment is grounded in the right of *self-protection*: "[i]t is morally legitimate to create these threats because it is morally legitimate to try to protect ourselves . . . against violations of our moral rights. . . . The theory asserts that a practice of punishment is at its moral core a practice of self-protective threats."¹⁸⁷

Quinn's justification of punishment is therefore fundamentally distinct from both standard deterrence and standard retributive theories. Nonetheless, Quinn's theory incorporates the demand for proportionality. In classical cases of self-defense, we are entitled to defend ourselves in ways that are "intuitively proportionate to the intended offense."¹⁸⁸ The same applies to threats of punishment:

180. See R.A. Duff, *Penal Communications: Recent Work on the Philosophy of Punishment*, 20 CRIME & JUST. 1, 50 (1996). The correction of a malady responsible for a crime of relatively low moral gravity may require a large amount of (harsh) conditioning.

181. Morris, *supra* note 177, at 374.

182. Quinn, *supra* note 122, at 335.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 360.

187. *Id.* at 336. Imposing punishment on wrongdoers is justified because otherwise the threat would not be credible, and therefore not an effective means of self-protection.

188. *Id.* at 347.

While we may attempt to prevent more serious crimes by creating risks of greater evils, some evils are too great for some crimes. *This idea of proportionality is not tied to the ideas of retribution and desert.* No retributivist claims that the right of self-defense is a right of retribution, but no retributivist can plausibly deny that the right of self-defense is governed by some requirement of proportionality.¹⁸⁹

As the theories of Morris and Quinn demonstrate, it is not only retributivism that demands that the punishment fit the crime. Philosophers have argued that the proportionality principle is a requisite of just punishment on such diverse grounds as the offender's desert (and degree thereof), the beneficial consequences to society, the good of promoting a wrongdoer's moral autonomy, and the right to self-protection. As Corlett asserts:

[T]he problem of proportional punishment [is a concern not only for retributivism, but also for every competing positive model of punishment. For which model of punishment, save a sceptical one, wants to violate the dictum that punishments should be proportional to offences? Would any plausible version of utilitarian punishment foist the notion that those guilty of minor offences should be punished by death simply to maximize social utility?¹⁹⁰

Whether any particular theory *succeeds* in providing a rationale for the requirement that punishment be proportional to crime is not, for present purposes, the crucial issue. The point is that there is consensus among theorists that a proportionality requirement is essential to a morally acceptable account of punishment. As the utilitarian arguments of Bentham and Rawls demonstrate, theorists "have made strenuous, detailed efforts" to show that restricting punishment to wrongdoers in proportion to the wrong "is explicable on purely utilitarian lines."¹⁹¹ The *extent* of these efforts is telling. A proposed theory is rejected, criticized, modified, or pruned to account for the requirement of proportionality. Few, if any, theorists simply conclude that, in light of their otherwise compelling and powerful account of punishment, the principle of proportionality must yield.¹⁹² In the case of proportionality, the "provisional fixed point" (to use Rawls's language) has proven to be very fixed indeed.

189. *Id.* (emphasis added).

190. J. Angelo Corlett, *Making Sense of Retributivism*, 76 *PHILOSOPHY* 77, 91 (2001); see also Burgh, *supra* note 86, at 210 (referring to the "central intuition that punishment be proportional to the offense").

191. HART, *supra* note 86, at 18.

192. Even economic theorists of punishment universally agree that proportionality is essential, albeit with reference to a somewhat idiosyncratic version of proportionality. See Becker, *supra* note 113, at 14.

C. *Interpreting "Cruel and Unusual Punishment"*

The proportionality principle, then, is not only a conviction about the requirements of justice that is prior to and independent of particular theories of punishment (including retributivism). It is also a conviction to which our commitment is extremely deep, as well as wide. The belief in proportional punishment is widely shared by individuals, is embedded in our philosophical justifications of punishment, and has long been reflected in our legal tradition.¹⁹³ Our commitment to the proportionality principle has, in sum, proven especially wide, strong, and long lasting. The extent and strength of our belief in the principle has, I propose, a number of ramifications for interpreting the Eighth Amendment, beyond refuting the particular argument Justice Scalia raised in *Harmelin* and *Ewing*.¹⁹⁴

1. *A Presumption in Favor of Proportionality*

The degree to which we are wedded to the principle of proportionality as a matter of both moral intuition and moral theory should, at the very least, necessitate a very strong presumption in favor of an interpretation of the Eighth Amendment that incorporates the requirement of proportionality. Even when considering the original meaning, we should start with the presumption that the public understanding of "cruel and unusual punishment" was consistent with fundamental notions of just punishment, notions that precede the Eighth Amendment.¹⁹⁵ We should not lightly conclude that the only constitutional limitation on punishment was understood (or intended, depending on which flavor of originalism you prefer) *not* to include a limitation so central to commonly held convictions about just punishment. This presumption would only be rebutted by the clearest historical evidence: not just that the clause was understood to prohibit inhumane *methods* of punishment, but also that it was positively understood to *not include* a requirement of proportionality. A prohibition on inhumane methods of punishment is consistent with a prohibition on dis-

193. The extent to which an individual's sense of justice includes a requirement of proportionality is demonstrated by Justice Rehnquist's inability to give up his strong intuitive belief that a life sentence for overtime parking could not be constitutionally sustained—even though he declared a rule that would permit such a penalty. See *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980); see also Granucci, *supra* note 4, at 845-46 (arguing that English law has included requirement that punishment fit crime to at least eleventh century). For a discussion of *Rummel*, see *supra* notes 36-40 and accompanying text.

194. For non-originalists, the implications are obvious and uncontroversial: given the convergence of contemporary intuitive and theoretical views as to the requirements of just punishment, the Eighth Amendment should be construed as prohibiting disproportionate punishment. The suggestions that follow are expressed with originalist arguments in mind, especially those of the kind to which Justice Scalia cleaves.

195. See Granucci, *supra* note 4, at 845-46.

proportionate punishment.¹⁹⁶ Only clear evidence that the proportionality principle was *rejected* by the framing generation would, on this proposal, rebut the presumption in favor of a proportionality requirement in the Eighth Amendment.

2. *The Unacceptability of Excluding Proportionality*

In all the philosophical accounts of just punishment considered above, excluding the principle of proportionality is considered unacceptable. Even if we might doubt whether the framing generation had strong pre-theoretical convictions against disproportionate punishment, it can hardly be doubted that contemporary standards of justice demand proportionality. Disproportionate punishment is unpalatable to contemporary sensibilities, both at the level of individual intuitions and at the level of theoretical principles. Justice Scalia has conceded that *even if* it could be “demonstrated unequivocally” that punishments such as public flogging and hand branding “were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision specifically disapproved them,” the fact that they are so unpalatable to modern moral sensibilities requires the Eighth Amendment be presently construed as prohibiting them.¹⁹⁷ A construction of the Eighth Amendment that contains *no* proportionality requirement would allow, for example, life imprisonment for parking offenses—a result just as unacceptable to us as hand branding. To borrow Justice Scalia’s language, I am confident that life imprisonment for overtime parking “would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality.”¹⁹⁸ Our theories of constitutional interpretation, like our theories of punishment, ought to accommodate considered judgments as obdurate as the principle of proportionality.

3. *The Cost of Originalism*

Many originalists, especially those less faint of heart than Justice Scalia, will no doubt reject the proposals I have sketched above and insist on construing the Eighth Amendment as *not* prohibiting disproportionate punishment. It is important to be clear, however, about what is at stake. The essential place of the proportionality principle in philosophies of punishment brings into sharp focus the high cost of interpreting the Eighth Amendment in such an insistently originalist fashion. An originalist of this stripe would demand of us (in the context of constitutional limitations on punishment) what no other theorist would demand of us (at the level of defining just punishment): that we relinquish our commit-

196. Indeed, some philosophers have framed the prohibition on inhumane methods of punishment as deriving from the principle of proportionality. See, e.g., CORLETT, *supra* note 87, at 58.

197. Scalia, *supra* note 62, at 861.

198. *Id.*

ment to the notion that punishment be proportional to the crime for which it is imposed. That is a high price to pay for fidelity to the original meaning. Given the extent to which we are committed to proportionality, proponents of originalism (in its undiluted form, at least) bear the burden of demonstrating that the price is worth paying.

V. CONCLUSION

The principle of proportionality—the sublime requirement “that the punishment fit the crime,” as Gilbert and Sullivan would say—is a central component of the Supreme Court’s Eighth Amendment jurisprudence. Most recently, the Court invoked the requirement of proportionality to declare that the death penalty could not be imposed for the crime of raping a child. In contrast to the majority of his brethren past and present, however, Justice Scalia maintains that the Eighth Amendment contains no requirement of proportionality. As this Article demonstrates, Justice Scalia’s position is untenable. The cornerstone of Justice Scalia’s argument—the philosophical claim that the “inherently retributive” principle of proportionality is unintelligible once weight is given to the consequentialist goals of punishment—is false. An examination of retributive and consequentialist theories demonstrates emphatically that the principle of proportionality *is* intelligible when deterrence, incapacitation, and rehabilitation are given weight. In fact, almost all philosophers understand that a compelling theory of punishment requires a combination of consequentialist goals with constraining principles such as proportionality.

In addition to demonstrating that Justice Scalia’s construction of the Eighth Amendment should be rejected, the philosophical theories discussed in this Article show that the proportionality principle should not be characterized as a retributivist notion. The principle of proportionality is, rather, a theoretically ubiquitous belief about the limits of morally acceptable punishment. Philosophers have been uniformly reluctant to give up the intuitive commitment to proportionality even when it has proven difficult to reconcile with their fundamental theoretical principles, such as utility. We should be similarly reluctant when interpreting the Eighth Amendment.