July 2017

Sound Principles, Undesirable Outcomes: Justice Scalia's Paradoxical Eighth Amendment Jurisprudence

Mirko Bagaric

Sandeep Gopalan

SOUND PRINCIPLES, UNDESIRABLE OUTCOMES: JUSTICE SCALIA'S PARADOXICAL EIGHTH AMENDMENT JURISPRUDENCE

*Mirko Bagaric**
*Sandeep Gopalan***

I. INTRODUCTION

Justice Scalia is renowned for his conservative stance on the Eighth Amendment and prisoners' rights.[1] Justice Scalia held that the Eighth Amendment incorporates no proportionality requirement of any nature regarding the type and duration of punishment which the state can inflict on criminal offenders.[2] Justice Scalia has also been labelled as "one of

* Swinburne University, School of Law, Melbourne.
** Dean of the Deakin Law School, Melbourne.

1. He has also been described as "the purest archetype of the conservative legal movement that began in the 1960s in reaction to the Warren Court." JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 146 (2009).

2. Richard Frase, *Excessive Prison Sentences, Punishment Goals, And The Eighth Amendment: "Proportionality" Relative To What?*, 89 MINN. L. REV. 571, 573 (2004).

the Justices least likely to support a prisoner's legal claim"[3] and as adopting, because of his originalist orientation, "a restrictive view of the existence of prisoners' rights."[4]

The criticism of Justice Scalia's approach to the Eighth Amendment, so far as it relates to the harshness of criminal sanctions, is wide-ranging and sometimes verging on the disparaging. Mugambi Jouet states:

> As draconian punishments became the norm over the last three decades, the Supreme Court largely rubber-stamped these practices. Justice Scalia played a key role in this process, as his hardline stances on criminal punishment significantly contributed to mass incarceration, numerous executions, and systemic racial discrimination. Scalia was an outspoken supporter of harsh punishments and wanted the court to take an even more hands-off attitude toward so-called "tough on crime" laws.[5]

Thus, the overwhelming weight of prevailing sentiment is that Justice Scalia was a foe of criminal law and procedure to the extent that this is associated with a moderate or lenient approach to the punishment of offenders.

A closer examination of the seminal judgments in these areas and the jurisprudential nature of the principle of proportionality and rights (including prisoners' rights) arguably put this characterization in a different light. While Justice Scalia may have been a foe of a move to less harsh sentencing and expansive rights to prisoners, there is an underlying coherence to some of his key decisions that is underpinned by the provisions he was applying and, even more so, the logical and normative contents or vagueness of the concepts under consideration.

Proportionality, in its crudest form, is the view that the "seriousness of the crime be matched by the harshness of the penalty."[6] The concept is intuitively appealing but no jurisprudential analysis has yet been capable of injecting sufficient content into the ideal such that it can be used to meaningfully influence sentencing outcomes. At the abstract

---

3. Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 869 (2011).

4. *Id.* at 872.

5. Mugambi Jouet, *The Human Toll of Antonin Scalia's Time on the Court*, SLATE (Feb. 17, 2016, 6:32 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonio_scalia_made_america_s_incarceration_problem_worse.html (last visited Nov. 26, 2016).

6. Mirko Bagaric & Sandeep Gopalan, *Saving the United States From Lurching To Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169, 189 (2016).

level, it is not easy to dispute that rights are important and that all people, including prisoners, should enjoy the greatest possible array and expression of rights. However, there is no logical or jurisprudential pathway that has been developed to coherently and firmly transpose abstract ideals in the form of rights into concrete entitlements, especially in a prison setting where the common good (often in the form of community protection) is typically the consideration that compels the prison term in the first place.

Thus, while Justice Scalia may have been a foe of the principle of proportionality and prisoners' rights, arguably this was at least in part because of a duty borne by the need for intellectual and judicial rigour as opposed to by design. We leave that for readers to decide.

In this Article, we examine the key judgments of Justice Scalia relating to the Eighth Amendment, with a focus on the concept of proportionate punishment and prisoners' rights.[7] We conclude that his judgments in these areas were "unfriendly" to offenders. We then analyze the logical and normative underpinnings of the principle of proportionality and prisoners' rights and suggest that the nebulous nature of these concepts, especially when viewed against the backdrop of the legal provisions he was considering, entailed that a more expansive view of proportionality was not necessarily jurisprudentially sound. In relation to prisoners' rights, our analysis is less agreeable with the approach taken by Justice Scalia. He had an influential role in developing a doctrinally flawed aspect of the test for establishing a breach of the Eighth Amendment. The requirement that prisoners need to establish that prison officials were subjectively aware of a breach of the Eighth Amendment stems from an erroneous understanding of the nature of punishment. However, this requirement is ultimately not the central reason for the existence of what is, in our view, often unacceptably harsh prison conditions. Rather, the harsh conditions stem from the high bar that needs to be crossed to establish that prison conditions are cruel. Justice Scalia did not set the height of that bar.

In Part II of this Article, we examine Justice Scalia's interpretation of the Eighth Amendment, with a focus on the proportionality principle. This is followed by an exploration of the nature of the proportionality principle and its logical and normative underpinnings. In Part III, we analyze the manner in which Justice Scalia approached the issue of

7. The prohibition against cruel and unusual punishment can obviously be violated in circumstances beyond disproportionate punishment; however, we focus on the principle of proportionality given the breadth of its potential application.

prisoners' rights against the backdrop of the Eighth Amendment. In the concluding remarks, we provide an overview regarding the doctrinal coherency and persuasiveness of his judgments in these areas.

II. THE EIGHTH AMENDMENT AND THE PROPORTIONALITY PRINCIPLE

This Part begins by briefly examining the role the proportionality principle has played in the Supreme Court's Eighth Amendment jurisprudence. After introducing the principle, this Part discusses the roots of the proportionality principle in Eighth Amendment case law and traces the principle's development throughout the early twentieth century. Next, this Part introduces Justice Scalia's rejection of the proportionality principle, the progression of his thought on the principle, and his arguments against the principle. Thereafter, this Part seeks to demonstrate that each of Justice Scalia's reasons for rejecting the proportionality principle—its incongruence with current punishment and sentencing objectives, its lack of susceptibility to intelligible application, and the ability to deprive it of force by pursuing the alternative goals of deterrence and community protection—are doctrinally sound, persuasive, and correct.

A. Overview of the Role of the Proportionality Principle Within the Scope of the Eighth Amendment

A logical starting point in the application of the proportionality principle is recognizing that the Supreme Court has held that the principle is incorporated within the Eighth Amendment's prohibitions against cruel and unusual punishment. Importantly, however, the jurisprudence regarding the meaning and scope of the principle is unclear, partly because proportionalism is not the only protective concept that the Supreme Court has held as springing from the Eighth Amendment. Meghan Ryan notes that since 1958, the Supreme Court has stated that the focus of the prohibition against cruel and unusual punishment is on protecting the dignity of the person.[8] In *Trop v. Dulles*, the Supreme Court held:

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court, but the basic policy reflected in these

8. Meghan Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, U. ILL. L. REV. 2129, 2141 (2016); *see also* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 86 (2011); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 203 (2011).

> words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.[9]

Ryan suggests that the dignity requirement is reflected in two considerations: proportionality and humanness.[10] In relation to proportionalism, for more than one hundred years, the Supreme Court has held that the concept is embedded within the Eighth Amendment.[11] Only Justices Thomas and Scalia have rejected this position; only Justice Scalia has set out reasons in support of this proposition.[12]

Ian Farrell notes that there are two core reasons for Justice Scalia's rejection of the proportionality doctrine.[13] The first stems from his originalist approach to interpreting the Constitution. According to Justice Scalia, proportionalism is not supported by a historical analysis of the Eighth Amendment.[14] The second stems from a philosophical objection.[15] While we agree with Farrell's broad classifications regarding Justice Scalia's approach to proportionality, we contend that Justice Scalia's approach is more doctrinally sound than is generally accepted.

---

9. 356 U.S. 86, 99-100 (1958); *see also* Hall v. Florida, 134 S. Ct. 1986, 1992 (2014); Brown v. Plata, 563 U.S. 493, 510 (2011); Roper v. Simmons, 543 U.S. 551, 560 (2005).

10. Ryan, *supra* note 8, at 2133.

11. The Court first recognized that proportionality was a component of the Eighth Amendment in *Weems v. United States*, 217 U.S. 349, 367 (1910). In *Coker v. Georgia*, the Court held that punishments that are grossly disproportionate are prohibited. 433 U.S. 584, 592 (1977). Further, as noted by Sharon Dolovich, "[t]he prohibition on cruel and unusual punishment has been held to forbid punishments that are 'grossly disproportionate' to the crime; that are 'totally without penological justification;' that 'involve the unnecessary and wanton infliction of pain'; and that are inconsistent with 'evolving standards of decency.'" In its most basic sense, to be cruel is to inflict unjustified suffering, and each of these principles may be read as condemning those criminal punishments that do just that." Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 883-84 (2009).

12. Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 330 (2010).

13. Farrell distinguishes between the originalist and historical claim, but logically they are connected. *Id.*

14. *Id.* at 332.

15. *Id.* at 332-33.

B. Origins of the Proportionality Principle Within the Scope of the Eighth Amendment

We now analyze Justice Scalia's reasons for rejecting proportionalism in the context of discussing the manner in which proportionality has been recognized and applied by the Supreme Court. Because, "in some respects, the Court's Eighth Amendment jurisprudence is a bit of a mess," this analysis involves a degree of interpretation and judgment.[16] Farrell makes a similar observation:

> While nearly a century has passed since the Court first relied upon the proportionality principle, the Court has by no means spoken with one voice on the issue. 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. 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.[17]

Nevertheless, it is possible to set out the broad parameters of proportionality that have been established and to identify Justice Scalia's key objections to the principle.

The United States Supreme Court first considered the concept of proportionality in the context of the Eighth Amendment in *Weems v. United States*. Paul Weems was a United States Coast Guard Official who was charged with falsifying a public and official document with the intent to deceive and defraud the United States government.[18] Weems entered into his cash book that he paid out the sums of 208 and 408 pesos as wages to certain employees of the lighthouse service, when, in fact, he did not pay out the money.[19] Weems was convicted and sentenced to fifteen years in prison and to pay a fine of 4,000 pesetas.[20] As part of his sentence, he was to "always carry a chain at the ankle, hanging from the wrists; . . . be employed at hard and painful labor, and . . . receive no assistance whatsoever from without the institution."[21]

16. Ryan, *supra* note 8, at 2156.
17. Farrell, *supra* note 12, at 322.
18. Weems v. United States, 217 U.S. 349, 357 (1910).
19. *Id.* at 363.
20. *Id.* at 358.
21. *Id.* at 364.

Weems filed a writ of error with the U.S. Supreme Court, claiming that the charges against him were improper and that his conviction should be overturned.[22] The Court held that the punishments imposed on Weems were cruel and unusual and reversed the judgment with directions to dismiss the proceedings.[23] So far as proportionality is concerned, the Court noted that:

> In interpreting the Eighth Amendment, it will be regarded as a precept of justice that punishment for crime should be graduated and proportioned to the offense. . . . What constitutes a cruel and unusual punishment prohibited by the Eighth Amendment has not been exactly defined, and no case as heretofore occurred in this court calling for an exhaustive definition. . . . The Eighth Amendment is progressive, and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice . . . .[24]

Following *Weems*, the Court would take on a number of cases, the result of which was the enshrinement of the proportionality principle as an integral element of the Eighth Amendment.

The Supreme Court next considered the concept of proportionality as a component of the Eighth Amendment in *Robinson v California.* In this case, the defendant was convicted in California state court for violation of a criminal statute that made it an offense for a person to be addicted to the use of narcotics.[25] The defendant was stopped by the police who observed his arms and saw "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the defendant's left arm.[26] Testifying on his own behalf, the defendant denied that he had ever used narcotics or had been addicted to their use.[27] He explained that the marks on his arms resulted from an allergic condition contracted during his military service, and two witnesses corroborated this testimony.[28] The Supreme Court held that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and

22. *Id.* at 357.
23. *Id.* at 382.
24. *Id.* at syllabus.
25. Robinson v. California, 370 U.S. 660, 660 (1962).
26. *Id.* at 661.
27. *Id.* at 662.
28. *Id.*

unusual punishment in violation of the Fourteenth Amendment."[29]In his concurrence, Justice Douglas stated:

> A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishment." (citation omitted). So may the cruelty of the method of punishment, as, for example, disemboweling a person alive. (citation omitted). But the 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.[30]

Robinson ushered in modern proportionality analysis, and further discussions of the role of proportionality in constitutional punishment would soon follow.

The role of proportionality in the context of the Eighth Amendment was further elaborated upon in *Solem v Helm*, where the offender had been punished with imprisonment for life without parole for the crime of uttering a no-account check. [31] Although the actual sentence for the crime was five years imprisonment and a fine of $5,000, based on South Dakota's recidivist statute, Helm's punishment was ratcheted up to life imprisonment without parole.[32] Justice Powell, writing the majority opinion, noted that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive."[33] He rejected the State's contention that proportionality does not apply to imprisonment, pointing out that the:

> [C]onstitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment

29. *Id.* at 667.

30. *Id.* at 676.

31. 463 U.S. 277, 281 (1983). The Court also touched on proportionality as a component of the Eighth Amendment in *Gregg v. Georgia*, where the Court held that the death penalty for the crime of murder does not violate the Eighth (or Fourteenth) Amendment. 428 U.S. 153 (1976). In this case, although the Court held that the Eighth Amendment proscribes grossly disproportionate punishment, there was no detailed analysis of the concept. The Court relevantly held: "[f]inally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed. There is no question that death, as a punishment, is unique in its severity and irrevocability. (citation omitted). When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. (citation omitted). But we are concerned here only with the imposition of capital punishment for the crime of murder, and, when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes." *Id.* at 187.

32. *Solem*, 463 U.S. at 281-83.

33. *Id.* at 284.

> imposes "parallel limitations" on bail, fines, and other punishments . . . . It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common law principle incorporated into the Eighth Amendment clearly applied to prison terms.[34]

The Court went on to hold that Eighth Amendment proportionality analysis "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[35]

According to Justice Powell, the first element could be evaluated using "widely shared views as to the relative seriousness of crimes," such as the fact that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence," and by referring to "accepted principles" utilized by courts to assess the "harm caused or threatened to the victim or society."[36] In recognizing that "a lesser included offense should not be punished more severely than the greater offense," that "attempts are less serious than completed crimes," and that "an accessory after the fact should not be subject to a higher penalty than the principal," the absolute magnitude of the crime may be relevant.[37] The Court accepted that in order to apply its test, a court would have to

34. *Id.* at 288-89.

35. *Id.* at 292. In *Harmelin v. Michigan*, Justice Scalia conceded that the third element could be applied with "clarity and ease" but dismissed it as irrelevant: "That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows a fortiori from the undoubted fact that a State may criminalize an act that other States do not criminalize at all. Indeed, a State may criminalize an act that other States choose to reward—punishing, for example, the killing of endangered wild animals for which other States are offering a bounty. What greater disproportion could there be than that? 'Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.'" 501 U.S. 957, 989-90 (1991).

36. *Solem*, 463 U.S. at 292-93. This first element was severely attacked by Justice Scalia in *Harmelin*: "[W]hether it is a 'grave' offense merely to possess a significant quantity of drugs—thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute — depends entirely upon how odious and socially threatening one believes drug use to be. Would it be 'grossly excessive' to provide life imprisonment for 'mere possession' of a certain quantity of heavy weaponry? If not, then the only issue is whether the possible dissemination of drugs can be as 'grave' as the possible dissemination of heavy weapons. Who are we to say no? The Members of the Michigan Legislature, and not we, know the situation on the streets of Detroit." 501 U.S. at 988.

37. *Solem*, 463 U.S. at 293.

compare prison terms:

> For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area.[38]

Applying its objective criteria, the court found that the punishment imposed on Helm violated the Eighth Amendment.[39]

C. Justice Scalia's Rejection of the Proportionality Principle

In *Harmelin v. Michigan*, Justice Scalia's opinion for the Court was highly critical of the reasoning in *Solem*. [40] In *Harmelin*, the defendant was convicted of possession of more than 650 grams of cocaine and sentenced to a mandatory term of life in prison without the possibility of parole.[41] Harmelin argued that this punishment was significantly disproportionate to the crime he was convicted of and that it constituted cruel and unusual punishment under the Eighth Amendment.[42] The Supreme Court affirmed Harmelin's conviction and noted that the Eighth Amendment does not contain a proportionality guarantee.[43] Engaging in an extensive historical analysis, Justice Scalia wrote that:

> [W]e think it most unlikely that the English Cruel and Unusual Punishments Clause was meant to forbid "disproportionate" punishments. There is even less likelihood that proportionality of punishment was one of the traditional "rights and privileges of Englishmen" apart from the Declaration of Rights, which happened to be included in the Eighth Amendment.[44]

For Scalia, "to use the phrase 'cruel and unusual punishment' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to

38. *Id.* at 294.

39. *Id.* at 303. For further discussion regarding the Supreme Court's analysis regarding the Eighth Amendment and proportionality, see Richard Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 J. OF CONSTITUTIONAL LAW 39, 49-53 (2008) [hereinafter Frase, *Limiting Excessive Prison Sentences*].

40. *Harmelin*, 501 U.S. at 977.

41. *Id.* at 961.

42. *Id.*

43. *Id.* at 996.

44. *Id.* at 974.

saying more directly."[45]

Importantly, according to Justice Scalia, the concept of proportionality is too vague to provide meaningful guidance regarding the outer limits of permissible penalties. He stated:

> There are no adequate textual or historical standards to enable judges to determine whether a particular penalty is disproportional. The first two of the factors that *Solem* found relevant — the inherent gravity of the defendant's offense and the sentences imposed for similarly grave offenses in some jurisdictions — fail for lack of an objective standard of gravity. Since, as the statutes Americans have enacted in different times and places demonstrate, there is enormous variation of opinion as to what offenses are serious, the proportionality principle is an invitation for judges to impose their own subjective values.[46]

In the view of Justice Scalia, the Eighth Amendment's proscription was about the modes of punishment and not disproportionality.[47]

Justice Kennedy wrote a separate concurring opinion finding that the Eighth Amendment "encompasses a narrow proportionality principle."[48] According to Justice Kennedy, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[49] Also notable was Justice White's dissent, where he opined that a court's proportionality analysis "should be guided by objective criteria, including: the gravity of the offense and the harshness of the penalty;[50] the sentences imposed on other criminals in the same jurisdiction; and the sentences imposed for commission of the same crime in other jurisdictions."[51]

This confusing state of affairs received fresh attention in *Ewing v. California*, where the Court affirmed the *Harmelin* test and reiterated the narrow proportionality principle contained in the Eighth Amendment.[52] To this end, a majority of the Court was heavily influenced by Justice Kennedy's opinion in *Harmelin.* In *Ewing*, the defendant was convicted in California state court of felony grand theft and sentenced to twenty-

45. *Id.* at 977.
46. *Id.* at syllabus.
47. *Id.* at 985.
48. *Id.* at 997.
49. *Id.* at 1001.
50. For Justice Kennedy, "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1005.
51. *Id.* at 1018.
52. 538 U.S. 11 (2003).

five years to life under the state's three strikes law.[53] Under California's three strikes law, a defendant who is convicted of a felony and who has previously been convicted of two or more serious or violent felonies must receive an indeterminate life imprisonment term.[54] The defendant had previously been convicted of two or more serious or violent felonies, and while out on parole for one of those convictions, he was convicted for stealing three golf clubs worth $399 a piece.[55] The defendant argued that his sentence of twenty-five years to life was grossly disproportionate to the crime committed.[56]

The Court noted that California enacted the three strikes law for individuals who have repeatedly engaged in serious or violent crimes and whose conduct has not been deterred by more conventional punishment approaches for the purpose of isolating those individuals from society to protect public safety.[57] The Supreme Court held that California properly enacted the statute upon determining that recidivism among criminals presents a serious concern for public safety.[58] The Court further noted that the Eighth Amendment does not require strict proportionality between crime and sentence, but that it forbids only extreme sentences that are grossly disproportionate to the crime.[59] Therefore, the Supreme Court held that the defendant's sentence of twenty-five years to life under the three strikes law was not grossly disproportionate and thus not in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.[60]

Justice O'Connor elaborated on the application of the test to the facts:

> In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. . . . [in order] to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "It is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its

53. *Id.* at 20.
54. *Id.* at 16.
55. *Id.* at 18.
56. *Id.* at 20.
57. *Id.* at syllabus.
58. *Id.* at 26-28.
59. *Id.* at syllabus.
60. *Id.* at 30-31.

> criminal law." (citation omitted). To give full effect to the State's choice of this legitimate penological goal, our proportionality review of Ewing's sentence must take that goal into account.[61]

The Court noted that "Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality,'" and held that a sentence of twenty-five years for stealing three golf clubs was not grossly disproportionate.[62]

Although Justice Scalia ultimately concurred in the Court's judgment, he was unimpressed with the Court's reliance on proportionality in reaching its decision. According to him:

> Proportionality . . . 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," (citation omitted) 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.[63]

He went on to destroy the plurality's reasoning:

> Having completed [the first step of its test] (by a discussion which, in all fairness, does not convincingly establish that 25 years-to-life is a "proportionate" punishment for stealing three golf clubs), the plurality must then *add* an analysis to show that "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons."[64]

Justice Scalia pointed out that under the plurality's explanation, the Court is not actually undertaking a proportionality analysis but reading in a requirement that "all punishment should reasonably pursue the multiple purposes of the criminal law."[65] The plurality's inability to sustain its holding that twenty-five years imprisonment is a proportionate punishment for stealing three golf clubs on any intelligible logic illustrates the current state of judicial understanding of the concept.

---

61. *Id.* at 29.
62. *Id.* at 30.
63. *Id* at 31.
64. *Id* at 31-32. ("[W]hy that has anything to do with the principle of proportionality is a mystery.").
65. *Id.* at 32.

In summary, the Supreme Court has held that proportionality is an aspect of the Eighth Amendment. Justice Scalia rejected this proposition. However, in pragmatic terms, the disagreement is more abstract than real. Proportionalism has rarely been invoked by the Court for striking down a sentence, especially in the context of the length of prison terms.[66] As noted by Richard Frase, "[o]f all the government measures subject to Eighth Amendment scrutiny, excessively long prison sentences seem to receive the least favorable treatment, and are governed by the most opaque standards."[67]

In relation to the rationale adopted by Justice Scalia for rejecting proportionality, it is important to note that the above historical analysis, implanted within an originalistic interpretive methodology,[68] did not, however, provide an insurmountable obstacle for Justice Scalia injecting proportionalism into the Eighth Amendment. This is because Justice Scalia was not absolute in applying originalism and would deviate from this approach where it would result in an outcome which was either demonstrably unacceptable to contemporary values or in conflict with the doctrine of *stare decisis*. In *Ewing* he stated:

> In my concurring opinion in *Harmelin v. Michigan*, . . . I concluded that the Eighth Amendment's prohibition of "cruel and unusual punishments" was aimed at excluding only certain *modes* of punishment, and was not a "guarantee against disproportionate sentences." Out 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*. This case demonstrates why I cannot.[69]

Thus, the fundamental basis for Justice Scalia's rejection of the proportionality principle was jurisprudential, not historical or otherwise tied to his originalist approach to constitutional interpretation.[70]

66. In *Roper v. Simmons*, the Court held that it was unconstitutional to impose the death penalty on offenders who committed the offense when they were minors. 543 U.S. 551, 568 (2005). However, this limitation was rooted in the nature of the penalty.

67. Frase, *Limiting Excessive Prison Sentences*, *supra* note 39, at 63.

68. The originalistic approach by Justice Scalia is set out in BISKUPIC, *supra* note 1, at 146.

69. *Ewing*, 538 U.S. at 31.

70. Ian Farrell uses the term philosophical. *See* Farrell, *supra* note 12.

D. Analysis of the Persuasiveness of Justice Scalia's Reasons for Rejecting Proportionality- Retributivistic and Utilitarian Theories of Punishment

1. Justice Scalia is Correct that Proportionality is Conventionally Associated with Retributivism

There are two main of theories of punishment. As alluded to by Justice Scalia above, one of the theories is retributivism.[71] The other is utilitarianism, which is the view that while punishment is inherently bad due to the pain it causes the wrongdoer, it is ultimately justified because any harm to the wrongdoer is outweighed by the "good" consequences stemming from it.[72] Traditional "good" consequences come in the form of incapacitation (i.e., imprisoning offenders and thereby preventing them from further offending), deterrence (discouraging the offender and other people from further offending), and rehabilitation (inducing positive attitudinal reform).[73]

Retributive theories of punishment are not clearly defined, and it is difficult to isolate a common thread running through theories carrying this label.[74] All retributive theories assert that offenders deserve to suffer and that the institution of punishment should inflict the suffering they deserve. However, they provide divergent accounts of why criminals deserve to suffer.[75] Despite this, there are three broad similarities shared by retributive theories.[76]

The first similarity is the principal justification for punishment: only those who are blameworthy deserve punishment. Thus, punishment is only justified, broadly speaking, in cases of deliberate wrongdoing.[77] The second commonality is that punishing criminals is just in itself; it cannot be inflicted as a means of pursuing some other aim. Accordingly,

71. *Ewing*, 538 U.S. at 31.

72. *See* Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTRALIAN J. OF LEGAL PHILOSOPHY 95, 95-144 (1999) [hereinafter Bagaric, *In Defence of a Utilitarian Theory of Punishment*].

73. *See generally* Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124 (2000).

74. *See* TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 211 (rev. ed., 1984); David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 L. & PHILOSOPHY 507, 507 (1997).

75. *See, e.g.*, Anthony Duff & Andrew Von Hirsch, *Responsibility, Retribution and the "Voluntary": A Response to Williams*, 56 CAMBRIDGE L.J. 103, 107 (1997).

76. J. L. Anderson, *Reciprocity as a Justification for Retributivism*, 16 CRIM. JUST. ETHICS 13, 13 (1997).

77. *Id.* at 13-14.

the justification for punishment does not turn on the likely achievement of desirable outcomes. It is justified even when "we are practically certain that attempts [to attain consequentialist goals, such as deterrence and rehabilitation] will fail."[78] Thus, is it conventionally understood that retributive theories are backward-looking, merely focusing on past events in order to determine whether punishment is justified, which is in contrast to utilitarianism, which is concerned only with the likely future consequences of imposing punishment. The third unifying aspect of most retributive theories is the claim that punishment must be equivalent to the level of wrongdoing.[79] Thus, proportionalism is a built-in definitional aspect of many retributive theories.

The role of proportionality within a retributive construct is further illustrated by an overview of two influential retributive theories. The retributive account that most clearly endorses the proportionality thesis is the *lex talionis* or the "eye for an eye, a tooth for a tooth" approach to punishment. This theory, however, provides little guidance regarding the proper workings of proportionalism. The *lex talionis* theory has no clear application in relation to most offenses: "what penalty would you inflict on a rapist, a blackmailer, a forger, a dope peddler, a multiple murderer, a smuggler, or a toothless fiend who has knocked somebody else's teeth out?"[80] It has been suggested that a more plausible interpretation of the *lex talionis* theory is that the punishment and the crime should be equal or equivalent.[81] However, even this approach does not illuminate the actual content of the principle.

Although modern retributive theories are more nuanced, proportionality still remains an indispensable aspect of the theories. One of the leading retributive theories is that advanced by Andrew von Hirsch. He contends that the principal justification of punishment is censure— that is, to convey blame or reprobation to those who have committed a wrongful act.[82] Von Hirsch believes that censuring holds offenders responsible and accountable for their actions and that, by giving them an opportunity to respond to their misdeeds through acknowledging their wrongdoing in some form, it recognizes their moral agency.[83] For von Hirsch, punishment has a dual objective; in addition to

78. R. A. DUFF, TRIALS AND PUNISHMENTS 7 (1986).

79. Anderson, *supra* note 76, at 13-14.

80. JOHN KLEINIG, PUNISHMENT AND DESERT 120 (Martinus Nijhoff ed., 1973).

81. C. L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 153 (1987).

82. ANDREW VON HIRSCH, CENSURE AND SANCTIONS 9-10 (1993).

83. *Id.*

censuring offenders, punishment is justified as a means of preventing crime. Andrew von Hirsch believes that the following three steps justify the proportionality principle within his theory of punishment:

> 1. The State's sanctions against proscribed conduct should take a punitive form; that is, visit deprivations in a manner that expresses censure or blame.
>
> 2. The severity of a sanction expresses the stringency of the blame.
>
> 3. Hence, punitive sanctions should be arrayed according to the degree of blameworthiness (i.e. seriousness) of the conduct.[84]

Thus, the fulcrum around which retributive theories are grounded is ensuring there is proportionality between the punishment and the crime. It is equally clear that Justice Scalia was correct to assert that proportionality is an entrenched aspect of retributive theories of punishment.

2. Contemporary Sentencing Law Invokes Cardinal Utilitarian Objectives

In addition to his keen observations concerning the role of proportionality in retributive theories of punishment, Justice Scalia was also correct to assert that sentencing law and practice pursues traditional utilitarian objectives in the form of incapacitation, deterrence, and rehabilitation (even though sentencing is not based on a coherent and express philosophical theory of punishment).[85] A good illustration is federal sentencing law. In the Federal Sentencing Guideline system, the range for an offense is determined by reference to two main considerations. The first is the offense level, which entails an assessment of the seriousness of the offense (this often includes a number of variables and, depending on the offense, can include the nature of any injury caused or monetary amount involved).[86] The second is the

84. *Id*. at 15. The same three premises were advanced by Ashworth and Von Hirsch several decades later in ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 135 (2005), with inconsequential changes to premise one.

85. This may still leave room for a more modest retributive approach to apply proportionality, which is termed "limiting retributivism." Frase, *Limiting Excessive Prison Sentences*, *supra* note 39, at 41-42. However, for reasons discussed below, this theory of proportionality like all such theories is unintelligible unless content is provided to the two limbs of the principle.

86. *See Federal Sentencing Guidelines Manual*, U.S. SENT'G COMM'N (Nov. 1, 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf [hereinafter U.S SENT'G COMM'N 2015]. For analysis and criticism of the Guidelines, see Amy Baron Evans,

offender's criminal history score, which is based on the seriousness of the past offenses and the time that has elapsed since the prior offending.[87]

There are forty-three different offense levels, and the corresponding penalties increase in relation to offense levels.[88] An increase of six levels approximately doubles the sentence.[89] Where the range includes a term of imprisonment, the range is relatively narrow in that it cannot exceed the minimum penalty by more than the greater of six months or twenty-five percent.[90] The objectives that the Guidelines seek to achieve are clearly utilitarian in nature. The Guidelines Manual relevantly states:

> The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.[91]

Thus, there is little question that proportionality is most commonly associated with a retributive theory of punishment and that contemporary sentencing law and practice adopts objectives which are commonly associated with a utilitarian theory of punishment. This provides a strong foundation for Justice Scalia's view that the discord between the retributive approach to punishment and sentencing practice is incompatible with proportionalism. However, this view is not incontestably correct. Although proportionality has traditionally been thought to have little or no role in a utilitarian theory of punishment, on closer analysis, there is arguably scope for the principle of proportionality within a utilitarian approach to punishment and sentencing.[92]

Litigating Mitigating Factors: Departures, Variances, and Alternatives to Incarceration, NAT'L SENT'G RESOURCE COUNS. (2010), https://www.fd.org/docs/training-materials/2012/MT2012/Litigating_Mitigating_Factors.pdf.

87. *See* U.S SENT'G COMM'N 2015, *supra* note 86; *see also* Baron Evans, *supra* note 86.

88. *See* U.S SENT'G COMM'N 2015, *supra* note 86.

89. *See id*. at 11.

90. *See id*. at 2.

91. *See id*. at 1.

92. *See* K. G. Armstrong, *The Retributivist Hits Back*, *in* THEORIES OF PUNISHMENT 33-34 (S. E. Grupp ed., 1971)*; infra* Part II.

3. Possible Doctrinal Misgivings Regarding the Separation Between Utilitarianism and Proportionalism

While the notion of proportionality may appear to be incompatible with utilitarian theories of punishment, proportionality need not be regarded as wholly inconsistent with utilitarian objectives of punishment. Influential utilitarian philosopher Jeremy Bentham argued in favor of the proportionality principle on the basis that if crimes are to be committed, it is preferable that offenders commit less serious rather than more serious ones.[93] In his view, sanctions should be graduated commensurate with the seriousness of the offense so that those disposed to crime will opt for less serious offenses. In the absence of proportionality, potential offenders would not be deterred from committing serious offenses any more than minor ones, and hence would just as readily commit them. This argument, however, has been persuasively criticized by Andrew von Hirsch. He points out that there is no evidence that offenders make comparisons regarding the level of punishment for various offenses.[94] Further, the weight of empirical evidence suggests that the theory of marginal deterrence is flawed. There is virtually no link between higher penalties and lower crime.[95] The most effective way to reduce crime is to increase the likelihood that people will be caught if they commit crime, as opposed to simply increasing penalties.[96]

For example, the National Research Council published a report in 2014 which analyzed a large number of studies that examined the connection between harsh criminal sanctions and the crime rate and noted that the weight of evidence does not support the view that harsh

93. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165 (J. H. Burns & H.L.A. Hart eds., 1970) (1789); *see also* Frase, *Limiting Excessive Prison Sentences*, *supra* note 39, at 44-46.

94. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 32 (1987).

95. NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 139-40 (2014) [hereinafter NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION]; Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPECTIVES 163, 177 (2004) (estimating the increase in police numbers to be about fourteen percent). For further discussion, see John E. Eck & Edward R. Maguire, *Have Changes In Policing Reduced Violent Crime? An Assessment Of The Evidence*, *in* THE CRIME DROP IN AMERICA 207, 248 (Alfred Blumstein & Joel Wallman eds., 2000); Raymond Paternoster, *A Century of Criminal Justice: Crimes and Punishment: So, How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 799 (2010).

96. *See, e.g.*, Levitt, *supra* note 95, at 177. *See also* Eck & Maguire, *supra* note 95, at 248; Paternoster, *supra* note 95, at 799.

penalties reduce crime. The Report states:

> Ludwig and Raphael . . . find no deterrent effect of enhanced sentences for gun crimes; Lee and McCrary . . . and Hjalmarsson . . . find no evidence that the more severe penalties that attend moving from the juvenile to the adult justice system deter offending; and Helland and Tabarrok . . . find only a small deterrent effect of the third strike of California's three strikes law. As a consequence, the deterrent return to increasing already long sentences is modest at best.[97]

Yet, there is an alternative basis for injecting proportionalism into utilitarianism.

It has been contended that proportionality is necessary to ensure that the criminal justice system is not placed into disrepute. Disproportionate sentences would, so the argument runs, offend the principle that privileges and hardships ought to be distributed roughly in accordance with the degree of merit or blame attributable to each individual.[98] Violations of this principle lead to antipathy towards institutions or practices, which condone such outcomes. Christopher Harding and Richard Ireland, for example, believe:

> Proportion in punishment . . . is a widely found and deeply rooted principle in many penal contexts. It is . . . integral to many conceptions of justice and as such the principle of proportion in punishment seen generally acts to annul, rather than to exacerbate, social dysfunction.[99]

Empirical evidence offers some support to this sentiment. After a 1984 study of approximately 1,500 people who lived in Chicago regarding their contact with legal authorities, scholars noted that normative issues are linked with compliance with the law.[100] From this study, there is some evidence to support the argument that people do not merely obey the law because it is in their self-interest to do so; they also obey the law because they believe it is proper to do so. The judgment that it is appropriate to obey the law is not only affected by the internal content of the law, but by the attitude of the community towards those who enforce the law. Thus, the perception that the content of the law is fair and legitimate can make it more likely that laws will be observed.

Accordingly, there is a utilitarian foundation for proportionalism *if*

97. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION, *supra* note 95, at 139.

98. This is similar to the concept of desert. However, unlike retributivist theories, it is based on forward-looking considerations.

99. CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE, AND PRACTICE 205 (1989).

100. TOM TYLER, WHY PEOPLE OBEY THE LAW 107 (1990).

the proportionalist ideal is so inherently ingrained in the human psyche that non-observance of the doctrine will disincline individuals from complying with legal norms.[101] In light of the above discussion, there is theoretical merit and some evidence in support of this argument. While this is a position that has in fact been endorsed by one of us,[102] it is not the orthodox or mainstream understanding regarding the rationale for proportionality. Thus, Justice Scalia's view that proportionality is not an aspect of the Eighth Amendment because the current sentencing objectives are incompatible with a retributive theory of punishment (which underpins proportionalism) is doctrinally correct so far as conventional understandings regarding the rationale for proportionality are concerned.

4. Theoretical Misgivings About Utilitarianism and Proportionality do not Undermine Scalia's Approach

Justice Scalia's position, however, can be challenged if one adopts what is, in our view, a more jurisprudentially progressive and reformist position regarding the logical and normative scope for proportionality within a principally utilitarian approach to sentencing. However, this failure by Justice Scalia to adopt this theoretical position does not constitute a persuasive criticism of his approach. The above theoretical position regarding the overlap between proportionality and utilitarianism is contentious, and it is not the role of a judge to shape the law according to emerging but unproven academic arguments. In particular, such an approach would run counter to the judicial conservatism which was a hallmark of Justice Scalia's approach to decision-making.[103]

101. There is some scientific support for an intrinsic desire to punish. *See* Mirko Bagaric, *Scientific Proof that Humans Enjoy Punishing Wrongdoers: The Implications for Punishment and Sentencing*, 1 INT'L J. OF PUNISHMENT & SENT'G 98 (2005).

102. Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 NEW ZEALAND UNIV. L. REV. 411 (2013) [hereinafter Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*].

103. It is beyond the scope of this Article to examine the desirability of this approach to legal interpretation. However, for one of our views regarding the merits of an originalistic approach to constitutional interpretation, see Mirko Bagaric, *Originalism: Why Some Things Should Never Change - Or at Least Not Too Quickly*, 19 UNIV. OF TAS. L. REV. 173 (2000).

E. The Unassailability of Justice Scalia's Second Reason for Rejecting Proportionality—Proportionality is not Sufficiently Intelligible to Provide Pragmatic Guidance

1. Proportionality as Currently Understood is Vacuous

As noted above, there are two other reasons Justice Scalia provided for rejecting the proportionality principle as being grounded within the Eighth Amendment. The first of these is the most persuasive. According to Justice Scalia, proportionality is unintelligible.[104] Ostensibly, this might seem untenable. Proportionality is widely endorsed and embraced. It is a requirement of the sentencing regimes of ten states in the United States,[105] and as we have seen, it is a core aspect of retributive theories of punishment and has even been endorsed by some utilitarian philosophers.[106] Proportionality is also a core principle that informs (though it does not strongly influence) the Federal Sentencing Guidelines. In addition to this, a survey of state sentencing law by Thomas Sullivan and Richard Frase shows that at least nine states have constitutional provisions relating to the prohibition of excessive penalties or treatment (an endorsement of proportionalism),[107] and that twenty-two states have constitutional clauses which prohibit cruel and unusual penalties, including eight states with a proportionate-penalty clause.[108] Despite this, it has been contended that proportionalism is a vacuous concept: it exists in the abstract only, devoid of even the sparsest of content.

The most obscure and problematic aspect of proportionality is that there is no stable and clear manner in which the hardship of the punishment can be matched to the severity of the crime. Jesper Ryberg, in the course of his rigorous and probing analysis of the proportionality principle, observes that one of the key criticisms of proportionalism is that it "presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment."[109]

104. Ewing v. California, 538 U.S. 11, 31 (2003).

105. This is discussed in Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington, and West Virginia); *see also* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 154 (Oxford Univ. Press 2008).

106. SULLIVAN & FRASE, *supra* note 105, at 157.

107. *Id*. at 154-55.

108. *Id*. at 154.

109. JESPER RYBERG, THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION 184 (2004); *see also* Ryan, *supra* note 8.

He further notes that to give content to the theory, it is necessary to rank crimes, rank punishments, and anchor the scales.[110]

The vagaries associated with proportionalism are so pronounced that it is verging on doctrinal and intellectual fiction to suggest that an objective answer can be given to common sentencing dilemmas, such as how many years imprisonment is equivalent to the pain felt by an assault victim, or whether a robber should be dealt with by way of imprisonment or fine, or the appropriate sanction for a drug trafficker. There is no demonstrable violation of proportionality if a mugger, robber, or drug trafficker is sentenced to either six to ten months or six to ten years imprisonment. The fact that the principle can be so flexible suggests that it is no principle at all, but rather a doctrinal expedient—a sophistry invoked by courts (and legislatures) as a means of justifying their intuitive sentencing impulses. The unstable and illusory nature of proportionality is, in our view, one of the reasons that the Supreme Court has consistently declined to invalidate crushing prison terms, even for relatively minor offenses. As noted by Richard Frase:

> As is well known, the Court has been very reluctant to invalidate lengthy prison terms on Eighth Amendment grounds. Only one prisoner, in *Solem v. Helm*, has won such a claim in modern times. And in recent years the Court has upheld sentences of shocking severity—life without parole for a first-time offender charged with cocaine possession (admittedly, involving a very large quantity), and a mandatory minimum prison term of twenty-five years to life for the crime of shoplifting several golf clubs.[111]

As such, Justice Scalia's contention that the proportionality principle provides little guidance in terms of recognizing Eighth Amendment violations is premised on viable theoretical bases.

2. Justice Scalia's Reasoning is Sound Notwithstanding Compelling Theoretical Support for Proportionality

Despite infirmities with proportionality theories, such infirmities should not give rise to the inference that it is not doctrinally feasible to shore up the proportionality principle and inject it with concrete meaning. To do so requires a fundamental reassessment of the principle. The starting point is to identify its constituent features. Broken down to its core elements, proportionality has two limbs: the seriousness of the

110. RYBERG, *supra* note 109, at 185.

111. *See* Frase, *Limiting Excessive Prison Sentences*, *supra* note 39, at 57.

crime and the harshness of the sanction. Further, the principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

While the complexity associated with operationalizing the principle has been noted by numerous scholars, one of us has argued elsewhere that there is one criterion which should be used to measure offense severity and the hardship of a sanction: individual well-being.[112] The type and degree of punishment imposed on offenders should cause them to have their well-being set back by an amount equal to that which the crime set back the well-being of the victim.

The main difficulty to this approach relates to mapping and calculating the notion of well-being. There is admittedly a degree of approximation involved in such an assessment. However, the level of accuracy in making such determinations is increasing. The concept of well-being has achieved such broad acceptance that, in some contexts, it is replacing or complementing conventional and widely-accepted economic indicia for evaluating human progress and achievement. The Organisation for Economic Co-operation and Development (OECD) has developed a "Better Life Index," which attempts to set out and prioritize the matters that are most essential for human "well-being."[113] The index lists eleven criteria for measuring life quality.[114] It allows nations to develop their social and economic priorities, and has distinguished between responses from men and women. It is apparent that men and women have near identical priorities. From most to least important is: life satisfaction, health, education, work-life balance, environment, jobs, safety, housing, community, income, and civic engagement.[115] In order to attain life satisfaction, key interests are the right to life, physical

112. Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, *supra* note 102. The approach has some similarity with the majority opinion of Justice Powell in *Solem v. Helm*, who stated that the seriousness of the offense is determined by harm caused and the defendant's degree of culpability. 463 U.S. 277, 293-94 (1983); *see also* Frase, *Limiting Excessive Prison Sentences*, *supra* note 39, at 58. However, lacking in this analysis is the criteria by which harm is to be determined.

113. *Create Your Better Life Index*, OECD BETTER LIFE INDEX, http://www.oecdbetterlifeindex.org/#/11111111111 (last visited Jan. 9, 2017). These measures are designed to be more informative than economic statistics, especially in the form of Gross Domestic Product (GDP).

114. *Id*.

115. Mirko Bagaric, *Proportionality in Sentencing: The Need to Factor in Community Experience, Not Public Opinion*, *in* POPULAR PUNISHMENT: ON THE NORMATIVE SIGNIFICANCE OF PUBLIC OPINION 76, 90 (Jesper Ryberg & Julian V. Roberts eds., 2014).

integrity, liberty, and the right to property.[116]

While relevant studies have not been conducted with a view to providing insight into calculations of offense seriousness or sanction severity, nevertheless, two tentative conclusions can be made regarding the relevance of the studies to the concept of proportionalism.

First, property offenses—which deprive victims of wealth as opposed to diminishing their personal security—are over-rated in terms of their seriousness. Wealth has a far smaller impact on personal happiness than a range of other factors,[117] and hence, the criminal justice system should view these offenses less seriously. The main situation where property offenses make a significant adverse impact on victims is where they result in the victim living in a state of poverty. The second conclusion that follows from the above analysis is that offenses that imperil a person's sense of security, or otherwise negatively affect a person's health and capacity to lead a free and autonomous life, should be punished severely.

These conclusions are supported by studies that assess the impact of different forms of crime on victims. The available data suggest that victims of violent crime and sexual crime have their well-being more significantly set back than victims of other types of crime.[118] For example, one study showed that victims of violent crime, sexual crime in particular, have difficulty being involved in intimate relationships,[119] higher divorce rates,[120] diminished parenting skills (although this finding was not universal),[121] lower levels of success in the employment setting,[122] and much higher levels of unemployment.[123] Victims of

116. This is the trend of information emerging from the following works and extensive research data in these works. *See, e.g.*, Michael Argyle et al., *Happiness as a Function of Personality and Social Encounters*, *in* RECENT ADVANCES IN SOCIAL PSYCHOLOGY: AN INTERNATIONAL PERSPECTIVE 189 (Joseph P. Forgas & J. Michael Innes eds., 1989); DAVID G. MYERS, THE PURSUIT OF HAPPINESS (1992); TIM KASSER, THE HIGH PRICE OF MATERIALISM (2002); Martin E. P. Seligman & Mihaly Csikszentmilhayi, *Positive Psychology: An Introduction*, 55 AM. PSYCHOLOGIST 5 (2000); MARTIN E. P. SELIGMAN, AUTHENTIC HAPPINESS (2002). The results of these studies are summarized in Mirko Bagaric & James McConvill, *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, 10 DEAKIN L. REV. 1 (2005). For related readings, see this same edition of the Deakin Law Review, which is a thematic edition regarding the link between law and happiness research.

117. *Money Can't Buy Happiness*, AM. PSYCHOL. ASS'N (June 14, 2011), http://www.apa.org/news/press/releases/2011/06/buy-happiness.aspx (last visited Jan. 9, 2017).

118. Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189 (2010).

119. *Id.* at 191-92.

120. *Id.*

121. *Id.* at 191.

122. *Id.* at 192; *see also* Mike Dixon et al., *The Unequal Impact of Crime*, INST. FOR PUB.

property crimes likewise suffer reduced levels of well-being but at generally less pronounced rates than victims of sexual and violent crime.[124]

The other side of the proportionality equation—measuring punishment severity—is less contentious. Ryberg contends that this is because of the underlying belief that the "answer is pretty straightforward," as imprisonment is clearly the harshest disposition.[125] As Ryberg notes, the answer would seem to rest on the "negative impact on the well-being of the punished."[126] To this end, it is clear that imprisonment is the harshest commonly applied sanction because, as discussed further below, it has a severe impact on the well-being of offenders.[127]

The final problem regarding proportionality is how to match the severity of the punishment with the seriousness of the offense. In light of the above discussion, this is, theoretically, relatively straightforward. The type and degree of punishment imposed on offenders should set their well-being back in an amount equal to that which the crime set back the well-being of the victim.[128]

The above approach assesses both the hardship of punishment and the severity of the crime as they relate to well-being. This enables at least a crude match to be made, which stems from a number of premises. First, the crimes which have the most serious adverse consequences for victims are assault and sexual offenses. Secondly, the adverse effects of imprisonment seem to have been greatly undervalued. In light of this, a reasonable starting point is that, generally, imprisonment should be imposed only for sexual and violent offenses and most prison terms should be reduced compared to those currently imposed.[129] Of course,

---

POL'Y RES. 26 (2006), http://www.ippr.org/files/images/media/files/publication/2011/05/crimeshare_1500.pdf?noredirect=1.

123. Hanson et al., *supra* note 118, at 192.

124. *See* Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT'L REV. VICTIMOLOGY 141, 155-56 (1998).

125. RYBERG, *supra* note 109, at 102.

126. *Id*. at 102-03.

127. *See infra* Part II.

128. This is in keeping with the approach of some other theorists. Von Hirsch asserts that an interests analysis, similar to the living standard analysis he adopts for gauging crime seriousness, should be used to estimate the severity of penalties. Andrew Von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 34-35 (1991). Ashworth states that proportionality at the outer limits "excludes punishments which impose far greater hardships on the offender than does the crime on victims and society in general." ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 97 (2d ed., 1995).

129. We suggest that most offenses should be dealt with in a manner which does not involve a term of imprisonment and that imprisonment should be mainly reserved for serious sexual and

this says nothing about the appropriate length of imprisonment for certain categories of sexual and violent offenses. However, the default position should be that most prison terms for these offenses should be less than is currently the norm given that current sentencing practices greatly underestimate the harshness of imprisonment.[130]

Thus, while there is a tenable basis for injecting content into the proportionality principle, this theory has not garnered broad acceptance, and it has not been adopted into sentencing practice. It follows that Justice Scalia's position that proportionality is vacuous, so much so that even concepts such as gross disproportionality are effectively meaningless, is jurisprudentially sound and is, in fact, mandated by a judicially conservative approach to legal interpretation and decision-making.

F. Proportionality can be Rendered Nugatory by the Pursuit of Deterrence and/or Community Protection—Justice Scalia's Third Reason for Rejecting Proportionality is also Sound

Justice Scalia is also on firm conceptual ground regarding his last reason for holding that proportionalism is not grounded in the Eighth Amendment. According to Justice Scalia, the proportionality principle cannot have a constitutional basis because it can be rendered nugatory by the pursuit of other sentencing objectives.[131] As we have seen, sentencing has a number of objectives. The three key sentencing aims that justify longer penalties are incapacitation, general deterrence, and specific deterrence.[132] These objectives can potentially justify sanctions which are harsher than the seriousness of the offense, so much so that they can logically and jurisprudentially overwhelm the proportionality principle. It has even been asserted that the pursuit of utilitarian sentencing goals is so powerful that, in some circumstances, it is permissible to punish the innocent. To this end, a famous example is H.J. McCloskey's small-town sheriff scenario:

> Suppose a sheriff [was] faced with the choice of either framing [an African American] for a rape which had aroused white hostility to [African Americans] (this particular [African American] being believed to be guilty) and thus preventing serious anti-[African American] riots which would probably lead to loss of life, or of

violent offenses.

130. *See* Bagaric & Gopalan, *supra* note 6.

131. Ewing v. California, 538 U.S. 11, 31-32 (2003).

132. *See* Bagaric & Gopalan, *supra* note 6, at 184.

> allowing the riots to occur. If he were an act utilitarian he would be committed to framing the [African American].[133]

The main utilitarian goal that inclines in favor of framing the African American in the above example is community protection, achieved through community satisfaction regarding the operation of the "justice" system. In less extreme cases, it is easy to illustrate how proportionality can be dwarfed to the point of irrelevance by other sentencing objectives. To this end, there is no need to look beyond the facts in *Ewing*. Twenty-five years for stealing golf clubs is, by any measure, a draconian penalty. This is especially so given that in assessing the seriousness of an offense, the assessment is confined to the circumstances of *the* offense, not previous offenses of the accused. An offender's prior criminality does not form part of the calibration of the offense severity limb of the proportionality thesis.[134]

From the perspective of doctrinal rectitude, we have argued that specific deterrence and general deterrence should not logically increase penalty lengths because these rationales are empirically flawed.[135] We have also argued that the objective of community protection should drive up penalties only slightly.[136] Incapacitating offenders in prison is the most effective form of community protection given that offenders cannot commit crime in the community during their period of confinement. However, incapacitation is only necessary if the offender would have re-offended if he or she was not incarcerated. Incapacitation, in its broadest sense (as being applicable to all offenders and all offense types), is flawed because we are poor at predicting which offenders are likely to commit offenses in the future (especially in relation to serious offenses),[137] and while incapacitation seems to work in the case of certain categories of minor offenses, the cost of imprisoning minor offenders normally outweighs the seriousness of the offense.[138] To the

133. H. J. MCCLOSKEY, META-ETHICS AND NORMATIVE ETHICS 180–81 (1969).

134. Mirko Bagaric, *The Punishment Should Fit the Crime – Not The Prior Convictions of The Person That Committed The Crime: An Argument For Less Impact Being Accorded to Previous Convictions In Sentencing*, 51 SAN DIEGO L. REV. 343, 345-46, 357 (2014) [hereinafter Bagaric, *The Punishment Should Fit the Crime*].

135. *See* Bagaric & Gopalan, *supra* note 6.

136. *Id*.

137. *See* Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SECURITY RES. 317, 322-23 (2011). The most thorough treatment of the subject matter is found in DANGEROUS PEOPLE: POLICY, PREDICTION AND PRACTICE (Bernadette McSherry & Patrick Keyzer eds., 2011). *See also* BERNADETTE MCSHERRY & PATRICK KEYZER, SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE (2009).

138. *See* William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime, in* CRIME AND JUSTICE: A REVIEW OF RESEARCH 419-20 (Michael Tonry ed., 2000);

extent that incapacitation is justifiable, it should be confined to recidivistic serious sexual and violent offenders, where a recidivist loading of twenty to fifty percent should be applied, given that is consistent with their rate of re-offending.[139]

It follows that the most common considerations which are used to justify harsh penalties, in the form of specific deterrence, general deterrence, and incapacitation, are flawed or are given too much primacy in the sentencing calculus. Logically and normatively, offenders *should* be punished commensurate with the seriousness of their crime, and the level of punishment should not be increased to satisfy common sentencing objectives in the form of general deterrence, specific deterrence, and incapacitation (except to a relatively minor extent regarding recidivist serious sexual and violent offenders).

However, again, this theoretical framework does not represent mainstream sentencing practice. The orthodox approach to sentencing facilitates the enactment and implementation of sentences that can totally trump the role of proportionality. This reality supports and justifies Justice Scalia's approach to proportionality in the context of the Eighth Amendment.

III. PRISONERS' RIGHTS AND THE EIGHTH AMENDMENT

This Part begins by outlining the privations typically associated with imprisonment. Next, this Part reviews the Supreme Court's prisoners' rights case law. This Part then continues by examining Justice Scalia's approach to Eighth Amendment prisoners' rights claims through the lens of his critics. After a critical review of Justice Scalia's approach, this Part then probes whether the subjective limb of the cruelty test is valid in light of the substantial punitive effects of incidental punishment. Next, this Part assays the strength of the objective test in protecting

---

Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F.L. REV. 585, 594 (2009); NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION, *supra* note 95, at 4-5; *Prison and Crime: A Complex Link*, PEW CHARITABLE TRUSTS (Sept. 11, 2014), http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/prison-and-crime (last visited Jan. 9, 2017); Don Weatherburn, Jiuhazo Hua, & Steve Moffatt, *How much crime does prison stop? The incapacitation effect of prison on burglary*, NSW BUREAU OF CRIME STAT. & RES. (Jan. 2006), http://www.austlii.edu.au/au/journals/NSWCrimJustB/2006/4.html (last visited Jan. 9, 2017); Jacqueline Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, *in* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 209 (Alfred Blumstein et al. eds., 1978); *see also* THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2000).

139. Bagaric, *The Punishment Should Fit the Crime*, *supra* note 134, at 410.

prisoners' rights. This Part concludes by determining that protections afforded prisoners under the Eighth Amendment are unavoidably variable, regardless of the validity of the test applied, because of the vague nature of "rights."

A. Overview of the Deprivations of Imprisonment

When it comes to the intersection between prisoners' rights and the Eighth Amendment, Dolovich correctly notes that "[a]lthough the Clause prohibits cruel and unusual punishment, its normative force derives chiefly from its use of the word cruel."[140] There is no doubt that prison is a harsh, and ostensibly cruel, environment, and hence, on its face, the Eighth Amendment has ample scope for operation in the context of the prison environment. This is especially so given that a closer look at the conditions that many inmates endure and the longer-term effects of prison indicate that prison is a more traumatic experience than is apparent from the surface nature of the sanction. The most direct and obvious negative impact of imprisonment is the deprivation of liberty. In addition, there are other "pains" of imprisonment, including the deprivation of access to goods and services;[141] the deprivation of sexual relationships;[142] the deprivation of security;[143] and the curtailment of family relationships and the right to procreation.

There are also long-term deprivations stemming from imprisonment which transcend the period inmates spend behind bars. The negative consequences of imprisonment include significantly reducing life expectancy;[144] vulnerabilities associated with financial matters, drug temptations, decision-making, and social interactions;[145] negative

140. Dolovich, *supra* note 11, at 883.

141. GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 67-68 (2007).

142. *Id*. at 70-71; *see also* Robert Johnson & Hans Toch, *Introduction* to THE PAINS OF IMPRISONMENT 17 (Robert Johnson & Hans Toch eds., 1982).

143. SYKES, *supra* note 141, at 76-77.

144. A study which examined the 15.5 year survival rate of 23,510 ex-prisoners in the U.S. State of Georgia, found much higher mortality rates for ex-prisoners than for the rest of the population. There were 2,650 deaths in total, which was a forty-three percent higher mortality rate than normally expected (799 more ex-prisoners died than expected). The main causes for the increased mortality rates were: homicide, transportation accidents, accidental poisoning (which included drug overdoses), and suicide. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 479, 481-82 (2011); *see also* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION, *supra* note 95, at 220-26.

145. Michael Roguski & Fleur Chauvel, *The Effects of Imprisonment on Inmates' and their Families' Health and Wellbeing*, NAT'L HEALTH COMM. 61 (Nov. 2009),

impacts on family members of prisoners, including higher rates of divorce;[146] homelessness;[147] higher rates of depression, anxiety, and antisocial behavior among children of inmates;[148] and difficulty in securing employment and lower rates of lifetime earnings.[149]

We have suggested that these deprivations are so profound that they raise important human rights concerns.[150] The fact that rights infringements relating to cardinal human interests such as the right to security, employment, family, and procreation are denied or limited in the prison setting does not excuse or justify this state of affairs. Rather, it makes it worse because it cumulates the pain stemming from the deprivation of liberty.

While prisoners are subject to a number of potential human rights denials, these violations have, by and large, not been ameliorated by the Supreme Court in its application of the Eighth Amendment. As noted by Sharon Dolovich:

> To the extent that the Supreme Court has considered what makes a punishment cruel, it has done so primarily in assessing criminal sanctions. In some cases, the Court has found the use of certain penalties to be per se unconstitutional, something the state may never do to anyone as punishment. But for the most part, when courts consider challenges to criminal sentences, whether the death penalty or a prison sentence or some other penalty, the linchpin of the analysis is the criminal offense.[151]

In particular, Justice Scalia did not adopt a position consistent with enhancing prisoners' rights. We now examine in greater detail the limited role that the Eighth Amendment has had in protecting the rights of prisoners and the basis for this approach.

B. Supreme Court Jurisprudence on Prisoners' Rights

As we shall see, the Eighth Amendment is not a provision that is

---

http://www.antoniocasella.eu/salute/Roguski_2009.pdf (last visited Jan. 9, 2016). A limitation of this research is that it had a small sample size—consisting only of 63 participants. *Id.* at 3.

146. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION, *supra* note 95, at 265.

147. *Id*. at 267.

148. *Id*. at 270.

149. *Id*. at 247. One study estimated the earnings reduction to be as high as forty percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DÆDALUS, Summer 2010, at 13.

150. Mirko Bagaric, Sandeep Gopalan & Marissa Florio, *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38(5) CARDOZO L. REV. (forthcoming 2017).

151. Dolovich, *supra* note 11, at 884.

conventionally invoked in relation to the administration of sentences.[152] In fact, only in rare instances has the Supreme Court interpreted the Eighth Amendment in a manner which protects prisoners' rights.[153]

The criteria for upholding a prisoner's right to his physical integrity was set out in *Farmer v. Brennan*,[154] where the Court held that in order for prison conditions to violate the Eighth Amendment, two elements must be satisfied.[155] First, it must be established that, in an objective sense, the inmate either was harmed as a result of being deprived of a basic human need or has experienced or was exposed to serious harm.[156] After satisfying this first requirement, it must then be established that the relevant prison official was subjectively aware of the violation and did not respond in a reasonable manner.[157] The Court emphasized that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments,'" and for this to occur, there must be a subjective intention to inflict punishment.[158] There can be no Eighth Amendment violation "unless the official knows of and disregards an excessive risk to inmate health or safety."[159]

In *Wilson v. Seiter*, Justice Scalia, writing for the majority, stated that the subjective requirement is necessary in relation to both "'short-term' or 'one-time conditions'" and "'continuing' or 'systemic' conditions . . . ."[160] Justice Scalia stated:

> [There is] neither a logical nor a practical basis for [the short term/long term] distinction. The source of the intent requirement is not the

152. *Id*. at 884-85.

153. For a historical overview of this area of law, see Frase, *Limiting Excessive Prison Sentences*, *supra* note 39, at 39, 59-61.

154. 511 U.S. 825 (1994). This is regarded by some as the most important decision regarding the application of the Eighth Amendment to prison conditions and prisoners rights. *See* Dolovich, *supra* note 11, at 889-90.

155. For a discussion of the elements, see Ryan, *supra* note 8. As noted by Richard Frase, neither of these standards "strongly emphasize[] proportionality." Frase, *supra* note 39, at 60.

156. *Farmer*, 511 U.S. at 834.

157. *Id.* at 847. To this end, as noted by Meghan Ryan, there are slightly different subjective tests applied in relation to medical care cases and excessive force cases: "[I]n the first category—the medical care cases—the Court has determined that prison authorities' 'deliberate indifference to serious medical needs of prisoners' constitutes cruel and unusual punishment in violation of the Eighth Amendment. In the second category—the excessive force cases—the Court has found it unconstitutional for prison authorities to 'maliciously and sadistically use force to cause harm' to prisoners. . . . In both the medical-care cases and the excessive-force cases, the Court is concerned about the prison officials' purposes behind their actions: Were they *deliberately indifferent* toward the inmate's basic needs? Or were they *maliciously and sadistically* employing force against the inmate?" Ryan, *supra* note 8, at 2164 (emphasis added).

158. *Farmer*, 511 U.S. at 837-39.

159. *Id.* at 837.

160. 501 U.S. 294, 296-302 (1991).

> predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.[161]

He added that:

> The thread common to all [Eighth Amendment prison cases] is that "punishment" has been deliberately administered for a penal or disciplinary purpose. . . . The long duration of a cruel prison condition may make it easier to *establish* knowledge, and hence some form of intent, . . . but there is no logical reason why it should cause the *requirement* of intent to evaporate. The proposed short-term/long-term distinction also defies rational implementation. Apart from the difficulty of determining the day or hour that divides the two categories (is it the same for *all* conditions?), the violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing.[162]

Hence, in rejecting the short term/long term distinction, Justice Scalia relied on the express terms of the Eighth Amendment and also practical difficulties associated with applying such a distinction.

In *Hudson v. McMillian*, the Supreme Court held that the Eighth Amendment was violated when a prison official beat an inmate.[163] Excessive force against an inmate violates the Eighth Amendment when it is used "maliciously and sadistically for the very purpose of causing harm."[164] Justice Scalia dissented in this case (along with Justice Thomas) on the basis that the Eighth Amendment can only be invoked where the prisoner suffers serious harm: "[i]n my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under

161. *Id.* at 300.

162. *Id.* at 300-01.The groundwork for this distinction was laid in *Wilson*. *See* Dolovich, *supra* note 11, at 896-98. In *Hope v. Pelzer*, the Supreme Court held that the use of a "hitching post" by prison guards to handcuff a prisoner for seven hours in the hot sun constituted cruel and unusual punishment. 536 U.S. 730, 745-48 (2002) It was also held that the prison officials could not rely on the defense of qualified immunity against the prisoner's civil claim because their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 739-41. Justice Scalia, again finding himself among the dissenters, agreed with Justice Thomas that the acts of prison officials in handcuffing a prisoner to a restraining bar was not a violation of a clearly established right. *Id.* at 752.

163. 503 U.S. 1 (1992).

164. Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (citing Johnson v. Glick, 481 F.2d 1028, 1033 (1973) (Friendly, J.)).

other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.'"[165]

Justice Scalia added:

> We made clear in *Estelle* that the Eighth Amendment plays a very limited role in regulating prison administration. . . . [T]he Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but *only* that narrow class of deprivations involving "serious" injury inflicted by prison officials acting with a culpable state of mind. We have since described these twin elements as the "objective" and "subjective" components of an Eighth Amendment prison claim. (citation omitted).[166]

He continued:

> We have never found a violation of the Eighth Amendment in the prison context when an inmate has failed to establish either of these elements.[167]

He further remarked:

> We synthesized our Eighth Amendment prison jurisprudence last Term in *Wilson* . . . . There the inmate alleged that the poor conditions of his confinement *per se* amounted to cruel and unusual punishment, and argued that he should not be required in addition to establish that officials acted culpably. We rejected that argument, emphasizing that an inmate seeking to establish that a prison deprivation amounts to cruel and unusual punishment always must satisfy *both* the "objective component . . . (was the deprivation sufficiently serious?)" *and* the "subjective component (did the officials act with a sufficiently culpable state of mind?)" of the Eighth Amendment. (citation omitted). Both are necessary components; neither suffices by itself.[168]

In relevant part, he concluded (quoting *Wilson v. Seiter*):

> If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [as punishment].[169]

Accordingly, Justice Scalia was firmly of the view that the Eighth Amendment, so far as prisoner's rights are concerned, only applies in

165. *Hudson*, 503 U.S. at 18.
166. *Id.* at 20.
167. *Id.*
168. *Id.* at 21
169. *Id.*

relation to the deliberate infliction of serious harm.

The high-water mark for upholding prisoner's rights pursuant to the Eighth Amendment is the decision in *Brown v. Plata*, where the Supreme Court, by a 5-4 majority, affirmed a decision by a district court requiring California to reduce its prison capacity to 137.5 percent of the prisons' rated capacity by the end of 2013.[170] As a result of the overcrowding, prisoners in California were denied access to basic health services and treatment, in relation to both physical and psychological problems. Justice Kennedy, writing for the majority, stated:

> To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates "may actually produce physical 'torture or a lingering death.'" (citations omitted). Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society. If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation. (citation omitted). Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. (citation omitted). Courts nevertheless must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." (citation omitted). Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.[171]

The majority held that consistent with the terms of the Prison Litigation Reform Act of 1995 (PLRA), the court could limit the prison population to a percentage of design capacity of the prisons, given that this was the only way to ameliorate the breach of the Eighth Amendment.[172] The majority emphasized that curing the overcrowding was essential in order to remedy the rights infringements that were occasioned upon sick and mentally ill prisoners.[173]

---

170. 563 U.S. 493, 545 (2011). For a discussion of this decision, see Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013).

171. *Plata*, 563 U.S. at 510-11.

172. *Id.* at 524-26.

173. *Id.* at 530.

The majority added:

> The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay.[174]

A somewhat perplexing aspect of the majority decision is that it would be based in part on such an inherently vague concept as "decency."

In *Brown v. Plata*, Justice Scalia dissented for several reasons. He noted that the mistreatment alleged in the case was not related to each individual prisoner, but rather a systemic failing that resulted in a relatively small portion of prisoners having their right to basic health care denied:

> The plaintiffs do not appear to claim—and it would absurd to suggest—that every single one of those prisoners has personally experienced "torture or a lingering death," . . . as a consequence of that bad medical system. Indeed, it is inconceivable that anything more than a small proportion of prisoners in the plaintiff classes have personally received sufficiently atrocious treatment that their Eighth Amendment right was violated—which, as the Court recognizes, is why the plaintiffs do not premise their claim on "deficiencies in care provided on any one occasion." (citation omitted). Rather, the plaintiffs' claim is that they are all part of a medical system so defective that some number of prisoners will inevitably be injured by incompetent medical care, and that this number is sufficiently high so as to render the system, as a whole, unconstitutional.[175]

Justice Scalia took the view that there was no tenable procedural principle that could justify certifying a class of plaintiffs in a manner whereby they could make a claim of systemic unconstitutionality.[176] He stated:

> Whether procedurally wrong or substantively wrong, the notion that the plaintiff class can allege an Eighth Amendment violation based on "system wide deficiencies" is assuredly wrong. It follows that the

174. *Id.* at 545.

175. *Id.* at 551-52.

176. It has been correctly noted that the decision in *Plata* was not as radical as indicated by Justice Scalia. Court orders to reduce prison populations are not unprecedented and in fact were once even "commonplace." Schlanger, *supra* note 170, at 196.

> remedy decreed here is also contrary to law, since the theory of systemic unconstitutionality is central to the plaintiffs' case.[177]

Justice Scalia described the decision as "perhaps the most radical injunction issued by a court in our Nation's history,"[178] and the outcome of the case so undesirable to require "every effort to read the law in such a way as to avoid that outrageous result."[179] He added that, in ruling in favor of the prison reduction order:

> [T]he Court has aggrandized itself, grasping authority that appellate courts are not supposed to have, and using it to enact a compromise solution with no legal basis other than the Court's say-so. That we are driven to engage in these extralegal activities should be a sign that the entire project of permitting district courts to run prison systems is misbegotten.[180]

Thus, Justice Scalia felt so strongly that the majority position was flawed that he expressly criticized the court for exceeding the proper limits of its authority.

C. Criticism of Scalia's Approach to Eighth Amendment Prisoner's Rights Claims

Scholars have been highly critical of Justice Scalia's approach to prisoners' rights claims under the Eighth Amendment. Christopher E. Smith has claimed that Justice Scalia, in *Wilson v. Seiter*, was responsible for reframing the test for breach of the Eighth Amendment by injecting the subjective element from precedents that were not applicable.[181] Smith states that Justice Scalia:

> [A]ltered the test used to examine whether conditions of confinement in prisons violate the Eighth Amendment prohibition on cruel and unusual punishments. . . . In Wilson, Justice Scalia avoided discussing [earlier] precedents on prison conditions and instead treated as controlling precedent two cases that were about very specific Eighth Amendment issues—medical care and the use of force, neither of

177. *Plata*, 563 U.S. at 553.
178. *Id.* at 550.
179. *Id.*
180. *Id.* at 562.
181. *Wilson v. Seiter* is one of two cases in relation to which it has been suggested that "Justice Scalia exerted significant influence over the definition and existence of prisoners' rights through two majority opinions in which he ingeniously exploited the malleability of judicial language in order to create new precedent that curtailed rights for prisoners." Smith, *supra* note 3, at 870. The other case was *Lewis v. Casey*, 518 U.S. 343 (1996), although the case did not concern an Eighth Amendment issue.

> which were the focus of the claims in Wilson. He selectively chose to use these other precedents in order to announce a new rule requiring a subjective evaluation of prison conditions. Justice Scalia's opinion required prisoners to prove "deliberate indifference" on the part of corrections officials in order to show that prison conditions violated the Eighth Amendment.[182]

Smith's charge about the selective use of precedents is not forceful. The analogies drawn by Justice Scalia were tenable, and there is no evidence for asserting that they constitute a manifest manipulation of precedent in order to achieve a desired outcome. This is supported by the fact that the majority of the members of the Court in *Wilson v. Seiter* joined the opinion of Justice Scalia.

Dolovich has been particularly critical of the subjective limb that prisoners must satisfy in order to invoke the Eighth Amendment. According to her, due to the very nature of prison (which nearly totally disempowers prisoners), the state has a "carceral burden" which makes the state responsible for conditions which offenders experience in prison.[183] She states:

> [A]ll the conditions to which an offender is subjected at the hands of state officials over the course of his incarceration are appropriately open to Eighth Amendment scrutiny. Understood in this light, the requirement that the punishment be "deliberately" imposed in order "to chastise or deter" does not disappear. Its satisfaction may simply be taken for granted whenever a convicted criminal offender is sentenced to prison.[184]

In our view, the general approach by Dolovich regarding the criteria that should be satisfied in order for the Eighth Amendment to operate in the context of prisoners' rights is sound. However, that outcome (and an explanation of the flaw with Justice Scalia's reasoning in this area) can be achieved by a more linear approach. Even if it is supposed that certain forms of hardship that occur in the prison setting are not intended by the state, it can yet be established that these hardships still constitute "punishment" in the proper sense of the word. The advantage of re-examining whether in fact most hardships sustained by inmates constitute "punishment" is that this approach does not rely on contentious doctrines (such as the carceral burden) and adopts the same nomenclature as Justice Scalia and other members of the Supreme Court.

182. Smith, *supra* note 3, at 870-71.
183. Dolovich, *supra* note 11, at 891-92.
184. *Id*. at 899.

D. The Subjective Limb of the Cruelty Test is Flawed: Incidental Punishment can Still be Punishment

An examination of the criteria that should be satisfied in order for a hardship or deprivation to potentially come within the purview of the Eighth Amendment is complicated by the fact that there is no universally accepted definition of punishment and by the fact that little scholarly attention has been paid to the issue of how extra-curial punishment (such as harsh prison conditions) should be classified.[185]

In defining punishment, some commentators focus on its association with *guilt*. Thus, Herbert Morris defines punishment as "the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person's guilty behavior."[186] Duff defines punishment as "the infliction of suffering on a member of the community who has broken its laws,"[187] and, similarly, McTaggart defines punishment as "the infliction of pain on a person because he has done wrong."[188] A wider definition is provided by Nigel Walker, who observes that while punishment generally requires that the offender has voluntarily committed the relevant act, it is sufficient that the punisher believes or pretends to believe that he or she has done so.[189] This definition better reflects this aspect of punishment, given that there is no question that the accused that are wrongly convicted and sentenced by courts undergo punishment. However, what is notable for the purpose of this discussion is that the above definitions, while focusing on the aspect of guilt, nevertheless require that the punishment is *for* the crime; that is, there is the implicit requirement of a causal link between the two subject matters.

This link also emerges in relation to commentators who focus on the connection with *blame* as being cardinal to the concept of punishment. Andrew von Hirsch states that "[p]unishing someone

185. Formally, an extra-curial punishment is a hardship stemming from the commission of the offense that is imposed on an offender by other than the sentencing court. Other examples include loss of employment, public opprobrium, and injuries sustained during the commission of the crime. *See* Mirko Bagaric, Lidia Xynas & Victoria Lambropoulos, *The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders*, 39 UNIV. OF NEW SOUTH WALES L. J. 47 (2016).

186. Herbert Morris, *Persons and Punishment*, *in* THEORIES OF PUNISHMENT 76, 83 (Indiana Univ. Press, 1971).

187. DUFF, *supra* note 78, at 267. Duff also states that punishment is suffering imposed on an offender for an offense by a duly constituted authority. *Id.* at 151.

188. JOHN MCTAGGART & ELLIS MCTAGGART, STUDIES IN HEGELIAN COSMOLOGY 129 (Cambridge Univ. Press, 1901).

189. NIGEL WALKER, WHY PUNISH? 2 (Oxford Univ. Press, 1991).

consists of visiting a deprivation (hard treatment) on him, *because* he supposedly has committed a wrong, in a manner that expresses disapprobation on the person for his conduct",[190] or that "[p]unishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong, under circumstances and in a manner that conveys disapprobation of the offender for his wrong."[191]

Apart from the alleged requirement of guilt and the tendency of punishment to condemn, another common definitional trait is the assumption that punishment must be imposed by a *person in authority*. For example, Hobbes provides that punishment is an:

> *Evill inflicted by publique Authority*, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the law; to the end that the will of men may thereby the better be disposed to obedience. . . . [T]he aym of Punishment is not a revenge, but terrour . . . .[192]

In a similar vein, Honderich defines punishment as "*an authority's infliction of a penalty*, something involving deprivation or distress, *on an offender*, someone found to have broken a rule, *for an offence*, an act of the kind prohibited by the rule."[193] In the postscript to the same book, written over a decade later, punishment is defined as "*that practice whereby* a social authority *visits penalties on offenders, one of its deliberate aims being to do so.*"[194] If the imposition of the punishment by an authority is essential, it follows that most forms of extra-curial punishment are not relevant to sentencing.

Some scholars have defined punishment in terms of pain. Bentham simply declared that "all punishment is mischief: all punishment in itself is evil."[195] Ten states that punishment "involves the infliction of some unpleasantness on the offender, or it deprives the offender of something valued."[196] Others have placed somewhat emotive emphasis on the hurt that punishment seeks to bring about. Punishment has been described as pain delivery,[197] and similarly, it has been asserted that "[t]he intrinsic

190. Andrew von Hirsch, *Censure and Proportionality*, *in* A READER ON PUNISHMENT 115, 118 (R.A. Duff & David Garland eds., 1994) (emphasis added).
191. VON HIRSCH, *supra* note 94, at 35.
192. THOMAS HOBBES, LEVIATHAN 353, 355 (Penguin, 1968 ed.) (emphasis added).
193. HONDERICH, *supra* note 74, at 15.
194. *Id*. at 208 (emphasis added).
195. BENTHAM, *supra* note 93, at 158.
196. TEN, *supra* note 81, at 2.
197. NILS CHRISTIE, LIMITS TO PAIN 19, 48 (Martin Robertson ed., 1981).

point of punishment is that it should *hurt* – that it should inflict suffering, hardship or burdens . . . ."[198]

Thus, there are numerous definitions of punishment. Most of them involve concepts that negate (or at least incline against) the possibility of extra-curial hardships coming within the scope of the concept. Extra-curial hardship, while it constitutes a deprivation, is not imposed by an authority and does not require blame to be projected at the offender. Furthermore, in most instances, there is no need for the offender to be found guilty of an offense.

However, these observations are not necessarily decisive against such deprivations being instances of punishment: the accounts of punishment that leave little scope for the operation of extra-curial hardships might be flawed. Additionally, there is a logical distinction between the definition of a term at its literal and justificatory levels. We now explore this dichotomy in greater detail.

From the above accounts of punishment, it emerges that there is consensus on two points—that punishment involves some type of unpleasantness and that punishment is meted out on account of actual or perceived wrongdoing.

The requirement that punishment must be imposed by a person in authority is less obvious. Walker takes the view that punishment can be ordered by anyone who is regarded as having the right to do so, such as certain members of a society or family,[199] not merely a formal legal authority, and that punishment stems not only from violation of legal rules, but extends to infringements of social rules or customs.[200] This would seem to accord with general notions regarding punishment, and indeed, there would appear to be many parallels between, for example, family discipline and legal punishment.[201] As Walker points out, punishment need not be by the state, and it has different names depending on the forum in which it is imposed. He adds that: "[w]hen imposed by English-speaking courts it is called 'sentencing'. In the Christian Church it is 'penance'. In schools, colleges, professional organizations, clubs, trade unions, and armed forces its name is 'disciplining' or 'penalizing.'"[202]

Thus, in principle, there does not appear to be any reason that the

198. ANTHONY DUFF, *Punishment, Citizenship and Responsibility*, *in* PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT 18 (Henry Tam ed., 1996).

199. WALKER, *supra* note 189, at 2.

200. *Id*.

201. *See, e.g.*, Morris, *supra* note 186.

202. WALKER, *supra* note 189, at 1; *see also* KLEINIG, *supra* note 80, at 17–22.

practice of punishment should not extend to other situations (i.e., those beyond the court setting) where the punisher is in a position of dominance, such as where the punisher is a teacher, parent, or employer.

Guilt and blame are also not intrinsic features of punishment. Innocent people who are wrongly convicted and imprisoned are nevertheless punished. Blame is a broader concept than guilt, but probably still not essential for punishment to occur. While nearly all criminal behavior engenders a degree of blame, there are some types of behavior where it is arguably lacking. An example is "mercy killing" (i.e., active voluntary euthanasia), which, strictly speaking, is murder but may not attract condemnation.[203] A more modest and accurate ingredient of this requirement in the context of punishment is that punishment is imposed to right a wrong.[204]

Thus, at its core, punishment consists of: (i) a hardship or deprivation and (ii) the taking away of something of value[205] for a wrong actually or apparently committed.[206] Typically, this would be administered by another person, although it is not clear whether that is essential.

The first requirement is incontestable: an experience which benefits an individual or has no impact on them is not punishment. The second requirement is less germane but nevertheless essential. Without this stipulation, any experience that constituted a detriment could be termed a punishment. However, it is not credible to describe an illness, failure in an exam, or a marriage break-up as a form of punishment.

---

203. Opinion polls show that approximately eighty percent of the community are in favor of active voluntary euthanasia. A poll published in *The Australian* on February 15, 1995, showed that eighty-one percent of people favored euthanasia. *See* Justine Ferrari, *Eight in 10 Support Law to Allow Euthanasia*, AUSTL., Feb. 15, 1995, at 3. This figure is in line with international trends. Polls in the United Kingdom, the United States, and Canada show approval rates for euthanasia of seventy-eight percent, sixty-eight percent, and seventy-eight percent, respectively. Select Committee on Euthanasia, *Report of the Inquiry by the Select Committee on Euthanasia*, LEGIS. ASSEMBLY N. TERRITORY 59-60 (May 1995), http://www.nt.gov.au/lant/parliamentary-business/committees/rotti/rottireport/vol1.pdf. The results of a comprehensive range of surveys on euthanasia are detailed in Senate Legal & Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Euthanasia Laws Bill 1996*, PARLIAMENT COMMONWEALTH AUS. ch. 7 (Mar. 1997), http://www.aph.gov.au/binaries/senate/committee/legcon_ctte/completed_inquiries/1996-99/euthanasia/report/report.pdf. For a more general view, see MARGARET OTLOWSKI, VOLUNTARY EUTHANASIA AND THE COMMON LAW (1997).

204. "Wrong" is defined broadly here to mean a violation of a moral, civil, or criminal norm.

205. In this respect, we agree with Kleinig who points out that punishment involves some deliberate imposition by the punisher on the punished. KLEINIG, *supra* note 80, at 22-23.

206. Apart from the qualification relating to the perception of the offense, this definition accords with that advanced by C. L. Ten, *Crime and punishment*, *in* A COMPANION TO ETHICS 366 (Peter Singer ed., 1991).

Thus, in order for a hardship to constitute a form of punishment, it must be a form of deprivation, and there must be *some connection* between the deprivation and the violation of a social norm (or law). Issues of causation are inherently complex and no satisfactory theory of legal causation has been developed by the courts or legislatures which can be invoked to provide clear answers to complex interactions.[207] However, several bright lines have been drawn in this context that apply to resolve clear-cut instances. They operate to exclude several forms of extra-curial punishment from being factored into the sentencing realm. For example, injuries sustained during the offense due to offender inadvertence or misadventure are not sufficiently connected to the offending behavior to be categorized as punishment. Rather, the fact that an offense is being committed in such circumstances is merely part of the backdrop to the injury. The injury is neither precipitated by a finding of guilt nor an attribution of blame, at least not in the sense of a considered judgment being made to this end.

Where an offender is injured in a drug laboratory explosion or in a motor vehicle collision that results in the death of other people, the injury is not caused by the fact that the conduct is a criminal offense. The legal characterization of the behavior is simply part of the contextual backdrop to the behavior which can only be determined definitively in an ex-post facto sense. Moreover, there is clearly no institutional or systemic decision-making process that mandates criminality as being a necessary ingredient or requirement for the infliction of the injury. In such cases, the injury is simply an unfortunate happenstance arising from an (admittedly illegal) activity that the offender was undertaking at the time. The hardship (in the form of the injury) is not one that is, in any sense of the word, imposed *for* the crime. The connection between the crime and the injury is so tenuous that not even the most modest causation requirement is satisfied. The minimal test for causation that has been advanced is the "but for" standard. If an accused person who is suspected of dangerous driving is injured during a collision that kills others and is subsequently acquitted of the offense, the injury will obviously remain even though any (institutional) sense of wrongdoing has been negated. It follows that the legality of the conduct is merely part of the setting in which the injury occurred—but it is a setting that has no legal relevance.

207. The authoritative (and seminal) work on causation remains H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW (1959). *See also* THE OXFORD HANDBOOK OF CAUSATION (Helen Beebee et al. eds., 2009).

Different considerations apply, however, relating to hardship incurred in an institutional setting. In this regard, the prisoner is institutionalized solely *because of* the crime. Hence, there is a strong argument that punishment consists of all deprivations experienced by the prisoners which foreseeably stem from the incarceration. This extends to compromised health care and beatings by staff, but not, for example, to an injury sustained due to an earthquake that damaged the prison. Accordingly, deprivations experienced by inmates which are a foreseeable incident of their confinement do fall within the meaning of punishment. All such hardships should be factored into an assessment of whether treatment is cruel and thus a violation of the Eighth Amendment. The contrary position adopted by Justice Scalia and the majority of the Court is flawed. Therefore, the subjective limb of the test for whether treatment of prisoners is cruel should be abolished.

E. The Subjective Requirement is not the Primary Cause of the Weak Protection of Prisoners' Rights by the Eighth Amendment—the Objective Test is too Strict

The subjective requirement for Eighth Amendment breaches is flawed.[208] However, despite the criticism that this requirement has received, it is not clear that this is the main cause of the very limited protection conferred by Eighth Amendment for prisoners' rights. Arguably, it is the interpretation that has been applied to the objective limb which has most significantly limited the application of the Eighth Amendment in prisoners' rights cases. This is best illustrated in the context of challenges to the harshest of prison conditions—those found in super-maximum prisons.

Over the past two decades, there has been a considerable increase worldwide in the utilization of "super-maximum [security]" or "supermax" prisons.[209] One of the first super-maximum prisons was the "rock fortress" Alcatraz in San Francisco Bay, which was operated by the U.S. Federal Bureau of Prisons from 1934 until its closure in 1963.[210] The number of such facilities has grown rapidly since that time. More than forty U.S. states now have super-maximum prisons.[211] These

208. *See* Frase, *Limiting Excessive Prison Sentences*, *supra* note 39, at 61.

209. For a discussion of the operations in each of these countries, see THE GLOBALIZATION OF SUPERMAX PRISONS (Jeffrey Ian Ross ed., 2013).

210. Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC'Y 163, 166 (1999).

211. AMNESTY INTERNATIONAL, ENTOMBED: ISOLATION IN THE FEDERAL PRISON SYSTEM 2 (July 2014).

prisons or units within prisons house at least 25,000 prisoners.[212]

Unlike regular prison, there is no consistency regarding the exact daily regimes of super-max prisoners, but such regimens can include being locked in cells for up to twenty-three hours per day.[213] When prisoners are out of their cells, they move to what is, in effect, no more than another (larger) cell where they normally have contact with no more than one other prisoner.[214] These facilities normally consist of "jails within prisons."[215] There is no uniformity to such conditions but, in general, they involve "incarcerating inmates under highly isolated conditions with severely limited access to programs, exercise, staff, or other inmates."[216] Keramet Reiter describes the conditions as follows:

> "Supermax" prisoners in the United States live for months (and often years) at a time in windowless, poured-concrete boxes. Each "box," or cell, includes roughly eighty square feet of space—about the size of a handicap bathroom stall, or a parking space. Prisoners spend at least twenty-two hours of every day in these cells, under fluorescent lights that never turn off. They only leave their cells four or five times per week, for showers or for brief, solitary exercise periods in "dog runs"—concrete pens with roofs at least partially open to natural light. . . . Usually, prisoners live in total solitary confinement in these cells.[217]

Super-maximum prisons are not only considerably more physically onerous than normal prisons, but there is also significant evidence establishing that they cause psychological damage to inmates.

A relatively recent report by Amnesty International notes:

> There is a significant body of evidence that confining individuals in isolated conditions, even for relatively short periods of time, can cause

212. *Id*. *See* Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 U.C. IRVINE L. REV. 89, 91 (2015).

213. Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 407 (2001).

214. Liz Hobday, *High-security prison 'driving remand prisoners mad'*, ABC ONLINE (Sept. 22, 2009), http://www.abc.net.au/news/2009-09-22/high-security-prison-driving-remand-prisoners-mad/1437474 (last visited Jan. 11, 2017).

215. CHASE RIVELAND, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 1 (1999).

216. *Id.* They have also been defined as "a free-standing facility, or a distinct unit within a facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behaviour while incarcerated. . . . [T]heir behavior can only be controlled by separation, restricted movement, and limited direct access to staff and other inmates." King, *supra* note 210, at 170.

217. Reiter, *supra* note 212, at 90-91.

> serious psychological and sometimes physiological harm, with symptoms including anxiety and depression, insomnia, hypertension, extreme paranoia, perceptual distortions and psychosis. This damaging effect can be immediate and increases the longer the measure lasts and the more indeterminate it is. Isolation has been found to have negative effects on individuals with no pre-existing illness and to be particularly harmful in the case of those who already suffer from mental illness.[218]

Despite the widely-acknowledged dangers of physical and psychological damage associated with imprisonment in super-max prisons, opponents of these conditions have faced stark challenges in U.S. courts.

The legality of super-max conditions has been challenged on numerous occasions, always without success.[219] The key decision on the legality of super-max conditions is *Madrid v. Gomez*,[220] where the court applied the test articulated in *Farmer v. Brennan*. In upholding the validity of the prison conditions as to most prisoners in the Secure Housing Unit (SHU) at the Pelican Bay State Prison in California, the court did not even address the subjective limb of the test because it held that the conditions did not constitute a serious harm to prisoners.[221] The court stated:

> Here, the record demonstrates that the conditions of extreme social isolation and reduced environmental stimulation found in the Pelican Bay SHU will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods. Clearly, this impact is not to be trivialized; however, for many inmates, it does not appear that the degree of mental injury suffered significantly exceeds the kind of generalized psychological pain that courts have found compatible with Eighth Amendment standards. While a risk of a more serious injury is not non-existent, we are not persuaded, on the present record and given all the circumstances, that the risk of developing an injury to mental health of *sufficiently serious magnitude* due to current conditions in the SHU is high enough for the SHU population as a whole, to find that current conditions in the SHU are per se violative of the Eighth Amendment with respect to all potential inmates.[222]

The court noted that a relevant consideration in determining whether

218. AMNESTY INTERNATIONAL, *supra* note 211, at 31; *see also* Jesenia Pizarro & Vanja M. K. Stenius, *Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates*, 84 PRISON J. 248, 256 (2004).

219. *See* Reiter, *supra* note 212.

220. 889 F. Supp. 1146 (N.D. Cal. 1995).

221. *Id.* at 1279-80.

222. *Id.* at 1265.

prison conditions violate the Eighth Amendment is whether such conditions have a valid penological objective.[223] The main penological purpose in this case was the need to "maintain the safety and security of both staff and inmates" and, in some cases, to punish offenders.[224] Although some forms of treatment are so harmful and damaging that they can never be justified, the court held that the Constitution allows more severe forms of treatment where they have a demonstrated penological purpose: "a condition or other prison measure that has little or no penological value may offend constitutional values upon a lower showing of injury or harm."[225]

However, the Court did note that in relation to certain categories of prisoners and types of treatment in the case, the Eighth Amendment had been violated. This was so in relation to prisoners who were mentally ill and those who were at very high risk of experiencing very serious harm to their mental health. In relation to this conduct, it was found that the subjective test was also satisfied.

The only occasion where the Supreme Court considered the validity of super-max conditions was in 2005 in *Wilkinson v. Austin*.[226] However, the issue in that case was whether the Due Process Clause of the Fourteenth Amendment conferred a liberty interest to prisoners in not being subjected to super-max conditions.[227] The Eighth Amendment issue was not litigated because, as noted by Reiter, the issue had been effectively resolved by a number of lower court decisions which consistently held that super-max conditions do not violate the Eighth Amendment. Reiter states:

> The *Wilkinson* Court . . . did not evaluate whether OSP conditions violated the Eighth Amendment prohibition against cruel and unusual punishment. . . . [B]y the time the Court heard arguments in *Wilkinson*, numerous lower federal courts, including the *Madrid* court, had already decided that supermax conditions did not violate the Eighth Amendment.[228]

Since *Wilkinson*, the Court has evinced little interest in taking the issue again for reconsideration.

223. *Id.* at 1263.
224. *Id.* at 1159.
225. *Id.* at 1263.
226. 545 U.S. 209 (2005).
227. *Id.* at 221-24.
228. Reiter, *supra* note 212, at 112.

F. The Eighth Amendment Protection for Prisoners is Unavoidably Fickle Due to the Vague Nature of "Rights"

The fact that super-max conditions were not invalidated under the Eighth Amendment stems not only from the high bar that the court set for establishing the objective requirement, but also from the intrinsically obscure and abstract nature of rights.[229] As noted above, prisoners' rights to be free from physical and psychological distress have often been defeated by the perceived security concerns of prison staff and other prisoners. No right is absolute and, at some point, all rights can be defeated by contrary interests in the form of conflicting rights or the greater good.[230] There is no firm formula for ascertaining the circumstances in which a right can be curtailed by other competing interests. Given this, in the case of super-max conditions, the interests of prisoners can readily be trumped by safety considerations without any hint of incoherency. The weighing and prioritization process is fluid and amenable to impressionistic judgment that is beyond the bounds of forceful contradiction. This is symptomatic of the limits of interests in the nature of rights to coherently and effectively protect human interests.[231]

Philosophers such as Ronald Dworkin and Robert Nozick have urged governments and individuals to takes rights seriously and accord them a meaningful and important role in decisions that impact the interests of individuals.[232] However, as has been noted by H.L.A. Hart, the foundation of rights (despite the prominence of such interests) remains obscure:

> It cannot be said that we have had . . . a sufficiently detailed or adequately articulate theory showing the foundation for such rights and how they are related to other values . . . . Indeed the revived doctrines of basic rights are . . . in spite of much brilliance still unconvincing.[233]

The paradox of rights is also noted by Campbell: "the idea of human rights is at this time so well accepted and internationally utilised that it is

229. *See* Bagaric, *In Defence of a Utilitarian Theory of Punishment*, *supra* note 72, at 121-43.

230. *Id*.

231. *See* L.W. SUMNER, THE MORAL FOUNDATION OF RIGHTS (1987).

232. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS (1981).

233. H. L. A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 195 (1983).

difficult to acknowledge just how flimsy are its political foundations."[234]

The scope and relative ranking of rights is almost intrinsically uncertain. It is for this reason that rights-based claims are almost inherently contestable and devoid of clear answers. In the prison setting, there is no evaluative tool that can be invoked to readily determine whether, for example, the interests of prisoners in enjoying a relatively high standard of health care and freedom from social isolation outweighs the interests that prison officials have in ensuring high levels of personal security and the capacity to administer prisons in a financially efficient manner. Given that the content, scope, and ranking of rights is inherently contestable, rights claims can be often summarily defeated by the stroke of a (judicial) pen.[235]

IV. CONCLUSION

Justice Scalia has been heavily criticized for his tough stance against offenders, especially in relation to his interpretation of the Eighth Amendment. Ostensibly, this is justified in relation to the proportionality principle, given that he is one of only two justices to hold that it is not a component of the Eighth Amendment. However, based on the orthodox understanding of the nature of the proportionality principle, Justice Scalia's stance in this regard is sound. He was correct to note that proportionality is associated with retributive theories of punishment and that it is so nebulous as to be incapable of being applied in an intelligible manner. Moreover, proportionality can logically be subsumed totally by the pursuit of other sentencing objectives. In order to contradict Justice Scalia's position on proportionality, it is necessary to justify the role of proportionality within a non-retributive punitive construct and to inject content into both limbs of the proportionality thesis. We have previously advanced theories which seek to accomplish this, and if valid, they logically undermine the approach by Justice Scalia. However, given the conservative and originalistic orientation that Justice Scalia adopted in his judicial writing, his position that proportionalism is not grounded in the Eighth Amendment is logically and jurisprudentially correct.

In relation to prisoners' rights, Justice Scalia was influential in imposing a second limb into the test for establishing breach of the Eighth

234. TOM D. CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM 164 (1996).

235. In this respect, we refer to rights claims in the conventional manner in which they are understood, i.e., against the backdrop of a deontological ethic. While, rights grounded in a utilitarian theory of morality have a potentially firmer foundation, however, this is not the context in which most contemporary rights claims are asserted. *See* Bagaric, *In Defence of a Utilitarian Theory of Punishment*, *supra* note 72, at 121-43.

Amendment. This is doctrinally flawed and thus creates an unnecessary burden to showing that punishment is cruel. The test for ascertaining whether prisoners' rights have been violated is doctrinally flawed because of a flawed approach to the meaning of punishment—an approach which fails to acknowledge that extra-curial hardships in the form of harsh prison conditions are properly classified within the scope of this term. However, this is not the sole reason for the underutilization of this potential protection of prisoners' rights. The objective standard has been interpreted very strictly, and the rights of prisoners have been arguably too readily trumped by the perceived demands and requirements of prison security.

Thus, in relation to the proportionality principle, both philosophy and an underlying coherency in the approach to statutory and constitutional interpretation support the position adopted by Justice Scalia. The contrary is the situation in relation to Justice Scalia's position on prisoners' rights. However, the criticism of Justice Scalia regarding his approach to Eighth Amendment issues in the context of prisoners' rights has been overstated. The views he espoused in this context are shared by the majority of the Supreme Court. From the perspective of interpreting the Eighth Amendment in a manner which would result in a moderate or lenient approach to the punishment of offenders, Justice Scalia was a foe of criminal law and procedure. However, his judgments in this context reveal he was a friend to adopting a rigorously consistent conservative approach (non-outcome driven) to statutory and constitutional interpretation. It is for readers to determine which of these imperatives is of the higher order.