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THE EIGHTH AMENDMENT, PROPORTIONALITY,  
AND THE CHANGING MEANING OF “PUNISHMENTS”

The debate over the scope and application of the Eighth Amendment has over the past few decades focused increasingly on the historical meaning of the words “cruel and unusual.” In a 1983 decision, *Solem v. Helm*,<sup>1</sup> Justice Powell traced the history of the Cruel and Unusual Punishments Clause back to the Magna Carta and the English Bill of Rights of 1689, which he found to have embodied a strong principle of proportional punishment.<sup>2</sup> More recently, some historians and a minority of the Court have come to question this historical argument. In *Harmelin v. Michigan*,<sup>3</sup> Justice Scalia argued that it is not necessarily clear whether proportionality was required by the English Bill of Rights. More importantly, Justice Scalia argued that the Framers of the Eighth Amendment understood the words “cruel and unusual” to refer only to certain barbarous *methods* of punishment.<sup>4</sup> If this historical account is correct, does this mean that the justification for finding a proportionality requirement in the Eighth Amendment — as the majority of the Court still does — is no longer valid? According to Justice Scalia, the answer is yes. In *Harmelin*, Justice Scalia reasoned that because the words “cruel and unusual” did not refer historically to proportionality, and because, in contrast, the language in certain contemporaneous state constitutions did, the Framers of the Eighth Amendment considered and rejected a ban on disproportionality in punishment.<sup>5</sup> Thus, using the Eighth Amendment to strike down disproportionate jail sentences today would be contrary to original intent: since prison in and of itself would not have been considered a barbaric form of punishment, even grossly disproportionate sentences would not implicate the Cruel and Unusual Punishments Clause.<sup>6</sup>

The purpose of this Note is to challenge this claim on its own terms. This purpose carries two qualifications. First, a protracted discussion of the proper theory of constitutional interpretation is beyond the scope of this Note. Divining original intent may be a precarious exercise<sup>7</sup> — it assumes both that some singular and concrete “intent”

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<sup>1</sup> 463 U.S. 277 (1983).

<sup>2</sup> *Id.* at 284–86.

<sup>3</sup> 501 U.S. 957 (1991).

<sup>4</sup> *See id.* at 966–85 (opinion of Scalia, J.).

<sup>5</sup> *See id.* at 977–78, 985.

<sup>6</sup> *See id.* at 986 n.11.

<sup>7</sup> *See* Charles Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 758–59 (1987) (warning that one should not try to “take the top off the heads of . . . framers — like soft-boiled eggs — to look inside for the truest account of their brain states at the moment that the texts were created”).

exists and that it is possible for modern jurists, with some sense of certainty, to determine what this intent was. This is especially true when, as here, the available historical evidence is scant. But the Court, even beyond Justice Scalia, has looked to and likely will continue to look to historical meaning to determine the scope of the Eighth Amendment. The fact of this approach is sufficient for present purposes — its wisdom may be debated elsewhere. Second, this Note will not seek to add to the scholarship on seventeenth-century English history or American constitutional history. More able historians might find new evidence that supports Justice Powell's understanding of the English Bill of Rights of 1689 or that challenges Justice Scalia's claim that the Framers did not understand "cruel and unusual" to mean disproportionate. But that is an entirely different project. Thus, this Note proceeds from (without defending) the assumptions that original intent can and should be the basis for determining the scope of the Eighth Amendment and that the Framers intended "cruel and unusual" to refer to certain methods of punishment.

This Note insists, however, that one cannot effectively discuss the Eighth Amendment in terms of original intent without examining the word that follows "cruel and unusual" in the constitutional text. The system of "punishments" that existed at the time of the Founding was fundamentally different from that which exists today.<sup>8</sup> The Cruel and Unusual Punishments Clause was written in the context of a system that relied to a large extent on public participation in punishments. Critically, this system of primarily "public" punishments was one in which true proportionality was neither a realistic possibility nor a theoretical imperative. Not long after the Founding, however, this system began to collapse and was gradually replaced by a new system that depended on different methods and a different logic — and that ultimately developed into the system of punishments that exists today. This new system employed as its primary means a markedly nonpublic method of punishment, incarceration, that could be made eminently proportional. Additionally, the system relied on the notion that punishment must be proportional in order to be effective. The gap in meaning between "punishments" at the time of the Founding and "punishments" under the system that subsequently developed make problematic Justice Scalia's claims about the intention of the Framers as to proportionality in punishments generally. The Framers may have intended not to ban disproportionality in the existing system of public punishments. But it is doubtful that this gives us any direct evidence

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<sup>8</sup> See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 3 (rev. ed. 1990).

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on the intention of the Framers regarding proportionality in the new system of nonpublic punishments.

If the gap in the meaning of “punishments” is such that history cannot provide direct answers as to the intention of the Framers, how should one interpret the Eighth Amendment? One tack is to hold that if the Framers did not specify *X*, then *X* is not part of the constitutional scheme; this is the reasoning used by Justice Scalia in *Harmelin*. But if one takes originalism seriously — that is, if one truly seeks to hew as closely as possible to the intention of the Framers — it cannot be the case that this is always the correct answer. As an alternative, following a method first described by Professor Lawrence Lessig,<sup>9</sup> this Note assumes that where changing contexts have fundamentally distorted the original meaning of a constitutional term, one should seek to reconstruct the term so as to effectuate as closely as possible the original intention of the Framers, using historical “equivalents” to bridge the gap in meaning. Two equivalents are proposed. The first equivalent involves a functional understanding of the purpose of the Eighth Amendment. One possible way to understand the ban on cruel methods of punishment in the public punishments system is that such methods rendered punishment self-defeating. Similarly, disproportionate punishments were seen as having the same effect in the new system. Thus, it would be contrary to the intention of the Framers to allow self-defeating punishments in the new system when the Eighth Amendment was intended to ban self-defeating punishments in the old system. The second equivalent centers around fines. Fines were a critical part of the old system of punishment. Unlike the system of physical punishments that existed at the time, economic punishments could be made entirely proportional. Critically, disproportionate punishments of this sort *were* banned by the Framers. Thus, to the extent that the Framers considered a system of punishment in which proportionality was a real possibility, they concluded that disproportionality should be banned.

Part I briefly reviews the debate over proportionality and the original understanding of “cruel and unusual,” along with Justice Scalia’s claim that the Framers conceived of this clause as a ban on particular methods of punishment. Part II explores the difference between the system of punishments that existed at the time of the Founding and the one that arose subsequently and discusses how the changing meaning of punishments weakens Justice Scalia’s claims about original intention. Part III, following Professor Lessig’s method, seeks historical “equivalents” to bridge the gap in meaning through translation. It proposes two equivalents, both of which suggest that rejecting a pro-

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<sup>9</sup> See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

portionality requirement may not be consistent with original intent. Part IV briefly concludes.

### I. THE DEBATE OVER "CRUEL AND UNUSUAL"

The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be imposed, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This language was derived from a provision in the Virginia Constitution, which in turn was taken directly from the English Bill of Rights of 1689.<sup>10</sup>

Through the beginning of the twentieth century, the Supreme Court consistently held that the Cruel and Unusual Punishments Clause was intended to prohibit "inhuman and barbarous" modes of punishment — "burning at the stake, crucifixion, breaking on the wheel, or the like."<sup>11</sup> The Court first suggested that the clause might contain a proportionality principle in *Weems v. United States*.<sup>12</sup> In that case, the Court stated that while the Eighth Amendment was "ordinarily" said to prohibit punishments that were "inhuman and barbarous, torture and the like,"<sup>13</sup> the punishment of incarceration "for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment."<sup>14</sup> This 1910 decision did not have much resonance at first,<sup>15</sup> but the Court began building on the proportionality principle about fifty years later.<sup>16</sup> By the late 1970s, the Court appeared to have accepted the proposition that the Eighth Amendment "proscribes grossly disproportionate punishments."<sup>17</sup>

<sup>10</sup> *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

<sup>11</sup> *In re Kemmler*, 136 U.S. 436, 446 (1890); accord *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); see also *Baze v. Rees*, 128 S. Ct. 1520, 1530 (2008) (opinion of Roberts, C.J.) (citing *In re Kemmler*, 136 U.S. at 447, 449; *Wilkerson*, 99 U.S. at 134–37); Granucci, *supra* note 10, at 839; Pamela S. Karlan, Lecture, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 883–84 (2004); Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 382–83 (1980); Gilbert King, Op-Ed., *Cruel and Unusual History*, N.Y. TIMES, Apr. 23, 2008, at A21 (providing an account of the gruesome details of Wilkerson's and Kemmler's executions, along with those of others that the Supreme Court "had no difficulty concluding" were not cruel or unusual (quoting *Baze*, 128 S. Ct. at 1559 (Thomas, J., concurring in the judgment)) (internal quotation mark omitted)).

<sup>12</sup> 217 U.S. 349 (1910).

<sup>13</sup> *Id.* at 368.

<sup>14</sup> *Id.* (quoting *McDonald v. Commonwealth*, 173 Mass. 322, 328 (1899)) (internal quotation mark omitted).

<sup>15</sup> See Schwartz, *supra* note 11, at 386–87.

<sup>16</sup> See, e.g., *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

<sup>17</sup> See *Solem v. Helm*, 463 U.S. 277, 288 (1983) (collecting cases).

In a 1980 decision, *Rummel v. Estelle*,<sup>18</sup> the Court reaffirmed the proportionality principle but appeared to weaken it significantly, holding that *Weems* and the cases applying proportionality to the death penalty were context specific, so “one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.”<sup>19</sup> Just three years later, however, the Court held in *Solem* that “[t]here is no basis for the . . . assertion that the general principle of proportionality does not apply to felony prison sentences,”<sup>20</sup> and that proportionality under the Eighth Amendment should be determined according to a three-part test.<sup>21</sup> In support of this holding, Justice Powell offered a historical argument, tracing the roots of the proportionality principle to the Magna Carta and concluding that it was a well-established principle of English law that was adopted by the Framers through the Eighth Amendment.<sup>22</sup>

Justice Scalia responded forcefully to this argument in *Harmelin*. In an opinion joined only by Chief Justice Rehnquist, Justice Scalia argued from an originalist perspective that the intention of the Framers comports with the traditional view once held by the Court — that is, that the words “cruel and unusual” referred only to barbarous *methods* of punishment.<sup>23</sup> First, he argued, contrary to Justice Powell, that there is no clear historical connection between proportionality and the Eighth Amendment’s source language in the English Bill of Rights; evidence suggests that the word “unusual” may have been used to mean “illegal” in that context, such that the English proscription was actually intended to bar punishments that departed from the common law tradition, rather than to embody any principle of proportionality.<sup>24</sup> Second, and more importantly, he argued that regardless of the original English usage, the framing generation appeared to have understood the language adopted in the Eighth Amendment solely as a ban on certain modes of punishment.<sup>25</sup>

Twelve years after *Harmelin*, in a short concurrence in *Ewing v. California*,<sup>26</sup> Justice Scalia reiterated his position that “the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’ was aimed at excluding only certain *modes* of punishment, and was not a

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<sup>18</sup> 445 U.S. 263 (1980).

<sup>19</sup> *Id.* at 274.

<sup>20</sup> *Solem*, 463 U.S. at 288.

<sup>21</sup> *Id.* at 290–92.

<sup>22</sup> *Id.* at 284–86.

<sup>23</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 961–94 (1991) (opinion of Scalia, J.).

<sup>24</sup> See *id.* at 966–75.

<sup>25</sup> See *id.* at 975–85.

<sup>26</sup> 538 U.S. 11 (2003).

'guarantee against disproportionate sentences.'"<sup>27</sup> In a separate concurrence in *Ewing*, Justice Thomas adopted Justice Scalia's position in *Harmelin* and concluded categorically that "the Cruel and Unusual Punishments Clause . . . contains no proportionality principle."<sup>28</sup> In *Ewing*, and in a second case from that Term, *Lockyer v. Andrade*,<sup>29</sup> the Court rejected challenges to California's three strikes law based on Eighth Amendment disproportionality.<sup>30</sup> In *Andrade*, in which the defendant was sentenced to two consecutive terms of twenty-five years to life in prison for the theft of approximately \$150 worth of videotapes from Kmart,<sup>31</sup> both Justice Scalia and Justice Thomas joined Justice O'Connor's opinion for the Court. The principles discussed by Justice Scalia in *Harmelin* are thus still vital, although they remain the minority position on the Court.

From a purely historical perspective,<sup>32</sup> Justice Scalia's arguments in *Harmelin* about the meaning of "cruel and unusual" appear compelling. A detailed discussion of seventeenth-century English history is beyond the scope of this Note, but it is fair to say that there is at least some historical doubt as to whether the Eighth Amendment's textual ancestor, the Bill of Rights of 1689, said anything about proportionality.<sup>33</sup> With regard to the Framers' understanding, the evidence is scant, but what little there is seems to support Justice Scalia's argument: to the extent that the Eighth Amendment was debated at the time of the Founding, the comments made do not suggest that the Framers understood disproportionate punishments to be "cruel" or "unusual."<sup>34</sup> More fundamentally, one would be hard-pressed to de-

<sup>27</sup> *Id.* at 31 (Scalia, J., concurring in the judgment) (quoting *Harmelin*, 501 U.S. at 985 (opinion of Scalia, J.)).

<sup>28</sup> *Id.* at 32 (Thomas, J., concurring in the judgment).

<sup>29</sup> 538 U.S. 63 (2003).

<sup>30</sup> *See id.* at 77; *Ewing*, 538 U.S. at 30-31.

<sup>31</sup> *See Andrade*, 538 U.S. at 66.

<sup>32</sup> The proportionality element of the Cruel and Unusual Punishments Clause is still recognized by the Court, albeit in a different form than that presented in *Solem*. *See* Karlan, *supra* note 11, at 886-88.

<sup>33</sup> *See* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 121-23 (2004) (describing the English source of the Eighth Amendment as a ban on discriminatory punishments); Lessig, *supra* note 9, at 1185-86 (apparently accepting the proposition that the source of the prohibition was "inspired by the practice of some English courts to apply punishments far outside any statutory sanction"); Schwartz, *supra* note 11, at 380-81. *But see* Granucci, *supra* note 10, at 860 (arguing that the clause in the English Bill of Rights was aimed both at punishments that were unauthorized by law *and* at punishments that were disproportionate).

<sup>34</sup> *See* Granucci, *supra* note 10, at 839-44, 860-65 (explaining how the understanding of the framing generation stemmed from a misinterpretation of English law); Schwartz, *supra* note 11, at 380; *see also* BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 186 (1832). *But see* *Furman v. Georgia*, 408 U.S. 238, 258-69 (1972) (Brennan, J., concurring). On this point, Justice Scalia's argument relied heavily on a 1969 article by Anthony Granucci, *see* Granucci, *supra*

scribe punishment as it was applied either in 1689 England or in 1791 America as “proportional” in any meaningful sense of the word.<sup>35</sup> If the words “cruel and unusual” were understood to encompass disproportionality, then the Eighth Amendment would have marked a fairly radical departure from the existing practices of punishment — and one might suspect that such a departure would have garnered somewhat more intense debate.

As noted above, however, the focus of this Note is not on the historical accuracy of this account, but rather on its implications. In *Harmelin*, Justice Scalia proposed that “[t]he notion of ‘proportionality’ was not a novelty” at the time of the Framing.<sup>36</sup> Two state constitutions adopted around the time of ratification — Ohio’s and New Hampshire’s — contained explicit requirements that “all penalties ought to be proportioned to the nature of the offence.”<sup>37</sup> Proportionality principles had also been included in the constitutions of Pennsylvania and South Carolina.<sup>38</sup> “There is little doubt,” Justice Scalia reasoned, “that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them.”<sup>39</sup> Because the Framers considered and rejected a ban on disproportionate punishments at that time, he concluded, it would be contrary to original intent to require proportionality in evaluating modern prison sentences.<sup>40</sup>

## II. THE CHANGING MEANING OF “PUNISHMENTS”

This Part seeks to problematize the conclusion that Justice Scalia draws from his historical analysis in *Harmelin*. It may be that the Framers considered and rejected a ban on disproportionate “punishments” — but the import of that word has changed so significantly since then that it would be difficult to draw conclusions about original intent as to punishments generally from this rejection. This Part explores the system of punishments that existed at the time of the Fram-

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note 10, which remains the authoritative study of the Eighth Amendment’s history; in nearly forty years since its publication, this article’s historical conclusions have not been seriously challenged.

<sup>35</sup> See Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 353 (1982) (concluding with regard to the American colonies that “[n]either certainty nor proportionality characterized penal measures in the late eighteenth century to those who made the laws and administered them”); see also ROTHMAN, *supra* note 8, at 51; Granucci, *supra* note 10, at 847 (noting with regard to seventeenth-century England that “[w]hether the principle [of proportionality] was honored in practice or not is an open question”).

<sup>36</sup> *Harmelin v. Michigan*, 501 U.S. 957, 977 (1991) (opinion of Scalia, J.).

<sup>37</sup> *Id.* at 977–78 (quoting N.H. BILL OF RIGHTS art. XVIII (amended 1792)) (internal quotation marks omitted) (citing OHIO CONST. of 1802, art. VIII, § 14).

<sup>38</sup> *Id.* at 977 (citing PA. CONST. of 1776, § 38; S.C. CONST. of 1778, art. XL).

<sup>39</sup> *Id.* (footnote omitted).

<sup>40</sup> See *id.* at 985–86, 986 n.11.

ing and the system that replaced it, along with the differences between them, focusing especially on the theoretical and practical role of proportionality in each.

Another qualification is necessary at this point. Any attempt to draw general conclusions about punishments in early American society is inherently problematic: the issue encompasses too many discrete societies, ideologies, and institutions, and too broad a swath of geography and time, to allow for simple, categorical answers.<sup>41</sup> Additionally, the historical data on different times and different areas are inconsistent and not necessarily comparable.<sup>42</sup> The problem of drawing neat legal conclusions from a nuanced and uncertain historical record may be inherent to the originalist project. To the extent that some common themes can be drawn out that clarify — or, more likely, muddle — the historical narrative upon which Justice Scalia builds his conclusion, this Note proceeds cautiously.<sup>43</sup>

#### A. *The Public Punishments System*

The system of physical punishments that existed at the time of the Framing was markedly different from the one that emerged shortly thereafter. Incarceration, the *sine qua non* of modern American punishment,<sup>44</sup> played a very minor role in colonial criminal justice.<sup>45</sup> Although local jails were found in some colonies,<sup>46</sup> these institutions bore only a coincidental resemblance to their modern counterparts. Early jails were crude, unimpressive buildings that looked and ran essentially like households.<sup>47</sup> Prisoners were not closely guarded<sup>48</sup> and were often responsible for their own upkeep.<sup>49</sup> More importantly, incarceration was generally not thought of as performing a penal function.<sup>50</sup>

<sup>41</sup> See Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293, 296, 316 (1982).

<sup>42</sup> Preyer, *supra* note 35, at 347; see also Greenberg, *supra* note 41, at 296.

<sup>43</sup> See Preyer, *supra* note 35, at 347; see also Greenberg, *supra* note 41, at 315.

<sup>44</sup> See JENNIFER WARREN ET AL., PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008) (reporting that one in 100 American adults is now incarcerated).

<sup>45</sup> See ROTHMAN, *supra* note 8, at 46; Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, in 6 CRIME AND JUSTICE IN AMERICAN HISTORY 383, 390 (Eric H. Monkkenon ed., 1992); Preyer, *supra* note 35, at 329. Incarceration may have played a larger role in Pennsylvania, and at an earlier stage, than it did in other colonies. See Preyer, *supra* note 35, at 337.

<sup>46</sup> See Preyer, *supra* note 35, at 329; see also ROTHMAN, *supra* note 8, at 52.

<sup>47</sup> ROTHMAN, *supra* note 8, at 52–56; NEGLEY K. TEETERS, THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA 1773–1835, at 8–9 (1955); Hirsch, *supra* note 45, at 390–92.

<sup>48</sup> See ROTHMAN, *supra* note 8, at 56; Hirsch, *supra* note 45, at 390–91.

<sup>49</sup> TEETERS, *supra* note 47, at 9.

<sup>50</sup> See Hirsch, *supra* note 45, at 385–90; see also TEETERS, *supra* note 47, at 9 (“The jail, in its early days, was thought of as a temporary abode for the prisoner since, after his trial, he was ei-

Imprisonment was “an instrument of coercion rather than sanction”;<sup>51</sup> it could be used to pressure debtors, but no one saw the institution as a means of rehabilitation or deterrence.<sup>52</sup> The primary purpose of the jail was simply to hold the alleged criminal before his trial and in the time between conviction and the execution of his sentence.<sup>53</sup>

How did Americans punish crime before the advent of incarceration? The most prevalent method of corporal punishment was whipping.<sup>54</sup> Whipping was the “simplest, least costly and most immediate form of punishment.”<sup>55</sup> It was used throughout the colonies, and for a wide variety of offenses.<sup>56</sup> Capital punishment was also widely used — although at least one historian claims that the extent to which executions were actually utilized in colonial America has been overstated.<sup>57</sup> Execution was prescribed — sometimes exclusively — for a wide array of offenses, from pickpocketing to horse-stealing to children’s disrespect for parents;<sup>58</sup> the number of capital offenses generally increased throughout the seventeenth and eighteenth centuries, and courts regularly inflicted the punishment.<sup>59</sup> Beyond this, the colonists, especially in New England, employed a variety of corporal “shaming” punishments, some familiar — the stocks, the pillory, wearing emblems on clothing — and others more curious — branding, the cage, the “seat of infamy,” and the “dame’s bridle.”<sup>60</sup> Although the prevalence of such punishments may be exaggerated by our cultural imagination, their use was not insignificant during the colonial period, and undoubtedly did extend beyond Hester Prynne’s Massachusetts.<sup>61</sup>

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ther acquitted, fined, punished or . . . executed. . . . [T]he early jail [was] only a temporary expedient in the penal practice of the colonies.”)

<sup>51</sup> Hirsch, *supra* note 45, at 386.

<sup>52</sup> See ROTHMAN, *supra* note 8, at xxvii–xxviii, 55–56; Hirsch, *supra* note 45, at 386.

<sup>53</sup> TEETERS, *supra* note 47, at 9; Hirsch, *supra* note 45, at 387; see also ROTHMAN, *supra* note 8, at 52–53. Jails may not have even been particularly good at discharging this function; due to lax conditions and the ease of escape, some towns required prisoners to post bonds to assure that they would remain in the jail. ROTHMAN, *supra* note 8, at 56.

<sup>54</sup> See Preyer, *supra* note 35, at 348.

<sup>55</sup> *Id.* at 349.

<sup>56</sup> See *id.* at 330, 333, 343 (discussing whippings in Massachusetts); *id.* at 336–37 (discussing whippings in Pennsylvania); *id.* at 338, 345 (discussing whippings in New York).

<sup>57</sup> See *id.* at 347.

<sup>58</sup> See ROTHMAN, *supra* note 8, at 15, 51.

<sup>59</sup> See *id.* at 332, 333–34, 342, 344–45; see also JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 701–05 (1970); ROTHMAN, *supra* note 8, at 51; TEETERS, *supra* note 47, at 7. *But see* Hirsch, *supra* note 45, at 401–02. In some instances, execution was available for even more minor crimes if the offender was a recidivist who proved impervious to lesser penalties. ROTHMAN, *supra* note 8, at 52.

<sup>60</sup> See GOEBEL & NAUGHTON, *supra* note 59, at 701–10; ROTHMAN, *supra* note 8, at 48–50; TEETERS, *supra* note 47, at 7; Preyer, *supra* note 35, at 331, 335–36. Banishment was often coupled with such punishments, especially when the criminal was a stranger to the community. See ROTHMAN, *supra* note 8, at 50.

<sup>61</sup> See Preyer, *supra* note 35, at 335–36, 349–50.

The public played a key role in this system of punishment. Whippings, everywhere the most pervasive corporal punishment, were carried out in public.<sup>62</sup> Executions were also public events, often accompanied by sermons.<sup>63</sup> Of course, the various shaming punishments — the stocks, the pillory, etc. — were inherently public to the extent they were used.<sup>64</sup> Public acknowledgment of fault, in and of itself, was often made a component of the prescribed punishment.<sup>65</sup>

Both the need for these sorts of public punishments and their effectiveness were rooted in the particular social realities of early American society. Law enforcement capabilities were very limited in the colonies, so communities relied heavily on self-enforcement to maintain order.<sup>66</sup> Lacking regular — much less professional — police forces, Americans built a system that marshaled instead the close-knit nature of colonial society as a check on deviancy.<sup>67</sup> Because of the severe limitations on law enforcement, it was in no way certain that one who committed a crime would necessarily be apprehended or prosecuted or punished; thus, there was reason to doubt that the prospect of punishment alone could deter a potential criminal.<sup>68</sup> In the face of these limitations, the public element of punishment was intended to reduce crime by educating the public at large about the values of the legal system. Public punishments were meant to work by making an "example" of the criminal,<sup>69</sup> but not just in the simple sense of scaring the public. The example of the condemned served to inculcate those watching the punishment with a respect for the law and its prohibitions.<sup>70</sup> In execution-day sermons, preachers sought not only to em-

<sup>62</sup> *Id.* at 349.

<sup>63</sup> See ROTHMAN, *supra* note 8, at 15–17.

<sup>64</sup> See Preyer, *supra* note 35, at 331, 349–50.

<sup>65</sup> See *id.* at 338; see also *id.* at 331.

<sup>66</sup> ROTHMAN, *supra* note 8, at 18–19.

<sup>67</sup> See *id.* at 12, 18–19, 49–51; Hirsch, *supra* note 45, at 426, 428; Preyer, *supra* note 35, at 349–50.

<sup>68</sup> See WILLIAM ROSCOE, OBSERVATIONS ON PENAL JURISPRUDENCE, AND THE REFORMATION OF CRIMINALS 13–14 (1819), reprinted in REFORM OF CRIMINAL LAW IN PENNSYLVANIA (1972); ROTHMAN, *supra* note 8, at 18–19, 50–51; Preyer, *supra* note 35, at 353 (noting that certainty was not a characteristic of punishments in the late eighteenth century). Professor David Rothman argues more categorically that the colonists did not believe that crime was really preventable, since they equated crime with sin and saw the latter as an inherent part of the human condition. See ROTHMAN, *supra* note 8, at 15, 17. This understanding, however, is challenged by Professor Adam Hirsch, who contends that Professor Rothman's view "rests upon a *reductio ad absurdum* of the Puritan creed." See Hirsch, *supra* note 45, at 424–26; see also *id.* at 395–97. In any case, Professor Rothman's argument would have little applicability beyond the Puritan colonies.

<sup>69</sup> See ROTHMAN, *supra* note 8, at xxiii; Hirsch, *supra* note 45, at 428 ("[A] whole family of humiliatory punishments, performed 'openly' or on lecture days before the assembled community . . . sought to deter both offenders and onlookers . . .").

<sup>70</sup> See ROSCOE, *supra* note 68, at 15; Hirsch, *supra* note 45, at 443–44; John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal*

phasize the morality of the condemned's fate, but to connect the criminal with the public and the criminal's sin with every man's transgressions against God, thus awakening the public to "the dangers of all forms of deviant behavior."<sup>71</sup>

This system of punishments was effective because communities were generally smaller and more closely connected at that time. In this context, public participation helped to offset the inherent weakness of the punishments themselves. Whippings were intensely painful, but also eminently temporary (especially compared to modern prison sentences);<sup>72</sup> and if the colonists were primarily interested in inflicting pain on the offender, then the various shaming punishments employed beyond whipping could not be the most effective means.<sup>73</sup> The true force of the punishments came from the eyes of the onlookers — the neighbors, friends, family, and parishioners who would heap scorn (as well as other, more tangible things<sup>74</sup>) on the offender.<sup>75</sup> In a close-knit society, where reputation was critical and people ordered their behavior according to the views of the community, shame was a powerful tool for controlling crime.<sup>76</sup> To the extent the colonists believed that individual offenders could be deterred,<sup>77</sup> the essential mechanism for achieving this might thus have been psychic rather than physical pain.

Critically, proportionality was not a major factor in this system of punishments, either practically or as a theoretical matter. The colonists were certainly not oblivious to the ideal of proportionality,<sup>78</sup> and they did to some extent attempt to vary the punishment according to

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*Punishment?*, 10 J.L. & RELIGION 433, 438, 452–53 (1994); see also Preyer, *supra* note 35, at 349–50; *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 213–14 (2007).

<sup>71</sup> ROTHMAN, *supra* note 8, at 15–16.

<sup>72</sup> See Preyer, *supra* note 35, at 353.

<sup>73</sup> See ROTHMAN, *supra* note 8, at 49.

<sup>74</sup> TEETERS, *supra* note 47, at 7–8 (“[I]t was assumed that the villagers had the right to throw stones, rotten fruit or mud at the heads of the victims whenever such sport pleased their fancies.”).

<sup>75</sup> See ROTHMAN, *supra* note 8, at 49–50; TEETERS, *supra* note 47, at 7 (“Being placed in the stocks or pillory was not severe in itself, except for the humiliation accompanying it . . .”); HIRSCH, *supra* note 45, at 428–29 (“The sting of the lash and the contortions of the stocks were surely no balm, but even worse were the piercing stares of lifelong neighbors who witnessed the offender’s disgrace, and with whom he would continue to live and work.”).

<sup>76</sup> See ROTHMAN, *supra* note 8, at 49–50; HIRSCH, *supra* note 45, at 426–29, 431; Preyer, *supra* note 35, at 349–50 (“Sensitivity to the opinion of others might well be strong in the context of small communities.”).

<sup>77</sup> See HIRSCH, *supra* note 45, at 424–26 (describing the desired effect of punishment on the offender as rehabilitation — and potentially even rehabilitation). Evidence of this may be found in the use of progressive penalties, under which repeat offenders were punished more severely than first-time offenders. See ROTHMAN, *supra* note 8, at 52.

<sup>78</sup> See Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishments Doctrine*, 24 BUFF. L. REV. 783, 813–15 (1975).

the nature of the crime and the circumstances of the criminal.<sup>79</sup> For example, the number of lashes meted out may have varied "according to judicial (or community) perception of the prevalence of the offense in general or the circumstances of the particular offense . . . with a rough proportionality of scale resulting."<sup>80</sup> Of course, the very existence of capital offenses shows that more serious punishments could be reserved to crimes that were seen as more grievous. The idea of proportionality may have even gained appeal as the eighteenth century progressed, as evidenced by the inclusion of explicit proportionality requirements in some state constitutions.<sup>81</sup>

But in practice, punishment was widely disproportionate.<sup>82</sup> No coherent pattern may be found in the circumstances under which different punishments were handed out,<sup>83</sup> and the amount of punishment prescribed would vary according to "the vagaries of individual choice by judges."<sup>84</sup> On a more basic level, this system of punishments, as a whole, did not offer much potential for true proportionality. The number of lashes could be increased or decreased — generally from five up to thirty-nine (the Biblical maximum), although more were occasionally prescribed.<sup>85</sup> But it would be hard to say that a sentence of fifteen lashes is a qualitatively different punishment from a sentence of five lashes in the same way that a modern prison sentence of fifteen years is compared to one of five years.<sup>86</sup> More importantly, even if fewer lashes could be given for minor offenses, and more lashes for more serious offenses, and death for yet more serious offenses, a huge gap existed between these latter two options. Between forty lashes and execution one can imagine a wide range of offenses and circum-

<sup>79</sup> See ROTHMAN, *supra* note 8, at 49–50; Preyer, *supra* note 35, at 331.

<sup>80</sup> Preyer, *supra* note 35, at 349.

<sup>81</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 977–98 (1991) (opinion of Scalia, J.).

<sup>82</sup> Preyer, *supra* note 35, at 353 ("Neither certainty nor proportionality characterized penal measures in the late eighteenth century . . .").

<sup>83</sup> See GOEBEL & NAUGHTON, *supra* note 59, at 705–06 (concluding, with regard to whipping in colonial New York, that "[t]he selection of this penalty was governed by factors which are quite outside our ken, for the cases cannot be worked into a semblance of consistency"); see also ROTHMAN, *supra* note 8, at 49 ("No clear-cut division by type of offense distinguished those who received a fine from those who received a whipping.")

<sup>84</sup> Preyer, *supra* note 35, at 349.

<sup>85</sup> See GOEBEL & NAUGHTON, *supra* note 59, at 705; Preyer, *supra* note 35, at 333, 349 & n.58.

<sup>86</sup> See ROTHMAN, *supra* note 8, at 50–51, 62 (arguing that system of incarceration that developed after the Founding could match punishment to crime in a way that the inflexible old system could not). *But see* Hirsch, *supra* note 45, at 396, 405 (challenging Professor Rothman's assertion that incarceration was "eminently variable" and suggesting there was no reason to think that whipping was any less flexible than incarceration); Preyer, *supra* note 35, at 349 ("Was 39 lashes 'severe' and 20 not? . . . The meaningful distinctions in the pain of the number of lashes given particular offenses may elude us, but they were well understood by those who imposed and those who received this particular punishment.").

stances for which neither option is proportional.<sup>87</sup> Beyond this, it does not appear that proportionality was seen as essential from any theoretical perspective. The colonists may have tried to vary the number of lashes given in different circumstances, but they were also willing to prescribe the same punishment — death — to crimes as disparate as adultery and murder.<sup>88</sup> It is always difficult to prove a negative, but there is little indication that a lack of proportionality — for example, a judge giving thirty lashes where fifteen would be more appropriate — was seen as fatal to the public punishments system's goals of educating the public and shaming the offender. The extent to which proportionality was unimportant in this system can be demonstrated by contrast to the centrality of this notion in the system that subsequently developed.

### B. *The Rise of Incarceration*

As the eighteenth century progressed, colonial society changed in a way that gradually reduced the efficacy of the existing system of punishment. Population and urbanization increased and people moved more freely between different communities.<sup>89</sup> As discussed above, the public punishment system depended on a close-knit society in which people ordered their behavior according to community sentiment.<sup>90</sup> As these conditions ceased to exist, so too did the effectiveness of shame as a mechanism for controlling deviant behavior.<sup>91</sup> Punishments carried out in front of an anonymous crowd could not put the same psychological pressure on the offender as those carried out in front of people with whom he was intimately connected.<sup>92</sup> “As the aura of shame and psychic trauma surrounding the penalty evaporated, there was left behind only a small core of physical pain quite insufficient to prevent offenses.”<sup>93</sup> Indeed, such punishments were more likely to produce indignation rather than shame. Commentators at the time believed that punishments under these circumstances destroyed the criminal's sense of shame, thus increasing his propensity to commit future offenses.<sup>94</sup> Public punishments were also losing their effects on

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<sup>87</sup> See ROTHMAN, *supra* note 8, at 50–51 (describing the system as characterized by “imbalance and inflexibility, a vacillation between lenient and harsh punishment” and noting “the absence of punishments in the middle range”).

<sup>88</sup> See Preyer, *supra* note 35, at 334.

<sup>89</sup> See Hirsch, *supra* note 45, at 431–32.

<sup>90</sup> See ROTHMAN, *supra* note 8, at 49–50.

<sup>91</sup> Hirsch, *supra* note 45, at 435.

<sup>92</sup> *Id.* at 435–36.

<sup>93</sup> *Id.* at 436–37.

<sup>94</sup> BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENT UPON CRIMINALS, AND UPON SOCIETY 5 (1787), reprinted in REFORM OF CRIMINAL LAW IN PENNSYLVANIA, *supra* note 68 (“The reformation of a criminal can never be effected by public

the public at large; as towns became larger and more anonymous, the centrality of public punishment rituals must necessarily have decreased. And those who did see the punishment were no longer thought to be gaining respect for the law as a result.<sup>95</sup>

As the public punishment system weakened, crime increased.<sup>96</sup> "By the last quarter of the eighteenth century the colonies confronted serious problems of effective punishment of crime."<sup>97</sup> Near the end of the eighteenth century, Americans began looking for alternatives. A few decades after the Founding, they settled on incarceration.<sup>98</sup> This new system, which came into fruition with the advent of the New York and Pennsylvania penitentiaries in the 1820s,<sup>99</sup> explicitly eschewed the mechanism of public punishments in favor of intrinsically nonpublic forms of punishment.<sup>100</sup> Deterrence would now be achieved not through inculcating the public at large with moral values but through altering *ex ante* the mindset and incentives of the specific potential criminal.<sup>101</sup> Focusing on deterrence, commentators argued that the existing system was creating skewed incentives for would-be offenders: if robbery and murder are both punished by death, why would a right-thinking robber hesitate to add murder to his résumé under the right circumstances?<sup>102</sup> By undermining the moral distinction between different wrongs, the system itself was increasing people's propensity for crime.<sup>103</sup> Moreover, the prospect of punishment under the existing system was not sufficiently certain to effect specific deterrence. Faced with the stark choice of sentencing a criminal to death or employing one of the milder forms of public punishment, Americans were increasingly opting for the latter, even though punishments such as whipping were becoming less effective.<sup>104</sup> Some juries even let criminals go free rather than imposing the death penalty.<sup>105</sup> What was needed was a punishment that was more moderate

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punishment [because] . . . , [a]s it is always connected with infamy, it destroys in him the sense of shame, which is one of the strongest out-posts of virtue."); *see also* Hirsch, *supra* note 45, at 436.

<sup>95</sup> *See* RUSH, *supra* note 94, at 5–10.

<sup>96</sup> *See* Hirsch, *supra* note 45, at 432–34.

<sup>97</sup> Preyer, *supra* note 35, at 352.

<sup>98</sup> *See id.* at 353 ("[F]uelled with the ideology of the beneficent potentialities of a newly independent American republic, some . . . former colonies . . . [sought] a more rational criminal code which made punishments certain . . . [and] would not only increase enforcement of the law but could also reform the offender and in so doing actually reduce the number of criminal offenses. . . . [I]mprisonment [became] the ideal embodiment of these new goals.").

<sup>99</sup> *See* ROTHMAN, *supra* note 8, at 79.

<sup>100</sup> *See* RUSH, *supra* note 94; Hirsch, *supra* note 45, at 443–44.

<sup>101</sup> *See* Hirsch, *supra* note 45, at 443–44.

<sup>102</sup> *See* ROTHMAN, *supra* note 8, at 59–60; RUSH, *supra* note 94, at 9; Hirsch, *supra* note 45, at 396.

<sup>103</sup> *See* RUSH, *supra* note 94, at 9; Hirsch, *supra* note 45, at 400.

<sup>104</sup> *See* Hirsch, *supra* note 45, at 439–41.

<sup>105</sup> *See* ROTHMAN, *supra* note 8, at 60.

than execution and that could thus be applied with complete consistency; the certainty of moderate punishment would have a much greater effect on the prospective criminal than an uncertain harsher punishment.<sup>106</sup> Prisons filled this role perfectly: because the length of incarceration could be varied to match the crime, no one would hesitate in properly convicting or sentencing the criminal, and punishment would thus become a certainty.<sup>107</sup>

The new system also brought a different approach to affecting the criminal after the crime was committed. The old system assumed that the psychic sting of communal scorn might induce criminals not to resort to their old habits. The new system aimed at a deeper level of rehabilitation. The root of deviant behavior came to be seen increasingly as not inherent depravity but merely depraved upbringings.<sup>108</sup> The penitentiary was intended to remove the criminal from the environment that had corrupted him and to place him in one that would successfully reeducate and rehabilitate him.<sup>109</sup>

Proportionality thus was not only a more realistic possibility under the new system of incarceration, it was a theoretical imperative. The prison movement stemmed from a rationalist ideology that viewed punishment as a necessary evil; under this view, any punishment beyond what was necessary to achieve the desired social purpose (deterrence or rehabilitation) was abusive and unjust.<sup>110</sup> More importantly, though, disproportionate sentences could render the new punishment self-defeating. Overly long sentences would recreate the problems of incentives decried in the earlier system: if lesser crimes and greater crimes received equal prison sentences, it was thought that deterrence would once again break down. And rehabilitation depended on the sentence being tailored to the specific circumstances of the offender and his actions.<sup>111</sup>

What the preceding discussion should demonstrate is that, at the least, it would be historically dubious to claim that in crafting the Eighth Amendment the Framers “chose”<sup>112</sup> to reject a ban on disproportionate punishment *generally*. If one accepts that “cruel and unusual” referred only to certain barbarous methods, one might infer from the existence of explicit proportional punishment clauses in contemporaneous state constitutions that the Framers of the Eighth

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<sup>106</sup> See *id.* at 59–61; RUSH, *supra* note 94, at 14–15; Hirsch, *supra* note 45, at 399–400.

<sup>107</sup> See ROTHMAN, *supra* note 8, at 62.

<sup>108</sup> See *id.* at 62–69, 82; Hirsch, *supra* note 45, at 413–15.

<sup>109</sup> See ROTHMAN, *supra* note 8, at 82–83; Hirsch, *supra* note 45, at 414–15. On the various forms used to institute this goal, see generally ROTHMAN, *supra* note 8, at 79–108.

<sup>110</sup> See Hirsch, *supra* note 45, at 398–99; see also RUSH, *supra* note 94, at 9 (“Laws can only be respected, and obeyed, while they bear an exact proportion to crimes.”).

<sup>111</sup> See RUSH, *supra* note 94, at 11–13.

<sup>112</sup> *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (opinion of Scalia, J.).

Amendment chose not to ban disproportionate *public* punishments. But the differences between the two systems — especially with regard to the role of proportionality — are such that one cannot necessarily view this rejection as direct evidence of original intent as to proportionality in punishment under the new system of incarceration. The differences in the logic and mechanisms of “punishments” in 1791 and “punishments” in the 1820s and following, as highlighted above, are such that one cannot simply elide the terms and assume that a statement on one is equivalent to a statement on the other. Thus, Justice Scalia’s conclusion that the Framers affirmatively rejected a ban on disproportionate punishments in the present system is weaker than it initially seems. A safer conclusion would be to say that, in writing the Cruel and Unusual Punishments Clause, the Framers said nothing at all about this problem.

### III. CONSTITUTIONAL TRANSLATION

If there is no direct evidence of original intent as to proportionality in a system of nonpublic punishments, how should one proceed? On one view, this is not a problem: if the words of the Eighth Amendment, as understood in their original context, say nothing about disproportionate punishments, then this is the end of the inquiry. This is essentially Justice Scalia’s reasoning in *Harmelin*.<sup>113</sup> This Note does not seek to defend one theory of interpretation over another, but if one takes seriously the notion that constitutional interpretations should be based on the original intention of the Framers, then the dilemma becomes more complicated. If “punishments” today represents a fundamentally different system than that which existed at the time of the Founding, then what can one say about the intention of the Framers with regard to “punishments” generally?

#### A. Gaps in Meaning and the Concept of Translation

Professor Lessig describes this problem more generally in his article on *Fidelity in Translation*.<sup>114</sup> Suppose one had a constitutional provision comprised of three terms: *X*, *Y*, and *Z*. As a first step, one might seek to understand the meaning of each of these terms and their collective application at the time of the Founding. But suppose also that over time the meaning of term *Z* became distorted or incoherent. In attempting to apply the provision at that point, one is left with a gap

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<sup>113</sup> See *id.* at 985 (“We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained.”).

<sup>114</sup> Lessig, *supra* note 9.

in meaning.<sup>115</sup> To fill this gap, Professor Lessig argues, one must reconstruct the term *Z* in such a way that the application of the entire provision in the new context maintains the force of its application in the original context.<sup>116</sup> This is essentially an act of translation: “find[ing] equivalents between two relatively autonomous systems of meaning.”<sup>117</sup> Without this second step, one cannot ensure fidelity to the original meaning of the Constitution.<sup>118</sup>

Professor Lessig provides the following example. Article I gives Congress the power “to raise and support Armies” and “to provide and maintain a Navy.”<sup>119</sup> There is no controversy over what the terms “Armies” and “Navy” meant at the time of the Founding or over the application of these provisions at that time. One might conclude that because the Framers provided explicitly for an army and a navy, the existence of an air force today is unconstitutional. “But of course, since there was no such thing as an air force in 1789, it is absurd to read the gap as a proscription.”<sup>120</sup> Professor Lessig identifies the Eighth Amendment as a similarly “overdetermined” source.<sup>121</sup> Like the Air Force, the modern prison system did not exist in 1791. The term “punishment” has a fundamentally different meaning today than it did then, so the Framers could not have considered the question of proportionality in the context of incarceration, even if they did consider and reject it in the context of public punishment. The modern interpreter must determine how best to deal with this gap in meaning in order to remain faithful to the constitutional design. Ignoring the gap is not necessarily the best way to go about this.<sup>122</sup>

One possible route of translation would be to assume that omission is equivalent to intention — that is, that by omitting a proportionality requirement in the context of public punishments, the Framers intended for legislatures to have complete discretion in setting sentences, regardless of proportion, under any system of punishment. This, effectively, is what Justice Scalia’s opinion assumes in *Harmelin*. But the problems with this translation are immediately apparent. What if a legislature were to punish parking violations with life in prison? In

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<sup>115</sup> See *id.* at 1201.

<sup>116</sup> See *id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *id.* at 1188–89; cf. *Austin v. United States*, 509 U.S. 602, 628–29 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (“In recounting the law’s history, we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved.”).

<sup>119</sup> Lessig, *supra* note 9, at 1203 (quoting U.S. CONST. art. I, § 8, cls. 12, 13) (internal quotation marks omitted).

<sup>120</sup> *Id.*

<sup>121</sup> See *id.* at 1203–04.

<sup>122</sup> See *id.* at 1204.

*Rummel*, Justice Rehnquist had conceded that proportionality review might be required in such extreme cases.<sup>123</sup> But Justice Rehnquist's argument was a more limited, precedential one: he found no cases to support a constitutional proportionality limit on felony jail sentences, but this did not mean that an exceptional case could not arise.<sup>124</sup> Justice Scalia's argument is more categorical, since it relies not on precedent but on the intent of the Framers.<sup>125</sup> If it comports with the Framers' intent for legislatures to have complete discretion in setting jail terms, regardless of proportionality, then how can one ever draw exceptions — even for parking violations punished by life imprisonment? Justice Scalia squirms around the question. He dismisses the *Rummel* exception as a "parade of horrors" argument and suggests that it is irrelevant because no reasonable legislature would ever pass such a law.<sup>126</sup> But even Justice Scalia is unwilling to say squarely that life sentences for petty offenses are in accord with the original meaning of the Eighth Amendment.<sup>127</sup>

Alternatively, one could seek historical "equivalents" for filling this gap in meaning. The remainder of this Note focuses on two potential equivalents, both of which suggest that reading a proportionality requirement into the Eighth Amendment would be more in keeping with the intention of its Framers.

### B. *Self-Defeating Punishments: Barbarous Methods and Disproportionate Sentences*

The first equivalent may be gleaned by comparing disproportionate punishments in the nonpublic system with the sorts of punishments that the Framers unquestionably did prohibit in the public system: barbarous *methods* of punishment. As discussed above, punishments in the colonial era sought to inculcate the values of the criminal justice system in the general population and to deter and punish offenders through the psychic sting of shame. Both these functions of public

<sup>123</sup> See *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980); see also *id.* at 288 (Powell, J., dissenting).

<sup>124</sup> See *id.* at 274 (majority opinion).

<sup>125</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (opinion of Scalia, J.).

<sup>126</sup> *Id.* at 986 n.11 (internal quotation marks omitted). This is a particularly weak argument. The fact that a certain violation is unlikely to occur has no relation to the substance of a constitutional provision. A rational legislature is also unlikely to prescribe the rack or gibbet as a form of punishment — nor was it likely to do so even at the time of the Founding — but this does not mean that the practice is not proscribed by the Constitution.

<sup>127</sup> See *id.* Justice Scalia encounters similar problems with regard to other theoretical applications of his Eighth Amendment interpretation. For example, the Founders clearly could not have considered whipping to be a cruel or unusual method of punishment. But even Justice Scalia admits that a modern statute providing for this form of punishment would be problematic. See Lesig, *supra* note 9, at 1187 (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989)).

punishment could be frustrated by cruel modes of punishment. Truly outlandish public punishments — such as garish and drawn-out tortures used in Europe at the time<sup>128</sup> — ran the risk of becoming spectacles, which horrified rather than edified the onlookers.<sup>129</sup> It was thought that such punishments would move the crowd not to know and respect the law but rather to resent it — and thus would increase the public's propensity to commit crimes.<sup>130</sup> Perhaps more importantly, the crowd would view the offender not with scorn but with sympathy.<sup>131</sup> Punishments of this sort — such as the “racks and gibbets” with which the framing generation were concerned — would thus be self-defeating in the eighteenth-century system.

Under the modern meaning of “punishments,” the method of punishment is for the most part no longer in question and there is little corresponding risk of spectacle. But punishments may now be rendered self-defeating through disproportionality. The goal of deterrence, which is as critical to the project of incarceration today as it was in the 1820s, cannot adequately be achieved if there is no relationship whatsoever between offenses and the lengths of prison sentences. To translate the nineteenth-century concern into modern terms, if theft and murder are both punished by life imprisonment, what incentives does the thief have not to murder the officer who discovers him? In other words, the modern system of incarceration is an attempt to order behavior according to the threat of sanction;<sup>132</sup> if threats bear no rational relationship to offenses, the system cannot function. Thus, proportionality may serve as an “equivalent” to restrictions on methods of punishment.

This is not to say that the Framers understood the Eighth Amendment in functional terms — it is more likely that they saw it simply as a personal right. But in translating the Cruel and Unusual Punishments Clause from the old system of meaning into the new, it is reasonable to favor an interpretation that gives this provision the same force that it had originally. To interpret the Cruel and Unusual Punishments Clause as allowing punishments that are as self-defeating in the modern context as those it originally proscribed were in the original context would thus be problematic.

<sup>128</sup> See ROTHMAN, *supra* note 8, at xxiii.

<sup>129</sup> See *id.* at xxii–xxv.

<sup>130</sup> See *id.* at xxiv–xxv; cf. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 6 (London, W. Clarke & Sons 1817) (1644) (explaining that because the execution of the incompetent is “cruell and inhuman,” it is a “miserable spectacle” that “can be no example to others”); RUSH, *supra* note 94, at 5–10 (arguing that all forms of public punishment are spectacles that lead the public to condemn rather than to respect the law).

<sup>131</sup> See ROTHMAN, *supra* note 8, at xxiv–xxv.

<sup>132</sup> See, e.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

### C. Fines

A second equivalent may be found in the clause that immediately precedes the Cruel and Unusual Punishments Clause. The Excessive Fines Clause prohibits monetary punishments that are "grossly disproportional" to the underlying offense;<sup>133</sup> it is a recognition of the historical fact that unlimited discretion in imposing pecuniary sanctions may be used by the government as a tool of oppression.<sup>134</sup> Alongside the corporal punishments discussed above, fines played a critical role in the system of punishments that existed before the Founding. Fines were widely used in this era,<sup>135</sup> and were applied to punish a variety of offenses, often as an alternative to whippings or other forms of public punishment.<sup>136</sup> They were "overwhelmingly the most common of the non-capital punishments" and, according to at least one historian, were "far more significant to consideration of penal measures than hanging, whipping, or pillory."<sup>137</sup>

While fines were a critical part of the earlier system of punishments, they were also different in a number of ways from the corporal punishments for which the Cruel and Unusual Punishments Clause was intended. Unlike other forms of punishment that existed before the Founding, fines acted purely on the individual offender — that is, they were inherently nonpublic punishments. Obviously, the fine by its nature involved no public ritual, so it could not be used as a means to edify the populace. It "relied entirely on deterrence to keep potential offenders in line."<sup>138</sup> Moreover, the critical mechanism for deterrence was the sanction itself, not any shame that it might bring on. Finally, the fine was a form of punishment that was much more capable of proportionality: "the precise amount of the fine" could be "tailored individually to the particular case."<sup>139</sup> As such, fines did not present the problem of a gap between over-leniency and over-punishment as did the system of corporal punishments that existed at that time.

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<sup>133</sup> *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

<sup>134</sup> See *id.* at 335–36; *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264–73 (1989); Granucci, *supra* note 10, at 844–47; see also Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1240–56 (1987).

<sup>135</sup> See Preyer, *supra* note 35, at 350–51.

<sup>136</sup> See GOEBEL & NAUGHTON, *supra* note 59, at 709–10; ROTHMAN, *supra* note 8, at 48–49; Hirsch, *supra* note 45, at 403. Professor Rothman notes that fines had a somewhat more limited application than whippings because they "presum[ed] that the offender had property whose loss would be chastening." ROTHMAN, *supra* note 8, at 48.

<sup>137</sup> Preyer, *supra* note 35, at 350.

<sup>138</sup> Hirsch, *supra* note 45, at 427.

<sup>139</sup> Preyer, *supra* note 35, at 350.

Thus, in some ways, fines at the time of the Founding resembled incarceration in the system that subsequently developed.<sup>140</sup> Like incarceration, and unlike the system of punishments for which the Cruel and Unusual Punishments Clause was intended, fines presented a meaningful potential for proportionality and focused on the offender rather than the public. This presents a powerful equivalent: to the extent that the Framers considered a mode of nonpublic punishment for which proportionality was a real possibility, they explicitly found that proportionality was an essential limitation.

Drawing an equivalence between fines and incarceration may thus be another way of filling the gap left in the Eighth Amendment by the changing meaning of “punishments.” This idea is not entirely novel. In 1832, shortly after the rise of the modern penitentiary in the United States, a commentator named Benjamin Oliver declared that, while “no express restriction is laid in the constitution[] upon the power of imprisoning for crimes,” disproportionate prison sentences would be “contrary to the spirit of the constitution” under the Excessive Fines Clause.<sup>141</sup> Oliver connected fines and incarceration — in implicit contrast to the forms of punishment handled by the Cruel and Unusual Punishments Clause — and concluded it would be “absurd,” when “courts have a discretionary power [both] to fine and imprison,” to assume that the Framers intended the former power to be restricted but the latter to be “wholly unrestricted.”<sup>142</sup> In *Harmelin*, Justice Scalia summarily dismissed Oliver’s reasoning as “convoluted.”<sup>143</sup> But the discussion above should illustrate that it is actually quite straightforward. Oliver recognized that the Framers had not considered the issue of incarceration, but he reasoned that given the clear proscription in the Excessive Fines Clause, it would be odd to say that the Framers’ intent would accord with unfettered applications of this new and more powerful form of nonpublic punishment. Oliver was thus translating from one system of meaning into another, and given his proximity in time to both the old system and the inception of the new one, it would be reasonable to give him a great deal of credibility as a translator.<sup>144</sup>

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<sup>140</sup> Of course, there are important differences between fines and modern incarceration. Because of the limitations on law enforcement discussed above, eighteenth-century Americans could not have viewed fines as a comprehensive system of deterrence, as the prison system was intended to be. Moreover, there is no indication that fines served any sort of rehabilitative function.

<sup>141</sup> OLIVER, *supra* note 34, at 185.

<sup>142</sup> *Id.* at 185–86.

<sup>143</sup> *Harmelin v. Michigan*, 501 U.S. 957, 981 (1991) (opinion of Scalia, J.); *see also id.* at 1009–10 (White, J., dissenting) (citing this argument for the proposition that it would be cruel and unusual to impose grossly disproportionate prison sentences).

<sup>144</sup> *See* Lessig, *supra* note 9, at 1194–96 (discussing the importance of familiarity — with both the source and the target contexts — in accurate translation).

## IV. CONCLUSION

This Note argues that even if the historical assumptions used by the majority of the Court to justify the proportionality element of the Eighth Amendment are incorrect, it is in no way clear that a ban on disproportionate punishments would be contrary to the intention of the Framers, as Justice Scalia suggests in *Harmelin*. The Framers may have chosen to reject a ban on disproportionality in the context of the system of punishments that existed at that time. But this was a very different system from the one that exists today, so it seems problematic to draw conclusions from this apparent rejection about the intention of the Framers as to proportionality in punishments generally. If the Framers said nothing about proportionality in incarceration, that does not necessarily mean that allowing unfettered discretion in setting prison sentences would comport with original intent. Indeed, if one looks to historical equivalents, it is possible to conclude that such an interpretation would be precisely contrary to what the Framers had intended.