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The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century

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THE ANOMALY OF EXECUTIONS: THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE IN THE 21ST CENTURY

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ABSTRACT

This Article describes the anomaly of executions in the context of the U.S. Supreme Court's Eighth Amendment jurisprudence. While the Supreme Court routinely reads the Cruel and Unusual Punishments Clause to protect prisoners from harm, the Court simultaneously interprets the Eighth Amendment to allow inmates to be executed. Corporal punishments short of death have long been abandoned in America's penal system, yet executions—at least in a few locales, heavily concentrated in the South—persist. This Article, which seeks a principled and much more consistent interpretation of the Eighth Amendment, argues that executions should be declared unconstitutional as “cruel and unusual punishments.” In so doing, the Article explores the history of the “cruel and unusual” catchphrase in English and American law and critiques the Supreme Court's “evolving standards of decency” test. The Article also describes the abandonment of corporal punishments as penal sanctions and discusses existing Eighth Amendment jurisprudence on that topic. The Article explains how executions are cruel—and were thought to be so even by some of America's founders—and have, over time, become unusual. The Article further highlights how the U.S. Constitution's Fourteenth Amendment fundamentally transformed the Cruel and Unusual Punishments Clause calculus, making modern-day executions unusual in the extreme because of the arbitrary and discriminatory way in which they are carried out.

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I. INTRODUCTION

The Eighth Amendment, ratified in 1791,¹ contains just sixteen words: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”² That amendment, however, has generated enormous controversy, spawning thousands of court cases³ and caustic reactions to U.S. Supreme Court decisions construing it.⁴ Courts have wrestled over the meaning of “excessive,”⁵ and jurists, lawyers, and scholars alike have spilled gallons of ink fiercely debating how to interpret the phrase “cruel and unusual punishments.”⁶ There is relatively little legislative history from the First Congress⁷ and the state ratification debates⁸

¹ *United States v. Austin*, 614 F. Supp. 1208, 1212 (D. N.M. 1985) (“The eighth amendment ... was proposed in 1789 and ratified two years later in 1791.”).

² U.S. CONST., amend. VIII (ratified Dec. 15, 1791).

³ “ALLFEDS” and “ALLSTATES” Westlaw database searches for “Eighth Amendment” both yielded “10000 Documents”—the maximum retrievable number—as “Results.”

⁴ In 2005, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of juvenile offenders. *Roper v. Simmons*, 543 U.S. 551 (2005). In 2008, the Court also held that those provisions prohibit the death penalty for non-homicidal child rape. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008). Both decisions generated heated and sustained public debate.

⁵ E.g., *United States v. Bajakajian*, 524 U.S. 321, 335 (1998) (“Excessive means surpassing the usual, the proper, or a normal measure of proportion.”); *Alexander v. United States*, 509 U.S. 544, 559 (1993) (commenting on “excessive” penalties within the meaning of the Eighth Amendment’s Excessive Fines Clause); *United States ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 435 (1921) (Brandeis, J., dissenting) (“It was assumed in *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 111 ... that an excessive fine, even if definite, would violate the Eighth Amendment.”).

⁶ E.g., Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69 (2012); Kevin White, *The Constitutional Limits of the “National Consensus” Doctrine in Eighth Amendment Jurisprudence*, 2012 B.Y.U. L. REV. 1371 (2012); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011); Aimee Logan, *Who Says So? Defining Cruel and Unusual Punishment by Science, Sentiment, and Consensus*, 35 HASTINGS CONST. L.Q. 195 (2008); Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is “Cruel and Unusual,”* 74 U. CIN. L. REV. 819 (2006); Susan M. Raeker-Jordan, *Parsing Personal Predilections: A Fresh Look at the Supreme Court’s Cruel and Unusual Death Penalty Jurisprudence*, 58 ME. L. REV. 99 (2006); Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 MIL. L. REV. 66 (2005); Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. REV. 559 (2003); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishments Clause*, 68 TENN. L. REV. 41 (2000).

⁷ JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* 186 (2012) (quoting the statements of Representatives William Loughton Smith and Samuel Livermore at the First Congress).

⁸ *Id.* at 186-87 (discussing the comments of Abraham Holmes at the Massachusetts convention and Patrick Henry’s comments at Virginia’s convention).

concerning the Eighth Amendment, further fueling the contentious public debate over the text.⁹

The Eighth Amendment—the subject of multiple books¹⁰ and countless law review articles¹¹—has been described as “something of an enigma.”¹² American judges rarely considered that amendment and state-law equivalents in the decades following the ratification of the U.S. Bill of Rights, so for generations the American people have wrestled mightily over the meaning of the bar on “cruel and unusual punishments.”¹³ Because what is “cruel and unusual” is largely a subjective determination, that long-standing debate is almost certain to continue.¹⁴ What is “cruel and

⁹ The death penalty itself has been a major focus of the Eighth Amendment debate. Compare John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL'Y 195, 254 (2009) with RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (2001).

¹⁰ E.g., BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7; MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2011) (1973); VINCENT BURANELLI, *THE EIGHTH AMENDMENT: THE AMERICAN HERITAGE HISTORY OF THE BILL OF RIGHTS* (1991); MICHAEL L. RADELET, *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* (1990); LARRY CHARLES BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* (1975).

¹¹ E.g., Laurence Claus, *Methodology, Proportionality, Equality: Which Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35 (2008); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008); Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & SOC. POL'Y 119 (2004); Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661 (2004); Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789 (1996); Deborah A. Schwartz & Jay Withingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1975); Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54 (1910).

¹² JoLee Adamich, Nick Chase, Jennifer Nestle & Evan Rice, *The Selected Cases of Myron H. Bright: Thirty Years of His Jurisprudence*, 83 MINN. L. REV. 239, 254 (1998).

¹³ U.S. CONST., amend. VIII (ratified Dec. 15, 1791).

¹⁴ Compare *Graham v. Connor*, 490 U.S. 386, 398 (1989) (“the terms ‘cruel’ and ‘punishments’ clearly suggest some inquiry into subjective state of mind”) and *Bland v. State*, 164 P.3d 1076, 1082 (Okla. Crim. App. 2007) (Chapel, J., dissenting) (“[I]t is simply unavoidable and inevitable that we turn to our societal conceptions of what is moral and appropriate to fill in the contours of constitutional terms that are as subjective and indeterminate as ‘cruel’ and ‘unusual.’”) with *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (“Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”).

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unusual” to one Justice may not be to another, leading to a plethora of five-to-four decisions by the U.S. Supreme Court in this area of law.¹⁵

The Supreme Court’s Eighth Amendment jurisprudence—in a state of flux in recent years¹⁶—has aptly been described as a “mess.”¹⁷ Even the Justices—who grapple with capital cases every year—seem dissatisfied and uneasy with the state of the law. For example, in a 2008 decision outlawing executions for non-homicidal child rape, the Court forthrightly acknowledged that its Eighth Amendment case law pertaining to capital punishment “is still in search of a unifying principle.”¹⁸ “When the law punishes by death,” Justice Anthony Kennedy wrote in that case, “it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”¹⁹

Judges are prone to interpret provisions of the U.S. Constitution differently, and the Eighth Amendment is no exception. The meaning of the Cruel and Unusual Punishments Clause—already the subject of uncertainty in the founding era and the decades that followed—was complicated even further by the Fourteenth Amendment’s ratification in 1868.²⁰ “At most,” law professor Akhil Amar writes of 1789, when the First Congress originally debated the Cruel and Unusual Punishments Clause, “the clause seemed to disfavor the odd-ball statute, wholly out of sync with other congressional criminal laws.”²¹ But after the Fourteenth Amendment’s post-Civil War ratification, the Eighth Amendment was held to apply to the states.²² In prior times, the Cruel and Unusual Punishments Clause only constrained the federal government’s actions.²³ “Once applied against states,” Amar notes of the Cruel and Unusual Punishments Clause, “the clause might have more judicially enforceable bite against state legisla-

¹⁵ *E.g.*, *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled*, *Payne v. Tennessee*, 501 U.S. 808 (1991); *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁶ *E.g.*, Richard M. Ré, *Can Congress Overturn Graham v. Florida?*, 34 HARV. J.L. & PUB. POL’Y 367, 371 (2011).

¹⁷ Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475 (2005); John “Evan” Gibbs, *Jurisprudential Juxtaposition: Application of Graham v. Florida to Adult Sentences*, 38 FLA. ST. U. L. REV. 957, 968 (2011); John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 75 (2010); J. Richard Broughton, *Some Reflections on Conservative Politics and the Limits of the Criminal Sanction*, 4 CHARLESTON L. REV. 537, 543 (2010).

¹⁸ *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008).

¹⁹ *Id.* at 420.

²⁰ U.S. CONST., amend. XIV (ratified July 9, 1868).

²¹ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 279 (1998).

²² *See generally* GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006).

²³ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866).

tures.”²⁴ “[T]he meaning of the Bill of Rights,” Amar sagely notes, “shifted when its words and principles were refracted through the prism of the Fourteenth Amendment.”²⁵

Not surprisingly, the “cruel and unusual punishments” language has been subject to varied constructions and interpretations over time.²⁶ But only in the late nineteenth century, in the post-Reconstruction Era, did the U.S. Supreme Court finally weigh in on the murkily understood²⁷ text. When it did, the Court held—in dicta, no less—that the language only barred gruesome “punishments of torture” such as breaking on the wheel, burning at the stake, crucifixion, emboweling alive, beheading, drawing and quartering, and public dissection for murder.²⁸ The “cruel and unusual” proscription, one Justice emphasized in 1892, was “usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the

²⁴ AMAR, *supra* note 21, at 171, 279. As Amar explains: “When judged against a national baseline, perhaps a single state legislature, or the legislatures of an entire region, might indeed be ‘unusual’ and out of sync with general national sentiment and national morality.” *Id.* at 279-80.

²⁵ Akhil Reed Amar, *America’s Lived Constitution*, 20 YALE L.J. 1734, 1779 (2011).

²⁶ In *The Morality of Law*, the noted Harvard law professor, Lon L. Fuller, wrote that the “cruel and unusual punishments” phrase “calls to mind at once the whipping post and the ducking stool.” LON L. FULLER, *THE MORALITY OF LAW* 105 (1964). However, earlier judicial decisions once held that whipping—a once popular form of punishment, especially as regards slaves—was not a cruel and unusual punishment. *State v. Cannon*, 190 A.2d 514, 517 (Del. 1963) (refusing to hold that whipping was a cruel and unusual punishment); *In re Candido*, 31 Haw. 982, 1931 WL 2830 *9 (Haw. Terr. 1931) (“whipping with a cat-o-nine-tails” did not constitute a cruel and unusual punishment); *Garcia v. Territory of New Mexico*, 1 N.M. 415, 1869 WL 2421 *2 (N.M. Terr. 1869) (the punishment of the crime of stealing mules by the infliction of lashes on the bare back did not constitute a cruel and unusual punishment).

²⁷ The “cruel and unusual Punishments” provision of the English Declaration of Rights of 1688 was prompted by abuses of the infamous Lord Chief Justice George Jeffreys of the King’s Bench during the Stuart reign of James II. *Harmelin v. Michigan*, 501 U.S. 957, 967-69 (1991). Historians, however, do not agree on which abuses. *Id.* One of the seminal studies of the Eighth Amendment pointed out that many early Americans (who often focused on the *mode* of punishment) may have misunderstood the original meaning of the English Declaration—later enacted by Parliament as the English Bill of Rights of 1689. Anthony Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CALIF. L. REV. 839, 843-44, 860 (1969). As Anthony Granucci wrote: “Executing male rebels by drawing and quartering continued with all its embellishments until 1814, when disembowelling was eliminated by statute. Beheading and quartering were not abolished until 1870. The burning of female felons continued in England until the penalty was repealed in 1790.” *Id.* at 855-56. Compare Stephen E. Meltzer, *Harmelin v. Michigan: Contemporary Morality and Constitutional Objectivity*, 27 NEW ENG. L. REV. 749, 760 n.95 (1993) (“It is asserted by some historians that the framers of the American Constitution misinterpreted the meaning of the cruel and unusual punishments clause of the English Bill of Rights. The clause was not misunderstood, nor was it meant differently than it was shown to mean in the English Bill of Rights.”).

²⁸ *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878); *In re Kemmler*, 136 U.S. 436, 446 (1890).

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iron boot, and the like, which are attended with acute pain and suffering.”²⁹ The proscription was thus read—as it still is by Justice Antonin Scalia and others³⁰—to restrict only a small *subset* of cruel punishments: those involving torture, a lingering death, or especially severe bodily pain.³¹

²⁹ *O’Neil v. State of Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting). The Eighth Amendment itself, of course, contains no reference to “methods” or “modes” of punishment.

³⁰ “The Eighth Amendment,” Justice Scalia has written, “is addressed to always-and-everywhere ‘cruel’ punishments, such as the rack and the thumbscrew.” *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting). He and some of his colleagues—unhappy with the Supreme Court’s “evolving standards of decency” test—thus read the Cruel and Unusual Punishments Clause to bar only certain “modes” of punishment, but not death itself. *See Harmelin*, 501 U.S. at 981 (opinion of Scalia, J.) (“The early commentary on the Clause contains no reference to disproportionate or excessive sentences, and again indicates that it was designed to outlaw particular *modes* of punishment.”) (*italics in original*); *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (“the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’ was aimed at excluding only certain *modes* of punishment”) (*italics in original*); *see also Graham*, 130 S. Ct. at 2049 n.3 (Thomas, J. dissenting) (“The Court ignores entirely the threshold inquiry of whether subjecting juvenile offenders to adult penalties was one of the ‘modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.’”) (citation omitted); *Baze v. Rees*, 553 U.S. 35, 99 (2008) (Thomas, J., concurring) (“Consistent with the original understanding of the Cruel and Unusual Punishments Clause, this Court’s cases have repeatedly taken the view that the Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment.”); *Roper v. Simmons*, 543 U.S. 551, 608 n.1 (2005) (Scalia, J., dissenting) (“The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the ‘modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.’”) (citation omitted); *see also* J. Amy Dillard, *And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution*, 45 U. RICH. L. REV. 961, 987 (2011) (“In the opening lines of his dissenting opinion in *Atkins*, Justice Scalia condemns the ‘evolving standards of decency’ rationale supporting the majority’s declaration that the execution of mentally retarded defendants would abridge the Eighth Amendment’s prohibition against ‘cruel and unusual punishment.’”).

³¹ *See, e.g., Harmelin*, 501 U.S. at 983 (“Throughout the 19th century, state courts interpreting state constitutional provisions with identical or more expansive wording (*i.e.*, ‘cruel or unusual’) concluded that these provisions did not proscribe disproportionality but only certain modes of punishment.”) (*italics in original*); *see also* *People ex rel.*

Kemmler v. Durston, 55 Hun 64, 7 N.Y.S. 813, 815 (N.Y. Sup. Ct. 1889):

We have no doubt that if the legislature of this state should undertake to prescribe, for any offense against its laws, the punishment of burning at the stake, breaking on the wheel, disembowelling, or hanging in chains, to perish by exhaustion, it would be the duty of the courts to pronounce upon such attempt the condemnation of the constitution. In the case supposed, no doubt could exist, because the statute would be, on its face, repugnant to the provision of the constitution against cruel and unusual punishments. It is common knowledge that the punishments mentioned are unusual, and, by the common consent of mankind, they are cruel punishments, because they involve torture and a lingering death.

Yet, for decades now, the Eighth Amendment has been used to strike down a variety of prison abuses and an array of punishments other than physically torturous ones.³² Indeed, the Cruel and Unusual Punishments Clause has long been used to invalidate punishments less severe than death.³³ For example, in *Jackson v. Bishop*,³⁴ the late Justice Harry Blackmun—then writing for the U.S. Court of Appeals for the Eighth Circuit—held in 1968 that whipping a prisoner with a strap in order to maintain discipline is prohibited.³⁵

That ruling by Justice Blackmun—who later came to view capital punishment as unconstitutional³⁶—shows that non-lethal corporal punishments have also been in the Eighth Amendment’s crosshairs. “[W]e have no difficulty in reaching the conclusion,” Blackmun wrote, “that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment.”³⁷ “[T]he strap’s use, irrespective of any precautionary conditions which may be imposed,” he concluded, “offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess.”³⁸ “Corporal punishment,” he emphasized, “is degrading to the punisher and to the punished alike.”³⁹

³² Robinson v. California, 370 U.S. 660, 666-67 (1962) (a California statute criminalizing narcotics addition constituted a cruel and unusual punishment). The Eighth Amendment has also been read to strictly regulate certain aspects of capital trials *even before* the punishment itself. Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (“The fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special “need for reliability in the determination that death is the appropriate punishment” in any capital case.”); Sue Ann Gerald Shannon, Atkins v. Virginia: *Commutation for the Mentally Retarded?*, 54 S.C. L. REV. 809 (2003) (“courts have repeatedly remarked that ‘death is different’ and ... have placed significant procedural and substantive safeguards on capital trials”).

³³ Hope v. Pelzer, 536 U.S. 730, 738 (2002) (prison guards violated the Eighth Amendment by handcuffing shirtless prisoner to hitching post for seven hours).

³⁴ 404 F.2d 571 (8th Cir. 1968).

³⁵ *Id.* at 579.

³⁶ Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of cert.) (“Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.”).

³⁷ *Jackson*, 404 F.2d at 579.

³⁸ *Id.*

³⁹ *Id.* at 580. A *Treatise on the Office of the Justice of the Peace*, published in 1581, stated that corporal punishments are either *capital* or *not capital*. Capital punishments, that treatise reported, are inflicted “in sundrie ways; as by hanging, burning, boiling, pressing: not capital,” the treatise added, “are of divers sorts, as cutting off the hand or ear, burning or branding the hand, face, shoulders, whipping, imprisonment, stocking, sitting in the pillory, or on the cucking-stool.” James v. Commonwealth, 1825 WL 1899 *8 (Pa. 1825). Of the non-lethal kinds of corporal punishments, the Pennsylvania Supreme Court wrote

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The modern debate over the Cruel and Unusual Punishments Clause—centered for more than fifty years on the U.S. Supreme Court’s “evolving standards of decency” test⁴⁰—has often focused on the concept of proportionality.⁴¹ That concept was popularized in America by Cesare Beccaria’s bestselling 1760s treatise, *On Crimes and Punishments*, a book admired by many of America’s founders.⁴² While the founders embraced the concept of proportionality, the Justices of the U.S. Supreme Court remain divided as to whether that concept should be relevant to Eighth Amendment jurisprudence at all,⁴³ with a tug of war simultaneously taking place as to whether the Eighth Amendment should be read in an “originalist” or a contemporary manner.⁴⁴ The latter divide is emblematic of the larger debate over

in 1825, “our old laws had more sorts than we now have; as pulling out the tongue for false rumors, cutting off the nose, and for adultery, taking away the privy parts.” *Id.*

⁴⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁴¹ See generally E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS (2008). The concept of proportionality, a major topic of Cesare Beccaria’s famous 1760s treatise, *On Crimes and Punishments*, dates back to even before America’s founding. Bessler, *supra* note 9, at 196. A whole chapter of Montesquieu’s influential 1748 treatise, *The Spirit of the Laws*, is devoted to that very subject. CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS 91 (Anne M. Cohler, Basia Carolyn Millier & Harold Samuel Stone, eds., trans. 1989) (1748) (in Chapter 16, titled “*On the just proportion between the penalties and the crime*,” Montesquieu writes: “Among ourselves, it is a great ill that the same penalty is inflicted on the highway robber and on the one who robs and murders.”) (italics in original).

⁴² See generally BESSLER, CRUEL AND UNUSUAL, *supra* note 7; Bessler, *Revisiting Beccaria’s Vision*, *supra* note 9.

⁴³ Compare *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (“The concept of proportionality is central to the Eighth Amendment.”) (opinion of Justice Kennedy, joined by Justices Stevens, Ginsburg, Breyer, and Sotomayor) with *id.* at 2039 (Roberts, C.J., concurring) (“Applying the ‘narrow proportionality’ framework to the particular facts of this case, I conclude that Graham’s sentence of life without parole violates the Eighth Amendment.”); *id.* at 2044 (Thomas, J., dissenting; joined by Justices Scalia and Alito) (“[T]he Court has held that the Clause authorizes it to proscribe not only methods of punishment that qualify as ‘cruel and unusual,’ but also any punishment that the Court deems ‘grossly disproportionate’ to the crime committed. This latter interpretation is entirely the Court’s creation. As has been described elsewhere at length, there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing.”) (citations omitted).

⁴⁴ Chief Justice John Roberts—as well as Justices Scalia, Thomas, and Alito—have written or joined opinions making reference to the “original meaning” of the Eighth Amendment. *Kennedy v. Louisiana*, 554 U.S. 407, 447, 469 (2008) (Alito, J., dissenting; joined by Chief Justice Roberts and Justices Scalia and Thomas) (arguing that the Court’s holding “is not supported by the original meaning of the Eighth Amendment”); *Roper v. Simmons*, 543 U.S. 551, 607-8 (2005) (Scalia, J., dissenting; joined by Chief Justice Roberts and Justice Thomas) (“The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to ‘the evolving standards of decency’ of our national society.”) (citation omitted); *id.* at 626 (Scalia, J., dissenting) (“The Court has, however—I think wrongly—long rejected a purely originalist approach to our Eighth Amendment”); *Atkins v. Virginia*, 536 U.S. 304,

how the Constitution, as a whole, should be read.⁴⁵ While originalists look to historical understandings, “living constitutionalists”⁴⁶ view the “cruel and unusual punishments” prohibition as part of what one scholar calls the nation’s “breathhtakingly abstract, principled constitution.”⁴⁷

This ongoing Eighth Amendment debate might well determine the fate of America’s 3,000 plus death row inmates.⁴⁸ If “cruel and unusual punishments” is read in line with eighteenth-century attitudes, their fate is sealed. In 1791, an array of crimes, including murder and other felonies, were punishable by death, with death sentences being mandatory for such crimes.⁴⁹ In that slave-holding era, brutal corporal punishments were also

337, 340, 348 (2002) (Scalia, J., dissenting; joined by Chief Justice Rehnquist and Justice Thomas) (“Beyond the empty talk of a ‘national consensus,’ the Court gives us a brief glimpse of what really underlies today’s decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people.”) (emphasis in original); *Helling v. McKinney*, 509 U.S. 25, 36, 40 (1993) (Thomas, J., dissenting; joined by Justice Scalia) (“[A]lthough the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose ‘punishment.’ At a minimum, I believe that the original meaning of ‘punishment,’ the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions.”).

⁴⁵ Compare CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE* 37 (2009) (“originalists, including Justices Antonin Scalia and Clarence Thomas, believe that the Constitution should be understood to mean what it meant at the time that it was ratified”) *with id.* at 10 (noting that Justices William Brennan and Thurgood Marshall “were willing to use their own judgments about the requirements of justice in order to move constitutional law in bold new directions—protecting privacy, banning discrimination, and striking down capital punishment”).

⁴⁶ Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy’s Move away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 44 (2007) (“The interpretation of the Eighth Amendment exemplifies the division between adherents and opponents of a ‘living Constitution.’”).

⁴⁷ RONALD DWORKIN: *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 127-28 (1993).

⁴⁸ *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER (Aug. 6, 2013).

⁴⁹ A federal law approved by Congress in 1790 made the following crimes capital offenses: treason, murder, piracy, robbery, forgery, counterfeiting, and rescuing any capital offender from the gallows. An Act for the Punishment of certain Crimes against the United States, §§ 1, 3, 8, 10, 14, 23 (approved Apr. 30, 1790). The law itself provided that any such offender “shall suffer death,” making death sentences mandatory. *Id.* §§ 1, 3, 8, 10, 14, 23. That same law—invoked so often by Justice Scalia in defense of executions (see, e.g., *Baze v. Rees*, 553 U.S. 35, 88 (2008) (Scalia, J., concurring))—also allowed murderers’ bodies to be “delivered to a surgeon for dissection”; permitted the use of the pillory for perjurers; allowed public whipping of certain offenders “not exceeding thirty-nine stripes”; and authorized up to a seven-year term of imprisonment and a fine not exceeding one thousand dollars for “any person or persons” who “shall *unlawfully* cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the

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then commonly inflicted by slaveholders, the military, and judicial systems alike.⁵⁰

Conversely, if current conceptions of justice, human rights and morality are considered, a different result might be reached as regards the constitutionality of executions. This is especially so if Supreme Court Justices stop deferring excessively to legislative judgments and focus on the Constitution's text to independently decide what constitutes a "cruel and unusual" punishment.⁵¹ In the founding era, it must be recalled, executions were the ordinary—or *usual*—punishment for many categories of offenders; today, however, life-without-parole sentences have far eclipsed executions as the public's preferred punishment for felony murders and first-degree murderers.⁵²

The prior decisions of the U.S. Supreme Court, where the Justices have sparred over these issues, frame the current, highly contentious debate. In *Ingraham v. Wright*,⁵³ a 1977 decision finding the Eighth Amendment inapplicable to public school discipline,⁵⁴ the majority opinion noted

nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person." *Id.* at §§ 4, 13, 15-16, 18 (emphasis added).

⁵⁰ *In re Candido*, 31 Haw. 982, 1931 WL 2830 *8 (1931) ("There can be no doubt that in 1791 when the Eighth Amendment was framed and adopted whipping was a well known form of punishment commonly used by the executive departments of the federal government and of some of the states.").

⁵¹ The concepts of *deference* and *independence* are mutually exclusive. "Deference" is defined as "the act or attitude of deferring: a yielding of judgment or preference out of respect for the position, wish, or known opinion of another." WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 591 (2002). "Independence," in common parlance, refers to "the quality or state of being independent." *Id.* at 1148. To be "independent" means to be "not subject to control by others: not subordinate." *Id.*

⁵² At common law in 1791, even offenders as young as seven years of age could be executed. *See Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) ("Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment.") (citing *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989)).

⁵³ 430 U.S. 651 (1977).

⁵⁴ *Id.* at 669, 671. The majority opinion in *Ingraham* ruled that the Cruel and Unusual Punishments Clause was intended to apply in the *criminal* context. *Id.* at 664 ("Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools."). In *Ingraham*, the Supreme Court

that “[t]he applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation.”⁵⁵ But long before that, the Supreme Court’s 1910 decision in *Weems v. United States*⁵⁶ flatly rejected a purely historical interpretation of the Eighth Amendment.⁵⁷ In holding unconstitutional a corporal punishment involving more than twelve years of hard labor in chains,⁵⁸ the Court in *Weems* emphasized: “Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”⁵⁹ For more than one hundred years, the Supreme Court has thus rejected a view of the Eighth Amendment that relies solely on historical understandings.

This Article argues that the time has come to declare executions unconstitutional as “cruel and unusual punishments.” It shows the bizarre anomaly of present-day American executions, not only in terms of modern Western thought and norms emphasizing equality and human rights, but in light of *existing* Eighth Amendment principles. The Eighth Amendment, in rulings dating back many decades, has already been interpreted to bar non-lethal *corporal* punishments—that is, bodily punishments *short of death*.⁶⁰ In fact, the federal courts have long characterized unprovoked and gratuitous inmate beatings and other forms of prisoner mistreatment and abuse as “obvious” or “clear” Eighth Amendment violations.⁶¹ The Supreme Court itself recognizes the government’s duty to *protect* prisoners from harm and provide them with their basic needs: shelter, medical care, and

specifically left open the issue of whether public school students have a substantive due process right to remain free from severe corporal punishments. *Id.* at 659 n.12.

⁵⁵ *Id.* at 670 n.39.

⁵⁶ 217 U.S. 349 (1910).

⁵⁷ *Id.* at 373.

⁵⁸ *Id.* at 363-64.

⁵⁹ *Id.* at 373.

⁶⁰ See *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (“handcuffing inmates to the fence and to cells for long periods of time” are “forms of corporal punishment” that “run afoul of the Eighth Amendment”). Decades ago, the U.S. Supreme Court itself noted American society’s “general abandonment of corporal punishment as a means of punishing criminal offenders.” *Ingraham v. Wright*, 430 U.S. 651, 660 (1977).

⁶¹ *Hope v. Pelzer*, 536 U.S. 730, 734-35 & n.2, 737-38, 741 (2002) (attaching prisoner to “hitching post,” causing “pain and discomfort” resulting in dehydration, a sunburn and muscle aches, was characterized as an “obvious” and “clear” Eighth Amendment violation); *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991) (“Deliberate nontreatment of broken ribs and a broken hand for 9½ months, resulting in permanent deformities, presents a clear Eighth Amendment violation.”); *Merced v. Moylan*, No. 9:05-CV-1426, 2007 WL 3171800 *10 (N.D.N.Y. Oct. 29, 2007) (“Attacking a handcuffed prisoner and causing injury, without provocation, constitutes a clear Eighth Amendment violation of which a reasonable person should have known.”); see also *Henderson v. DeRobertis*, 940 F.2d 1055, 1066 (7th Cir. 1991) (“In sum, in 1982 it was clearly established that prison inmates had a right under the eighth amendment of the Constitution to adequate heat and shelter.”).

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the like.⁶² The contradiction of the law protecting prisoners from harm while simultaneously allowing their execution—a kind of Dr. Jekyll-and-Mr. Hyde⁶³ jurisprudence—is the focal point of this Article’s critique.

This Article argues for a *principled* interpretation of the U.S. Constitution’s Cruel and Unusual Punishments Clause. Part II of the Article discusses the Eighth Amendment’s origins, from the English Bill of Rights to the Virginia Declaration of Rights to the state ratifying conventions that gave life to James Madison’s “cruel and unusual punishments” language.⁶⁴ It also shows how the catchphrases “cruel and unusual” and “cruel or unusual”—used in English law and the founders’ time to describe criminal assaults or to designate the severity of a homicide—became part of the nomenclature of American law. The *cruel* and *unusual* terms, history reveals, also constituted a well-established benchmark to gauge the mistreatment of slaves and mariners while simultaneously regulating the law of homicide and manslaughter. Those two conjoined words—by virtue of the Eighth and Fourteenth Amendments—have long forbidden the “cruel and unusual” punishment of criminals throughout the United States.⁶⁵

Following Part II’s historical account and its description of early American cases construing the “cruel and unusual” language, Part III discusses the current state of America’s death penalty and existing Eighth Amendment case law. That section emphasizes the arbitrary and racially discriminatory manner in which U.S. death sentences are imposed, as well as the many thorny problems that continue to plague America’s death penalty. Those thickets include the risk of executing the innocent, an error-ridden system, and prolonged stays on death row. Among other things, Part III highlights the racial bias and stark geographic disparities now so

⁶² *E.g.*, *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’”); *see also* *Martino v. Carey*, 563 F. Supp. 984, 999 (D. Ore. 1983) (“Functioning plumbing, including toilets, sinks and showers, is a basic necessity of civilized life. The provision of adequate means of hygiene, and the sanitary disposal of bodily wastes so that the wastes do not contaminate the cells, are constitutionally required. This is so because the facility’s obligation to provide basic minima of shelter and sanitation will otherwise not be satisfied.”); *Wright v. McMann*, 387 F.2d 519, 523 (2d Cir. 1967) (“We are of the view that civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper.”).

⁶³ *See* ROBERT LOUIS STEVENSON, *THE STRANGE CASE OF DR. JEKYLL AND MR. HYDE* (1886). In Robert Louis Stevenson’s novel, the kind and virtuous Dr. Jekyll—the respectable physician-protector—is transformed into the monstrous and wicked Mr. Hyde. *State v. Yarborough*, 39 Kan. 581, 18 P. 474 (Kan. 1888).

⁶⁴ The Eighth Amendment’s language was plainly derived from the English Bill of Rights and the Virginia Declaration of Rights and was included, albeit in modified form, in the constitutional amendments James Madison proposed in 1789. *United States v. Moore*, 486 F.2d 1139, 1235 n.160 (D.C. Cir. 1973) (Wright, C.J., dissenting).

⁶⁵ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 203-08.

closely associated with capital charges, death sentences and executions. Statistics show that the vast majority of American executions take place in just a few locales, mostly in the South, and that only a tiny percentage of U.S. counties—many of them in Texas—account for the vast majority of those executions.⁶⁶

Next, Part IV compares the reality of America's capital punishment system as it exists today with the constitutional guarantees set forth in the Eighth Amendment and the Fourteenth Amendment's Due Process and Equal Protection Clauses. In particular, Part IV describes how death sentences and executions are cruel—and were, in fact, labeled as such long ago, even by some of America's founders—and have, over time, become unusual. Part IV further describes how, in early America, the "cruel" and "unusual" labels were attached to particular criminal conduct or mistreatment, with judges or juries—through adjudication—making factual and legal findings as to whether specific conduct qualified as "cruel and unusual."⁶⁷ Finally, Part IV highlights how the Fourteenth Amendment, with its emphasis on equality and non-random, non-arbitrary outcomes, revolutionized American law by restricting state power.

The Fourteenth Amendment, a Reconstruction Era provision ultimately read by the U.S. Supreme Court to selectively incorporate protections of the Bill of Rights against the states, broadened the Eighth Amendment's scope and reach by making the "cruel and unusual punishments" prohibition applicable to the states.⁶⁸ In the process, the Fourteenth Amendment fundamentally transformed the U.S. Constitution, the relationship between the federal government and the states, and the "cruel and unusual punishments" calculus. Not only does the Fourteenth Amendment, like the Fifth Amendment before it,⁶⁹ specifically ensure "due process of law," but the Fourteenth Amendment also guarantees "the equal protection of the laws."⁷⁰ The Eighth Amendment cannot be read in isolation, but must be considered in light of its new companion, the Fourteenth Amendment, with its focus on equality and equal treatment.⁷¹ To fail to take into account

⁶⁶ Bessler, *Revisiting Beccaria's Vision*, *supra* note 9, at 200 n.927 ("The rate of executions varies widely by state, but also by counties within states.").

⁶⁷ Early American judicial proceedings were handled much differently than they are today, including with respect to the division of authority between judge and jury. *See* Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 575 (2012) ("Early American jurors were not only charged with fact-finding, as their English ancestors were, but they were also informed that they had the power, and the right, to determine the law in the case at hand.").

⁶⁸ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 203-08.

⁶⁹ U.S. CONST., amend. V (ratified Dec. 15, 1791).

⁷⁰ U.S. CONST., amend. XIV (ratified July 9, 1868).

⁷¹ In analyzing their objectives, provisions of constitutions are routinely read together with one another. Application of Lamb, 169 A.2d 822, 826 (N.J. Super. 1961) ("The various provisions of our Constitution with respect to the three divisions of government must be read, analyzed and interpreted together in determining the intended objectives of

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Fourteenth Amendment values when interpreting the Eighth Amendment and resolving disputes over the Constitution's meaning would be like omitting discussion of the Civil War from an American history course.

After describing the Supreme Court's "evolving standards of decency" test and summarizing existing precedents applying it, this Article—in Part V—offers its critique of that approach. The lofty sounding "evolving standards of decency" test—which now asks largely whether American society has reached a "national consensus" as to a particular punishment—has guided the Court's Cruel and Unusual Punishments Clause jurisprudence for more than a half century. That majoritarian test, however, has proven problematic because, to date, it has failed to produce anything resembling a sensible body of Eighth Amendment case law. The "evolving standards" test, in fact, gives short-shrift to the Constitution's text and has led to an untenable state of affairs: one in which the death penalty is declared constitutional while less serious corporal punishments are found to be unconstitutional. After recalling the abandonment of non-lethal corporal punishments in the American penal system, Part V specifically argues that the Eighth Amendment should be read in a more intellectually consistent and straightforward manner.

The Article concludes that the Supreme Court, exercising its judicial independence⁷² and reading the "cruel and unusual" language in a more logical and principled fashion, should reevaluate its hopelessly irreconcilable Eighth Amendment jurisprudence. In particular, the Article argues that the Court should declare U.S. executions unconstitutional because they are "cruel and unusual punishments."⁷³ Indeed, the Constitution's text—with

this fundamental and basic document."); *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 262 (Tex. 2002) ("Rules of constitutional interpretation dictate that all clauses must be given effect."); *Marsh v. Department of Civil Service*, 370 N.W.2d 613, 617 (Mich. App. 1985) ("Provisions of the constitution should be read in context, not in isolation, and they should be harmonized to give effect to all."); *Johnson County Bd. of Election Com'rs v. Holman*, 655 S.W.2d 408, 409 (Ark. 1983) ("Since we must give effect to all the language in the Constitution, we find no difficulty in reconciling the two quoted provisions."); *Olson v. City of West Fargo*, 305 N.W.2d 821, 825 (N.D. 1981) ("[A] court must give effect and meaning to every provision of the Constitution and, if possible, reconcile apparently inconsistent provisions. Further, this court has recognized that all constitutional provisions have equal dignity.").

⁷² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is"); see also *Chandler v. Judicial Council of Tenth Circuit of the United States*, 398 U.S. 74, 143 (1970) (Black, J., dissenting) ("The wise authors of our Constitution provided for judicial independence because they were familiar with history; they knew that judges of the past—good, patriotic judges—had occasionally lost not only their offices but had also sometimes lost their freedom and their heads because of the actions and decrees of other judges. They were determined that no such things should happen here.").

⁷³ In the past, some Supreme Court Justices have themselves argued for this result. Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1260 (2011) ("Justices Brennan and

its emphasis on cruelty and unusualness as well as due process and equal protection—compels that result when the reality of American executions is considered. Instead of looking to the concepts articulated in the Constitution as guiding lights, the Court has thus far fixated on its “evolving standards of decency” test, even though that test had produced absurd results. It makes perfect sense that harsh corporal punishments are no longer allowed within the U.S. penal system, but following that logic, it makes no sense that capital punishment—a much more draconian sanction—should continue to be permitted.

II. “CRUEL AND UNUSUAL”: A SHORT HISTORY

A. *The Origins of the Phrase*

The phrase “cruel and unusual punishments” first appeared in English law.⁷⁴ The English Declaration of Rights—later the English Bill of Rights of 1689—grew out of the Glorious Revolution of 1688⁷⁵ and provided in part: “[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.”⁷⁶ That clause—the Eighth Amendment’s oldest predecessor—is what inspired a number of equivalent provisions in state bills of rights and constitutions.⁷⁷ Indeed, that language in the English Bill of Rights—copied verbatim by Virginia plantation owner George Mason for inclusion in Virginia’s 1776 Declaration of Rights⁷⁸—would become the linguistic source for the Eighth Amendment itself.⁷⁹ During the Revolutionary War, Great Britain and the United States of America fought bitterly, but one thing is clear: both English subjects and early Americans despised *cruel* and *unusual* punishments, though understandings of what those were seems to have varied substantially from person to person.⁸⁰

Marshall found the death penalty per se unconstitutional based in part on its arbitrary imposition.”).

⁷⁴ See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

⁷⁵ *People ex rel. Kemmler v. Durston*, 55 Hun 64, 7 N.Y.S. 813, 814 (1889) (noting that the “cruel and unusual punishments” language “originated in the well known ‘bill of rights’ of England,” with the English Bill of Rights described as “one of the first fruits of the great revolution of 1688”).

⁷⁶ *Roper v. Simmons*, 543 U.S. 551, 577 (2005); *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991).

⁷⁷ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 162-80.

⁷⁸ VA. DECLARATION OF RIGHTS, § IX (June 12, 1776).

⁷⁹ *In re Kemmler*, 136 U.S. 436, 446 (1890) (“[t]he provision in reference to cruel and unusual punishments was taken from the well-known act of parliament of 1688, entitled ‘An act for declaring the rights and liberties of the subject, and settling the succession of the crown’”); Amy L. Riederer, *Working 9 to 5: Embracing the Eighth Amendment through an Integrated Model of Prison Labor*, 43 VAL. U. L. REV. 1425, 1429 (2009) (“the language of the Eighth Amendment was substantially copied from the language of the English Act of Parliament in 1688”).

⁸⁰ Near the end of his life, Edmund Randolph, of Virginia, wrote that Virginia’s prohibition “against excessive bail and excessive fines, was borrowed from England with

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In both the English Bill of Rights and the Virginia Declaration of Rights, the conjunctive *and* separated the *cruel* and *unusual* terms. English and American lawmakers, however, often paid little attention to the conjunctive word that separated those words. For example, a 1689 pronouncement of more than ten Lords in Great Britain's Parliament, pertaining to the notorious case of convicted perjurer Titus Oates, uses "nor" instead of "and" in the key position, to wit: "[T]hat excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual Punishments inflicted."⁸¹ In fact, the phrases "cruel and unusual" and "cruel or unusual" were often used interchangeably,⁸² with early American state constitutions often employing "cruel or unusual" instead of the "cruel and unusual" verbiage.⁸³

Sometimes, the word "unusual" was omitted entirely from constitutional documents,⁸⁴ making a given provision's sole emphasis—at least in the eyes of some—on cruelty.⁸⁵ In the 1792 constitutions of Delaware and Kentucky, for example, state lawmakers just prohibited "cruel" punish-

additional reprobation of cruel and unusual punishments." BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 376 n.40.

⁸¹ 10 How. St. Tr. 1079, 1316 (K.B. 1685); 1 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS, FROM THE RESTORATION IN 1660, TO THE PRESENT TIME 367 (1742). That substitute language—as one scholar writes—"indicates that during the time the Eighth Amendment was adopted the 'and' and the 'or' may have been used interchangeably when describing cruel and/or unusual punishments." Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices' Positions*, 24 ST. MARY'S L.J. 1, 100 n.532 (1992); compare *id.* at 100 ("The first Congress, which proposed the Eighth Amendment, may have rejected both punishments which are 'cruel' and punishments which are 'unusual' rather than only punishments which are at the same time 'cruel and unusual.'").

⁸² E.g., JOHN P. DUVAL, ED., COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, at 223 (1839) (the editorial summary of Florida's 1828 prohibition on "cruel or unusual punishment" of slaves, set forth in the margin next to the statutory prohibition itself, read as follows: "Cruel and unusual punishment of slaves").

⁸³ Steven G. Calabresi & Sarah E. Agudo, *Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 78 (2008) (discussing the language variations in state constitutions); see also *Furman v. Georgia*, 408 U.S. 238, 243-44 (1972) (Douglas, J., concurring) (discussing early American provisions).

⁸⁴ The English Declaration of Rights, in a recital, declared "that excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subject; and excessive fines have been imposed, and illegal and cruel punishments inflicted." *People ex rel. Kemmler v. Durston*, 55 Hun 64, 7 N.Y.S. 813, 814 (N.Y. Sup. Ct. 1889). The use of "illegal and cruel" instead of "unusual and cruel" in that recital only further confounded the debate over the Eighth Amendment's meaning.

⁸⁵ *Cf. Campbell v. Wood*, 511 U.S. 1119 (1994) (Blackmun, J., dissenting from cert. denial) ("Not only have 46 of the 48 States that once regularly imposed hanging abandoned the practice, but many state legislatures rejected the practice because it was perceived as inhumane and barbaric, precisely the concern that lies at the core of the Eighth Amendment.").

ments, dropping the word “unusual” altogether.⁸⁶ In the founding era, one finds unduly harsh or draconian punishments described with all sorts of labels, including the following: “barbaric,” “barbarous,” “cruel,” “disproportioned,” “ignominious,” “illegal,” “immoderate,” “infamous,” “inhuman,” “inhumane,” “ludicrous,” “odious,” “sanguinary,” “severe,” “unchristian,” “unheard-of,” “unnatural” and “unusual.”⁸⁷ Of that varied terminology, though, only “cruel” and “unusual” made it into the Cruel and Unusual Punishments Clause.

The concepts of cruelty and unusualness, linked together like a chain and related to one another in at least some fashion,⁸⁸ do, of course, have separate meanings, as English dictionaries have long shown. While cruelty has to do with causing pain or distress or tormenting someone, unusualness has to do with uncommonness.⁸⁹ The close proximity of *cruel* and *unusual* in the Eighth Amendment suggests, however, that the words were intended by the Founding Fathers to be read together.⁹⁰ How modern-day judges

⁸⁶ Stacy, *supra* note 17, at 504 (“Delaware and Kentucky enacted constitutions in 1792 during the year following the Bill of Rights’ ratification. All of these constitutions prohibited ‘cruel punishments,’ omitting entirely any reference to the term ‘unusual.’ Numerous state constitutions enacted after the Founding period used this same language.”).

⁸⁷ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 446 (listing references).

⁸⁸ In ordinary parlance, a punishment that is “cruel” can also easily be found to be “unusual” in the sense that one would not ordinarily expect a civilized society to impose a cruel punishment. Conversely, a punishment that is “unusual” might naturally be considered “cruel” in the sense that it might be deemed unconscionable or unfair to arbitrarily impose an outlier punishment on one person (or a small group of people) when others engaged in identical conduct are not receiving that particular punishment. After all, there is something inherently unusual in selectively inflicting a cruel punishment, just as a finding of cruelty can, in and of itself, be influential in determining that a punishment is unusual. The “selective prosecution” doctrine is itself premised on the notion that a prosecutor’s decision may not be deliberately based upon unjustifiable standards “such as race, religion, or other arbitrary classification.” *Wayte v. United States*, 470 U.S. 598, 608 (1985) (citations omitted).

⁸⁹ In 1785, Samuel Johnson’s dictionary defined “cruel” as “[b]loody; mischievous; destructive; causing pain.” The 1828 edition of Noah Webster’s dictionary defined “cruel” as “[i]nhuman; barbarous; savage; causing pain, grief or distress; exerted in tormenting, vexing or afflicting.” John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 911 (2011) (citations omitted). Seventeenth-century English dictionaries, by contrast, defined “unusual” as “[n]ot usual; uncommon; exceptional.” Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 602 (2010) (citations omitted).

⁹⁰ In early English legal history, one can even find reference to “unusual Cruelties.” See, e.g., 1 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS, FROM THE RESTORATION IN 1660, TO THE PRESENT TIME 362 (1742) (this language appears in 1689, the same year that the English Bill of Rights was put in place: “[T]hat which most nearly touch’d his Majesty, was the *French King’s* unchristian Prosecution of many of his Majesty’s *English Protestant Subjects*, for Matters of Religion, contrary to the Law of Nations, and express

read the proscription against “cruel and unusual punishments” is, as it must be, for them to decide on a case-by-case basis.⁹¹ *Cruel* and *unusual*, though related, are not identical, conjoined twins. Rather, those terms—connected by the *and*—can be thought of as fraternal twins conceived at the same time but whose linguistic qualities and characteristics differ.

The Eighth Amendment, it is clear, was not drafted in a vacuum; it came about as a product of the American Revolution. An examination of centuries-old laws and legal treatises also plainly shows that the concept of cruelty—the first part of the Cruel and Unusual Punishments Clause—has long been a familiar one to Anglo-American lawyers and jurists. In 1583, Sir Robert Beale—a clerk of the Privy Council who invoked the Magna Carta—condemned “the racking of grievous offenders, as being cruel, barbarous, contrary to law, and unto the liberty of English subjects.”⁹² In 1641, “The Body of Liberties”—a code of laws drafted by the Cambridge-educated, Puritan preacher Nathaniel Ward, and later adopted by the General Court of Massachusetts—also used the term “cruel”⁹³ almost half a century before the issuance of the English Bill of Rights. Clause 46 of that Massachusetts legal code read: “For bodilie punishments we allow amongst us none that are inhumane, barbarous or cruel.”⁹⁴ The concept of cruelty also appears in the writings of influential thinkers such as Coke,⁹⁵ Grotius,⁹⁶ Montesquieu,⁹⁷ Beccaria,⁹⁸ Vattel,⁹⁹ Burlamaqui,¹⁰⁰ Bentham,¹⁰¹ Romilly,¹⁰² and others.¹⁰³

Treaties, forcing them to abjure their Religion by strange and unusual Cruelties ...”) (italics in original).

⁹¹ Neither America’s Founding Fathers nor the Fourteenth Amendment’s framers are around to interpret the words they adopted, leaving it to today’s judges to make decisions in cases and controversies as they arise.

⁹² BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 171-72; Robert J. McWhirter, *Baby, Don’t Be Cruel*, 46 ARIZ. ATT’Y 38, 44 (2010) (quoting LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 232 (1999)).

⁹³ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 173-74.

⁹⁴ *Id.* at 174.

⁹⁵ SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES, ch. 26, p. 42 (1797) (1642) (“*Odium*, signifieth hatred, and *attia* or *acia* in this writ signifieth malice, because that malice is *acida*, that is, eager, sharpe and cruell.”) (italics in original); SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES, ch. 6, p. 44 (1669) (using the word “cruell” in a chapter titled “Of Felony by Conjuraton, Witchcraft, Sorcery or Inchantment”); SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS, ch. 1, p. 33 (1671) (noting that the “Earl of Northumberland ... was by the Rebels cruelly and causelessly slain”).

⁹⁶ HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND OF NATIONS 54, 74, 330 (2010) (1625) (referencing “cruel treatment,” “cruel acts,” “cruel wrath,” and “an inducement to captors to refrain from the cruel rigor of putting prisoners to death”).

The concept of unusualness—the second part of the “cruel and unusual punishments” prohibition—has likewise been with Anglo-American law for centuries. The British House of Commons, in commenting on the

⁹⁷ MONTESQUIEU, *supra* note 41, at 62, 84-85, 87, 91, 200, 206, 251, 258, 489, 670, 673-74 (referencing “the most cruel provision of this law,” “a cruel penalty,” “cruel punishments,” “cruel penalties,” “a crafty and cruel tyrant,” “cruel laws,” “cruel slavery,” “cruel masters,” and “cruel” monarchs and princes, and noting that “[i]n China robbers who are cruel are cut to bits”). Montesquieu also called Roman laws “very severe” and “full of very cruel provisions.” BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 36.

⁹⁸ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 64, 69-70, 80, 89 (Richard Bellamy, ed. & Richard Davis, trans., 1995) (1764) (referencing “cruel laws,” “cruel” penal servitude, “cruel tortures,” “cruel example,” and “cruel prerogatives”). Beccaria viewed torture itself as “a cruelty” and opposed the death penalty “because of the example of cruelty that it gives to men.” BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 35.

⁹⁹ EMMERICH DE Vattel, THE LAW OF NATIONS 20-21, 25, 148, 178, 191-93, 197, 199, 215, 224, 226, 228, 236 (Thomas Adamo, ed., 2011) (1758) (referencing “a cruel tyrant,” a “cruel and perfidious” enemy, a “cruel” fate, “cruel experience,” “cruel treatment,” “a cruel decision,” “cruel distress,” “cruel necessity,” “the dread of a cruel punishment,” “cruel punishments,” “cruel expedient,” “cruel licentiousness,” a prince’s “cruel and arbitrary disposition,” “cruel” war, “cruel enemies,” and “cruel conditions”).

¹⁰⁰ JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, chs. II & IV (Thomas Nugent, ed. 2006) (1747) (referring to “an unjust and cruel prince,” “bloody and cruel wars,” and the oppression of a subject “in so cruel a manner”).

¹⁰¹ There are more than a dozen references to the concept of “cruelty” in Bentham’s book, *The Principles of Morals and Legislation*. JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 58, 102, 114-19, 122, 137, 151, 180-81, 311 (Robert M. Baird & Stuart E. Rosenbaum, eds. 1988) (1789).

¹⁰² Samuel Romilly argued that the English mode of punishing treason—that the offender be dragged to the gallows; be hanged by the neck; while alive, be cut down, with his entrails taken out and burned; then beheaded and dismembered—“inflicts a most cruel death.” Romilly further argued against laws creating a “standard of cruelty.” “I call upon you to remember,” Romilly said, “that cruel punishments have an inevitable tendency to produce cruelty in the people.” Basil Montagu, *The Debate in the House of Commons* (Apr. 5, 1813), *reprinted in* 4 JAMES E. CRIMMINS, ED. THE DEATH PENALTY: DEBATES IN BRITAIN AND THE U.S., 1725-1868 (2004).

¹⁰³ In *A Treatise of the Pleas of the Crown*, sergeant-at-law William Hawkins—in a chapter entitled “Of Murder”—wrote in Section 41 of the applicable law: “It is to be observed, that wherever a person, in cool blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far.” 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN; OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 99 (John Curwood, Esq., 8th ed. 1824). In Section 42, Hawkins then added: “Also it seems, that he who, upon a sudden provocation, executes his revenge in such a cruel manner, as shews a cruel and deliberate intent to do mischief, is guilty of murder, if death ensue; as where the keeper of a park, finding a boy stealing wood, tied him to a horse’s tail and beat him, whereupon the horse ran away and killed him.” *Id.*; see also 1 *id.* at 98 (noting that “so base and cruel a revenge cannot have too severe a construction”); 1 *id.* at 789 (“A master is not justified in beating his servant in a cruel or barbarous manner, or with an improper instrument.”).

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harsh, seventeenth-century punishment of Titus Oates, ordered to be pilloried every year for life, declared that Oates' punishment was "barbarous," an "ill Example to future Ages," and "unusual" in that "an Englishman should be exposed upon a Pillory, so many times a Year, during his Life."¹⁰⁴ Even before the U.S. Bill of Rights was adopted, the phrase "cruel or unusual" appears in American trade legislation.¹⁰⁵ In early American slave codes, slave owners and their overseers were legally permitted to whip or chastise slaves, though not—at least in some places—with "unusual rigor."¹⁰⁶ The word "unusual" actually appears in America's founding document, the Declaration of Independence,¹⁰⁷ and the notion of "unusual punishments" was discussed at Virginia's ratification convention.¹⁰⁸

B. Blackstone's Commentaries

The concepts of cruelty and unusualness were certainly not novel ones to America's Founding Fathers. In William Blackstone's *Commentaries on the Laws of England*—a highly influential source for American colonial lawyers¹⁰⁹—the term "cruel" appears multiple times. "The laws of the Ro-

¹⁰⁴ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 175-76. In the modern era, members of the U.S. Supreme Court have emphasized that whether a punishment is "unusual" is tied to its frequency or acceptance and whether the punishment is uncommon. *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) ("whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance"); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) ("the word 'unusual' means '[s]uch as is [not] in common use'"); *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare"). The term "unusual" has been described as a "common synonym" of "uncommon." *Miller v. Alabama*, 132 S. Ct. 2455, 2481 (2012) (Roberts, C.J., dissenting).

¹⁰⁵ See An Act for Granting to the United States in Congress Assembled, Certain Imposts and Duties Upon Foreign Goods Imported into this State, and for the Purpose of Paying the Principal and Interest of the Debt Contracted in the Prosecution of the Late War with Great Britain (Oct. 20, 1783).

¹⁰⁶ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 314.

¹⁰⁷ In one of its recitals, the Declaration of Independence declared that the "King of Great Britain," George III, "has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures." DECLARATION OF INDEPENDENCE (July 4, 1776).

¹⁰⁸ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 299, 301.

¹⁰⁹ James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1614 n.1 (2011) ("First published in England between 1765 and 1769, when Blackstone held the Vinerian chair at Oxford, the *Commentaries on the Laws of England* enjoyed remarkable success in America."); Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 479 (2005) ("By 1776, American lawyers and many of the Founding Fathers were well-versed in English law and practice through Blackstone. The *Commentaries*, in short, were widely known in America and had an enormous influence on American legal thought."); Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV.

man kings, and the twelve tables of the *decemviri*,” Blackstone wrote, “were full of cruel punishments.”¹¹⁰ “It is, it must be owned,” Blackstone observed, “much *easier* to extirpate than to amend mankind; yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.”¹¹¹ Elsewhere, Blackstone refers to a “cruel law”¹¹² and “cruel edicts,”¹¹³ mentions a “cruel process,”¹¹⁴ and writes of “most cruel and disagreeable hardships”¹¹⁵ and “the cool and cruel sarcasm of the sovereign.”¹¹⁶ In America, apprenticeships and the study of Blackstone’s *Commentaries* remained the primary means of legal education until the late 1800s, making early American lawyers especially familiar with Blackstone’s treatise.¹¹⁷

In his *Commentaries*, Blackstone actually used the phrase “cruel and unusual” in two separate contexts.¹¹⁸ First, Blackstone used those words to define “murder by express malice.”¹¹⁹ In detailing the elements of murder, Blackstone wrote that “the killing must be committed *with malice aforethought*, to make it the crime of murder.”¹²⁰ “This,” he explained, “is the

1, 4 n.24 (1989) (“Included among those who read and acknowledged the authority of Blackstone’s *Commentaries* were John Adams, Nathaniel Green, James Madison, Alexander Hamilton, John Jay and Patrick Henry.”) (citing Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 743-45 (1976)). St. George Tucker’s annotated American edition of Blackstone’s *Commentaries*, published in 1803, was also later a standard legal reference for American lawyers. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1370-72 (1998).

¹¹⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at 17 (1769) (1979) (italics in original).

¹¹¹ *Id.* at 18 (italics in original).

¹¹² *Id.* at 138.

¹¹³ *Id.* at 151.

¹¹⁴ *Id.* at 323.

¹¹⁵ *Id.* at 219.

¹¹⁶ *Id.* at 399.

¹¹⁷ Jessica J. Sage, *Authority of the Law? The Contribution of Secularized Legal Education to the Moral Crisis of the Profession*, 31 FLA. ST. U. L. REV. 707, 714 (2004); see also Jason J. Kilborn, *Who’s In Charge Here? Putting Clients in Their Place*, 37 GA. L. REV. 1, 14 n.62 (2002) (“The influence of English law practice on the American bar was inevitable, as the primary early sources of legal training for aspiring American lawyers were apprenticeship, reading Coke or Blackstone in the office of an English-trained barrister, and study in one of the English Inns of Court.”); Kopel, *supra* note 109, at 1372 (“Almost every prospective lawyer began his studies by reading Tucker’s *Blackstone*, and some lawyers may never have read anything else. Thomas Jefferson recommended Tucker’s *Blackstone* as part of the course of study for aspiring law students, since the Tucker book was the best source for overall mastery of American law.”).

¹¹⁸ Ryan, *supra* note 89, at 601 nn.197 & 199 (citing Blackstone’s use of “cruel and unusual”).

¹¹⁹ 4 BLACKSTONE, *supra* note 110, at 199.

¹²⁰ *Id.* at 198 (italics in original).

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grand criterion, which now distinguishes murder from other killing: and this malice prepense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart; *un disposition a faire un male chose* and it may be either *express*, or *implied* in law.”¹²¹

“Express malice,” Blackstone wrote, “is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.”¹²² “Also,” Blackstone added, “if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*.”¹²³

Following that legal pronouncement, Blackstone—in the very next sentence—then listed these specific examples along with an explanation for why it would be considered murder by express malice: “As when a park-keeper tied a boy, that was stealing wood, to a horse’s tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar’s belly, so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter.”¹²⁴ “Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shews him to be an enemy to all mankind in general; as going deliberately with a horse used to strike, or discharging a gun, among a multiple of people.”¹²⁵ “So if a man resolves to kill the next man he meets, and does kill him, it is murder although he knew him not; for this is universal malice,” Blackstone concluded.¹²⁶

¹²¹ *Id.* at 198-99 (italics in original).

¹²² *Id.* at 199. “This takes in,” Blackstone explained, “the case of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also.” *Id.*

¹²³ *Id.* (italics in original); compare *id.* at 200. In *Pleas of the Crown*, Sir Matthew Hale had written in 1678: “In Cases of Murder, there must be Malice; and if a Man assaults another with a dangerous Weapon, tho’ without Provocation, ’tis express Malice from the nature of the Fact, which is Cruel.” SIR MATTHEW HALE, *PLEAS OF THE CROWN: OR, A METHODICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT* 19 (1716) (1678).

¹²⁴ 4 BLACKSTONE, *supra* note 110, at 199-200 (citing 1 Hal. P. C. 454, 471-74).

¹²⁵ *Id.* at 200.

¹²⁶ *Id.* Blackstone ended his discussion of murder by express malice by further explaining: “And, if two or more come together to do an unlawful act against the king’s peace, of which the probable consequence might be bloodshed; as to beat a man, to commit a riot,

After referring to a beating in a “cruel and unusual manner” under the rubric of murder by express malice,¹²⁷ Blackstone then wrote of cases of murder by implied malice and also contrasted deadly beatings where only “manslaughter” would be found. “[I]n many cases where no malice is expressed,” Blackstone noted, “the law will imply it: as, where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved.”¹²⁸ As Blackstone further explained: “[I]f a man kills another suddenly, without any, or without a considerable, provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause.”¹²⁹ “No affront, by words, or gestures only,” he wrote, “is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another.”¹³⁰ “But if the person so provoked had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise and not to kill him,” Blackstone clarified, “the law so far considers the provocation of contumelious behavior, as to adjudge it only manslaughter, and not murder.”¹³¹

In his second reference, Blackstone later referred to the concept of “cruel and unusual punishments” in discussing the English Bill of Rights.¹³² That reference—in Chapter 29 of Book Four, a chapter titled “OF JUDGMENT, AND IT’S CONSEQUENCES”—was prefaced by Blackstone’s discussion of criminal judgments and the possibility of an offender’s “pardon” or “praying the benefit of clergy” to “arrest” a judgment.¹³³ “If all these resources fail,” Blackstone wrote, “the court must pronounce that judgment, which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters.”¹³⁴ As he explained: “Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace are superadded: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the

or to rob a park; and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia praecogitata*, or evil intended beforehand.” *Id.* (italics in original).

¹²⁷ *Id.* at 199.

¹²⁸ *Id.* at 200.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* Blackstone thus contrasted deadly beatings carried out in a “cruel and unusual manner”—which would constitute murder by express malice—with deadly beatings carried out only with the intent to “chastise,” with the latter beatings only constituting manslaughter. *Id.* at 199-200.

¹³² *Id.* at 372.

¹³³ *Id.* at 368-69.

¹³⁴ *Id.* at 369-70.

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king's person or government, embowelling alive, beheading, and quartering; and in murder, a public dissection."¹³⁵

Though English law once allowed such horrific punishments, Blackstone was quick to note that the severity of these punishments was, in practice, often mitigated. "[T]he humanity of the English nation," Blackstone qualified, "has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as favour of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any person's being emboweled or burned, till previously deprived of sensation by strangling."¹³⁶ "Some punishments," he wrote, "consist in exile or punishment, by abjuration of the realm, or transportation to the American colonies: others in loss of liberty, by perpetual or temporary imprisonment."¹³⁷ "Some, though rarely," he added, "occasion a mutilation or dismembering, by cutting off the hand or ears: others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or face."¹³⁸ Blackstone also noted the availability of "discretionary

¹³⁵ *Id.* at 370. "And," Blackstone added, "in case of any treason committed by a female, the judgment is to be burned alive." *Id.*

¹³⁶ *Id.* at 370. Another commentator on English law specifically equated torture with cruelty, wrote that England did not use torture, and saw the "cruel and unusual punishments" prohibition as a restriction on acts of torture. J. L. DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 383-85 (Corrected ed., 1789) ("the use of Torture, that method of administering Justice in which folly may be said to be added to cruelty"; "the use of Torture has, from the earliest times, been utterly unknown in England" and "all attempts to introduce it, whatever might be the power of those who made them, or the circumstances in which they renewed their endeavors, have been strenuously opposed and defeated"; "From the same cause also arose that remarkable forbearance of the English Laws, to use any cruel severity in the punishments which experience shewed it was necessary for the preservation of Society to establish: and the utmost vengeance of those laws, even against the most enormous Offenders, never extends beyond the simple deprivation of life"). As that commentator wrote: "[S]o anxious has the English Legislature been to establish mercy, even to convicted offenders, as a fundamental principle of the Government of England, that they made it an express article of that great public Compact which was framed at the important era of the Revolution, that 'no cruel and unusual punishments should be used.'" *Id.* at 385-86 (citing English Bill of Rights, art. X). The same language also appears in an earlier edition of that treatise. J. L. DE LOLME, *THE CONSTITUTION OF ENGLAND, OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 340-41 (1777).

¹³⁷ 4 BLACKSTONE, *supra* note 110, at 370.

¹³⁸ *Id.* In one section, on the punishment of theft for those "who have no property themselves," Blackstone wrote: "Sir Thomas More, and the marquis Beccaria, at the distance of more than two centuries, have very sensibly proposed that kind of corporal punishment, which approaches the nearest to a pecuniary satisfaction; viz. a temporary imprisonment, with an obligation to labour, first for the party robbed, and afterwards for the public, in works of the most slavish kind: in order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order." *Id.* at 238. "But," Blackstone added, "notwithstanding all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout

finer” and punishments involving the infliction of “corporal pain” such as “whipping, hard labour in the house of correction, the pillory, the stocks, and the ducking-stool.”¹³⁹ A ducking stool was a chair connected to a pulley system where slanderers and women, among others, “were restrained and then repeatedly plunged into a convenient body of water.”¹⁴⁰

Blackstone, the Oxford scholar, felt strongly that English law—though harsh—was still enlightened compared to the laws of other countries.¹⁴¹ “Disgusting as this catalogue may seem,” Blackstone wrote of punishments authorized by English law, “it will afford pleasure to an English

the greatest part of Europe, to be capital: and Puffendorf, together with Sir Matthew Hale, are of opinion that this must always be referred to the prudence of the legislature; who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions.” *Id.*

¹³⁹ *Id.* at 370. Judicial discretion—and the ability to inflict a wide array of corporal punishments short of death—was a hallmark of the English legal system. See 3 THE WORKS OF SIR WILLIAM TEMPLE, BART 56 (1757):

[I]t may seem probable, that the more natural and effectual way in our nation, to prevent or suppress thefts and robberies, were to change the usual punishment by short and easy deaths, into some others of painful and uneasy lives, which they will find much harder to bear, and be more unwilling and afraid to suffer than the other. Therefore a liberty might at least be left to the judges and the bench, according to the difference of persons, crimes, and circumstances, to inflict either death, or some notorious mark, by slitting the nose, or such brands upon the cheeks, which can never be effaced by time or art; and such persons to be condemned either to slavery in our plantations abroad, or labour in work-houses at home; and this either for their lives, or certain numbers of years, according to the degrees of their crimes.

Accord 3 THE HISTORY OF THE WORKS OF THE LEARNED: OR, AN IMPARTIAL ACCOUNT OF BOOKS LATELY PRINTED IN ALL PARTS OF EUROPE 636 (1701) (“That for the more Effectual suppression of Thefts and Robberies, it would be proper to change the usual Punishment by short and easie Deaths, into some others of painful and uneasie Lives, which they will find much harder to bear, and be more unwilling and afraid to suffer than the other.”).

¹⁴⁰ Matthew W. Meskell, *The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 841-42 (1999). In *A Treatise of the Pleas of the Crown*, Englishmen William Hawkins—under the heading “Cucking Stool”—wrote: “Sometimes called Ducking Stool, the usual punishment for a *common scold*.” 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN; OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 624 (Thomas Leach ed., 6th ed. 1777) (italics in original); see also *id.* at 352 n.3 (in another section of his treatise, Hawkins also made reference to a “usual” punishment, writing in that unrelated context: “The usual mode of punishment at present is by pillory, fine, imprisonment, and surety for the good behaviour.”). While men were traditionally punished in the stocks in earlier times, ducking-stools had been used extensively in the sixteenth and seventeenth centuries to punish women. ALFRED CREIGH, HISTORY OF WASHINGTON COUNTY: FROM ITS FIRST SETTLEMENT TO THE PRESENT TIME, ch. 1 (1870).

¹⁴¹ William Blackstone (1723-1780) was the Vinerian Professor of Civil Law who, in the 1760s, arranged for Oxford University Press to print his *Commentaries*. Lionel Bently & Jane C. Ginsburg, “*The Sole Right ... Shall Return to the Authors*”: Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright, 25 BERKELEY TECH. L.J. 1475, 1499 (2010).

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reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe.”¹⁴² “[I]t is moreover,” Blackstone explained, “one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons.”¹⁴³ “[W]here an established penalty is annexed to crimes,” Blackstone offered, “the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judgment, of his actions.”¹⁴⁴

It was after this discussion that Blackstone cited the “cruel and unusual punishments” clause of the English Bill of Rights. “The discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose,” Blackstone first explained, “may seem an exception to this rule.”¹⁴⁵ “But,” he noted, “the general nature of the punishment, *viz.* by fine or imprisonment, is in these cases fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances.”¹⁴⁶ As Blackstone wrote: “Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punishment by fine, in general, without specifying the certain sum: which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but it’s discretion is regulated by law.”¹⁴⁷ “For the bill of rights,” Blackstone emphasized, “has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted.”¹⁴⁸

By the time James Madison drafted the U.S. Bill of Rights, he would have been quite familiar with William Blackstone’s *Commentaries*. Madison never became a lawyer, but he did intermittently study law.¹⁴⁹ After graduating from the College of New Jersey in 1771, he stayed on “employing his times in miscellaneous studies; but not without a reference to the

¹⁴² 4 BLACKSTONE, *supra* note 110, at 370-71.

¹⁴³ *Id.* at 371 (italics in original). Death sentences at that time, of course, were mandatory. Scott W. Howe, *Furman’s Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 472 (2007) (“mandatory death sentences were allowed at the time of the founding”).

¹⁴⁴ 4 BLACKSTONE, *supra* note 110, at 371.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (italics in original).

¹⁴⁷ *Id.* at 372.

¹⁴⁸ *Id.* Blackstone wrote that the English Bill of Rights “had a retrospect to some unprecedented proceedings in the court of king’s bench, in the reign of king James the second.” *Id.* He also stated that “the bill of rights was only declaratory, throughout, of the old constitutional law of the land.” *Id.*

¹⁴⁹ Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 LAW & HIST. REV. 389, 390-93 (2010).

profession of the Law.”¹⁵⁰ Upon returning to Virginia, he studied law for long stretches as he contemplated becoming a member of the Bar.¹⁵¹ The law books Madison read is not clear, but in 1773 Madison wrote that he intended “to read Law occasionally and have procured books for that purpose.”¹⁵² Madison even asked William Bradford, his closest college friend, to send him a list of the books Bradford planned to read to become a lawyer.¹⁵³ In Pennsylvania, Bradford—a penal reformer—would personally lead efforts to restrict that state’s death penalty to first-degree murderers. And Bradford was even willing to contemplate that evidence might show one day that executions were unnecessary for those murderers, too.¹⁵⁴

Blackstone’s *Commentaries*, which also communicated Cesare Beccaria’s ideas to a much wider audience,¹⁵⁵ were highly influential in the American colonies and early America.¹⁵⁶ Bradford—who later became the Attorney General of the United States and who greatly admired Beccaria’s treatise¹⁵⁷—specifically wrote of Blackstone’s *Commentaries*, telling Madison of that title: “I am most pleased with & find but little of that disagreeable dryness I was taught to expect.”¹⁵⁸ In 1783, Madison recommended that Congress acquire a copy of Blackstone’s *Commentaries*; in 1785, while trying to gain passage of Jefferson’s Virginia bill to proportion crimes and punishments, a bill that would have severely curtailed capital punishment, Madison took notes on Blackstone’s treatise; and at the 1787 Constitutional Convention in Philadelphia, in a debate over an *ex post facto* provision, Madison recorded a reference to Blackstone’s *Commentaries* made by John Dickinson.¹⁵⁹

¹⁵⁰ *Id.* at 393-94.

¹⁵¹ *Id.* at 394, 396-98, 402-03.

¹⁵² *Id.* at 394.

¹⁵³ *Id.* at 394-95.

¹⁵⁴ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 84-91.

¹⁵⁵ See Bessler, *Revisiting Beccaria’s Vision*, *supra* note 9 (describing Cesare Beccaria’s influence on American penal reform).

¹⁵⁶ Kathryn Preyer, “Cesare Beccaria and the Founding Fathers,” in BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER 241 (Mary Sarah Bilder, Maeva Marcus & R. Kent Newmyer eds., 2009) (“Blackstone’s references to Beccaria in his *Commentaries on the Laws of England*, published between 1765 and 1769 and widely available in the colonies, may have communicated Beccaria’s theories to a wider audience than read the original.”).

¹⁵⁷ Letter from William Bradford, Jr. to Luigi Castiglioni (Aug. 10, 1786), *reprinted in* LUIGI CASTIGLIONI’S VIAGGIO: TRAVELS IN THE UNITED STATES OF NORTH AMERICA 1785-1787, 313-14 (Antonio Pace ed., 1983) (“The name of Beccaria has become familiar in Pennsylvania, his authority has become great, and his principles have spread among all classes of persons and impressed themselves deeply in the hearts of our citizens.”).

¹⁵⁸ 4 BLACKSTONE, *supra* note 110, at 399.

¹⁵⁹ *Id.* at 395, 399. Thomas Jefferson also recommended that aspiring lawyers read Blackstone’s *Commentaries*. *Id.* at 398; BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 54.

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Blackstone's *Commentaries*—as with early American legal treatises such as Zephaniah Swift's *System of the Laws of the State of Connecticut*¹⁶⁰ and Tucker's *Blackstone*¹⁶¹—not only acknowledged the use of death

¹⁶⁰ ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 105-106 (1795) (“The power of justices of the peace, is not so expressly defined respecting corporal punishments, as pecuniary penalty; they can however, inflict no corporal punishment, but whipping, setting in the stocks, and imprisonment.”); *id.* at 181 (“Action of debt, will not lie upon a statute where the consequence of a conviction, is to subject the party to a corporal punishment.”); *id.* at 184 (noting “cases where corporal punishment is to be inflicted”); *id.* at 185 (“where corporal punishment is to be inflicted, debt, assumpsit, or action on statute will not lie”); *id.* at 232 (“A juror who has been convicted of ... any other infamous corporal punishment, may be challenged.”); *id.* at 239 (noting that a person who “has stood ... in the pillory, or has been stigmatized or cropped” as a result of a conviction associated with an “infamous judgment” shall be excluded from testifying); *id.* at 295 (“For a few of the most enormous crimes, the punishment was death, and for the rest, corporal pains and pecuniary penalties were inflicted, according to the nature of the offense.”); *id.* at 296 (noting that “corporal and pecuniary punishments are inflicted” for crimes not punishable by death or imprisonment in “New-Gate”); *id.* at 297 (“corporal pains and pecuniary penalties may be proportioned in such a manner as to subserve the interest of society: that corporal punishment is proper for those crimes which are infamous and bad in their own nature”); *id.* at 318 (“If the offender is unable to pay the forfeiture of twenty pounds, he shall be set in the pillory for one hour, in the county town where the offense was committed or next adjoining to the place, and have both his ears nailed.”); *id.* at 320-211 (noting that the punishments for “Blasphemy by the Statute” are “whipping not exceeding forty stripes, and setting in the pillory one hour” and that “Blasphemy at common law” is a crime “punishable by fine and imprisonment, and other infamous corporal punishment”); *id.* at 330 (noting the “corporal punishment not exceeding ten stripes” was a punishment for fornication); *id.* at 347 (noting that libel is punishable by “fine, imprisonment, and pillory at the discretion of the court”); *id.* at 352 (noting that cheating is “punishable by fine, imprisonment and pillory”); *id.* at 356 (noting that conspiracy “is punished by fine, imprisonment, and pillory”); *id.* at 365 (noting that the punishment of misdemeanors “must be fine, imprisonment and pillory, which are the common law punishments”); *id.* at 392 (referring to cases “where corporal punishment must be inflicted”); *id.* at 405 (“Whenever a statute creates a crime, it inflicts some specific punishment. The punishments at common law are fine, imprisonment and pillory.”).

¹⁶¹ 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARY: WITH NOTES OF REFERENCE (1803), ch. 14 (“Of Master and Servant”) (“A master may by law correct his apprentice or servant for negligence or other misbehavior, so it be done with moderation: though, if the master's wife beats him, it is good cause of departure. But if any servant, workman, or laborer assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb.”); *id.* at Note H (“wherever the benefit of clergy is allowed to a slave, the court, besides burning him in the hand (the usual punishment inflicted on free persons) may inflict such further corporal punishment as they may think fit”); *id.* (“A slave convicted of hog-stealing, shall, for the first offense, receive thirty-nine lashes: any other person twenty-five ... The punishment for the second and third offense, of this kind, is the same in the case of a free person, as of a slave, namely, by the pillory and loss of ears, for the second offense ... ”); *id.* (“we must not forget, that many actions, which are either not punishable at all, when perpetrated by a white person, or at most, by fine and imprisonment, only, are liable to severe corporal

as a punishment, but also described in multiple instances how corporal punishments were—or had been—used to punish crimes.¹⁶² In Blackstone's *Commentaries*, one finds specific references to “corporal punishment,”¹⁶³ including the pillory,¹⁶⁴ whipping,¹⁶⁵ and ear cropping.¹⁶⁶ “[I]t is usual to

punishment, when done by a slave; nay, even to death itself, in some cases”); *id.* (“Resistance to a white person, in any case, was, formerly, and now, in any case, except a wanton assault on the negroe or mulattoe, is punishable by whipping.”); *id.* (“Slaves, by these and other acts, are prohibited from going abroad without leave, in writing from their masters, and if they do, they may be whipped ... ”); *id.* (“By the act of 1723, c. 4, it was enacted, that when *any negroe or mulattoe* shall be found, upon due proof made, or *pregnant circumstances*, to have given false testimony, every such offender shall, *without further trial*, have his ears successively nailed to the pillory for the space of an hour, and then cut off, and moreover receive thirty-nine lashes on his bare back, or such other punishment as the court shall think proper, not extending to life or limb. This act, with the exception of the words *pregnant circumstances*, was re-enacted in 1792.”).

¹⁶² 4 BLACKSTONE, *supra* note 110, at 12 (referencing infliction of “corporal punishments” as punishment for offenders); *id.* at 123 (“for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory or other infamous corporal punishment”); *id.* at 125-26 (noting the use of “corporal punishment” to punish those “guilty of a high misprison”); *id.* at 138 (noting that “corporal and pecuniary punishments, exile and perpetual infamy, are more suited to the genius of the English law”); *id.* at 151 (noting that the punishment for libel “is fine, and such corporal punishment as the court in their discretion shall inflict”); *id.* at 173 (noting that “corporal punishment” is inflicted “as in case of wilful perjury”); *id.* at 175 (noting that “corporal and pecuniary” punishments are assigned for killing game “at unseasonable times of the year”); *id.* at 217 (noting that “ignominious corporal penalties” may be imposed for “a breach of the king’s peace”); *id.* at 237 (noting that “corporal punishment” had “been found necessary” to punish theft where the offender has no property, though stating that “how far this corporal punishment ought to extend, is what has occasioned the doubt”).

¹⁶³ *Id.* at 59 (in a section on offenses “against God and religion” and “*blasphemy*,” stating that “[t]hese are offenses punishable at common law by fine and imprisonment, or other infamous corporal punishment”); *id.* at 61-62 (in a section on offenders who are “*religious impostors*,” noting that such offenses “are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment”); *id.* at 65 (stating that the “temporal punishment for having *bastard children*” was not specified in the statute of Elizabeth but “that a corporal punishment was intended”); *id.* at 70-71 (noting that “corporal punishment” shall be inflicted upon offenders convicted of violating the rights of ambassadors).

¹⁶⁴ *Id.* at 61 (“persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year’s imprisonment, and standing four times in the pillory”); *id.* at 137 (in a section on the punishment of perjury, noting that the punishment by statute was “to stand with both ears nailed to the pillory”); *id.* at 158 (“any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory”); *id.* (anyone defrauding another of valuable chattels “shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct”); *id.* at 158-59 (the third offense of “*ENGROSSING*”—that is, “getting into one’s possession, or buying up, of corn or other dead victuals, with intent to sell them again”—is a forfeiture of “all his goods” and to be “set in the pillory, and imprisoned at the king’s pleasure”).

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award judgment of the pillory,” Blackstone noted in one instance.¹⁶⁷ Similar references to corporal punishments are also found in early American legal commentaries.¹⁶⁸ In the founding era, both corporal and capital punishments were thus woven into the fabric of English and American law. And at that time, both kinds of punishments—at least in certain forms—were considered usual or customary.

C. The Eighth Amendment and Its Equivalents

The “cruel and unusual punishments” phrase first found its way into American law through the Virginia Declaration of Rights.¹⁶⁹ Drafted in 1776 by Virginia plantation owner George Mason, the applicable provision of that natural rights-oriented legal document read in full: “That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.”¹⁷⁰ Before the Revolutionary War, Mason himself had expressed the belief that Americans should be afforded the same rights as Englishmen,¹⁷¹ so it is hardly surprising that he looked to English law when he did his own legal drafting. Mason later explicitly contended that the prohibition against cruel and unusual punishments was intended to prohibit “torture”¹⁷²—a concept now explicitly defined by in-

¹⁶⁵ *Id.* at 238 (“the inferior species of theft, or petit larceny, is only punished by whipping at common law”).

¹⁶⁶ *Id.* at 159-60 (noting the use of the pillory and “loss of one ear” as punishments for monopolists).

¹⁶⁷ *Id.* at 217.

¹⁶⁸ 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAWS 667 (1824) (citing a “July, 1795, Lincoln County” case known as “Avery’s case” in which Avery was prosecuted for the crime of blasphemy and “sentenced to be set on the gallows one hour, and to be whipped twenty stripes”); *id.* at 676 (noting that, “[i]n 1785, the Commonwealth of Massachusetts passed a law” providing that “if any man or woman shall commit adultery,” the offender “shall be set on the gallows with a rope &c. one hour” and “be publicly whipped, not exceeding thirty-nine stripes”); *id.* at 677 (noting that “in 1642, the Colony legislature passed an act” making fornication a crime and permitting “corporal punishment” and that a Massachusetts act of March 15, 1786, provided for a fine for fornication but further provided that if the offender failed to pay his fine “he may be whipped, not exceeding ten stripes”); *id.* at 719 (referencing “Mass. Act, July 4, 1786, revised, in substance, March 15, 1805,” and noting, “This act provides, (among many other things,) that if any person ‘shall forge or counterfeit any silver or gold money, or coin, that is or shall be current in this Commonwealth,’ he shall be fined, set in the pillory, have an ear cut off, set on the gallows, be whipped, and sentenced to hard labour, not above seven years.”).

¹⁶⁹ VA. DECLARATION OF RIGHTS, § IX (June 12, 1776).

¹⁷⁰ *Id.*

¹⁷¹ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 177 (“[A]s early as 1766, Mason himself had asserted that American colonists ‘claim Nothing but the Liberty & Privileges of Englishmen, in the same degree, as if we had still continued among or Brethren in Great Britain.’”).

¹⁷² *Id.* at 187-88. Mason expressed this view at Virginia’s ratification convention when the Constitution itself was being considered. Mason—who vehemently believed that a

ternational law,¹⁷³ what the Founding Fathers called the “Law of Nations” in the U.S. Constitution.¹⁷⁴

After the Virginia Declaration of Rights was approved on June 12, 1776,¹⁷⁵ other states soon followed suit. In August 1776, Maryland delegates approved their own declaration, with two clauses specifically addressing cruel punishments.¹⁷⁶ Clause 14 read: “That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State; and no law, to inflict cruel and unusual pains and penalties,¹⁷⁷ ought to be made in any

national bill of rights was necessary—said of his handiwork, the Virginia Declaration of Rights, that a “clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.” *Id.*

¹⁷³ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides as follows:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, G.A. res. 39/45 [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987]. The last line of that definition of *torture*, of course, begs the question of whether the physical or mental “pain or suffering” arising from, inherent in, and incidental to the death penalty is itself “lawful” under the Eighth Amendment’s Cruel and Unusual Punishments Clause. If death sentences and executions are found to be both *cruel* and *unusual*, they are—plain and simple—unconstitutional.

¹⁷⁴ U.S. CONST., art. I, § 8, cl. 10 (giving Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”).

¹⁷⁵ ROGER L. KEMP, ED., DOCUMENTS OF AMERICAN DEMOCRACY: A COLLECTION OF ESSENTIAL WORKS 52 (2010).

¹⁷⁶ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 178.

¹⁷⁷ The U.S. Constitution prohibited bills of attainder, legislative acts that in earlier times inflicted the punishment of death—either directly or conditionally—without a judicial trial. U.S. CONST., art. I, § 9; *Cummings v. Missouri*, 71 U.S. 277, 323-24 (1866); *see also* *Nixon v. Administrator for General Services*, 433 U.S. 425, 473 (1977) (“In England a bill of attainder originally connoted a parliamentary Act sentencing a named individual or identifiable members of a group to death.”). If the punishment were to be less than death, the act was termed “a bill of pains and penalties.” *Cummings*, 71 U.S. at 323; *see also* *United States v. Lovett*, 328 U.S. 303, 317 n.6 (1946) (“Originally a judgment of death was necessary to attain and the consequences of attainder were forfeiture and corruption of blood. If the judgment was lesser punishment than death there was no attainder and the bill was one of pains and penalties. Practically all the American precedents are bills of pains and penalties.”) (citations omitted); *Nixon*, 433 U.S. at 474 (“Generally addressed to persons considered disloyal to the Crown or State, ‘pains and penalties’ historically consisted of a wide array of punishments: commonly included were imprisonment,

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case, or at any time hereafter.”¹⁷⁸ Clause 22 further provided: “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law.”¹⁷⁹ Likewise, in September 1776, Delaware adopted a declaration of rights providing “[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”¹⁸⁰ Similar provisions were also soon put in place in North Carolina,¹⁸¹ Massachusetts,¹⁸² New Hampshire,¹⁸³ and New York.¹⁸⁴

By the time of the 1787 Constitutional Convention in Philadelphia, there was already a division among the states between provisions prohibiting “cruel *and* unusual punishments” and those barring “cruel *or* unusual punishments.”¹⁸⁵ While Virginia and New York forbade “cruel and unusual” punishments, other states chose to prohibit “cruel or unusual” punishments. There was also a division among American states as to whether such provisions were absolute prohibitions or something less. Some provisions used the mandatory language of “shall” and restricted the actions of all branches of government, while others seemed more hortatory or less restrictive, using “ought” or only restricting the actions of courts and magistrates.¹⁸⁶ The way in which individual states adopted such protections and

banishment, and the punitive confiscation of property by the sovereign.”). The Supreme Court has ruled that “[w]ithin the meaning of the [U.S.] Constitution, bills of attainder include bills of pains and penalties.” *Cummings*, 71 U.S. at 323; *see also Lovett*, 328 U.S. at 317 n.6 (“The Constitution in prohibiting bills of attainder undoubtedly included bills of pains and penalties as the majority in the *Cummings* case held.”); *Nixon*, 433 U.S. at 473-74 (“Article I, § 9, however, also proscribes enactments originally characterized as bills of pains and penalties, that is, legislative Acts inflicting punishment other than execution.”).

¹⁷⁸ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 178.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ N.C. DECLARATION OF RIGHTS, § X (1776) (“That excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”).

¹⁸² MASS. DECLARATION OF RIGHTS, art. XXVI (1780) (“No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”).

¹⁸³ N.H. BILL OF RIGHTS, art. XXXIII (1784) (“No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”).

¹⁸⁴ N.Y. BILL OF RIGHTS (1787) (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

¹⁸⁵ *See Harmelin v. Michigan*, 501 U.S. 957, 966 (1991).

¹⁸⁶ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 180, 184. The following excerpt from a Massachusetts author’s book—a guide for youth, looking at Massachusetts’ constitution—illustrates how restraints on legislatures were viewed separate from those on magistrates and courts:

Q. What restraint does the constitution lay upon the Legislature, respecting the declaration of crimes?

in which lawmakers spoke of them, with seemingly little attention paid to whether a disjunctive or conjunctive word was used between “cruel” and “unusual,” has led some scholars to label them “boilerplate” provisions.¹⁸⁷

There were, in fact, many different language variants employed in the late eighteenth century to express disdain for cruel or out-of-the-ordinary punishments.¹⁸⁸ Virginia’s provision counseled that “cruel *and* unusual” punishments “*ought not*” be inflicted, without any indication of whether the clause applied only to certain branches of government.¹⁸⁹ In contrast, Maryland’s provision barring “cruel *or* unusual punishments”—but also using the words “*ought not*”—only restricted “the courts of law.”¹⁹⁰

A. That no subject ought, in any case, or in any time, to be declared guilty of treason or felony by the Legislature.

Q. Under what restraint, also, are our magistrates and courts of law?

A. The constitution declares that they shall not demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishment.

JOSEPH RICHARDSON, THE AMERICAN READER: A SELECTION OF LESSONS FOR READING AND SPEAKING WHOLLY FROM AMERICAN AUTHORS 41 (1810).

¹⁸⁷ See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: The Original Meaning, 57 CALIF. L. REV. 839, 840 (1969) (arguing “cruel and unusual” was a kind of “constitutional ‘boilerplate’”); see also Claus, *The Antidiscrimination Eighth Amendment*, *supra* note 11, at 129 (“For many in the founding generation, it had become the verbiage of civility, and they were intent on employing it for whatever it was worth. Like the Latin Mass, it was valued by those for whom it was cultural heritage, whether understood or not.”).

¹⁸⁸ Some commentators and judges have suggested that, in light of the lack of historical evidence surrounding its adoption, the Eighth Amendment’s “cruel and unusual” verbiage should not necessarily be read conjunctively. See Ved P. Nanda, *Recent Developments in the United States and Internationally Regarding Capital Punishment—An Appraisal*, 67 ST. JOHN’S L. REV. 523, 549 (1993) (“As to the Court’s interpretation of the Eighth Amendment, opponents of capital punishment have argued that the Court should read the words ‘cruel and unusual’ disjunctively rather than conjunctively since there is no authoritative record of what the first Congress meant in using the phrase.”) (quoting Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices’ Positions*, 24 ST. MARY’S L.J. 1, 100-101 (1992)). One law professor points out that the inherited “cruel and unusual punishments” language “was copied into the Eighth Amendment without extensive discussion of whether the ‘and’ was conjunctive or disjunctive.” Donnelly, *supra*, at 100 n.532. The Justices of the Supreme Court have themselves reached very different conclusions on the import of the words. Compare *Furman*, 408 U.S. at 242-47 (Douglas, J., concurring) and *id.* at 258-64 (Brennan, J., concurring) with *id.* at 316-22 (Marshall, J., concurring) and *id.* at 376-83 (Burger, C.J., dissenting). The Constitution’s use of the word “and” has also been debated in another context, that of the Necessary and Proper Clause. See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 265 (“At first glance, ‘and’ appears to be a conjunctive—a law must be ‘necessary plus proper.’” Bus as Professor Scott Burnham has pointed out, ‘and’ can have a disjunctive meaning as well. One might read the Necessary and Proper Clause as saying that a law must be necessary or proper.”) (citing SCOTT J. BURNHAM, DRAFTING AND ANALYZING CONTRACTS 95 (3d ed. 2003)).

¹⁸⁹ VA. DECLARATION OF RIGHTS, § IX (June 12, 1776) (emphasis added).

¹⁹⁰ MD. DECLARATION OF RIGHTS, art. 2 (1776) (emphasis added).

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Whereas North Carolina's declaration proclaimed without reservation that "cruel *or* unusual" punishments "*should not*" be required,¹⁹¹ the Massachusetts and New Hampshire provisions—barring "cruel *or* unusual punishments"—limited their applicability to magistrates and courts of law.¹⁹² The Massachusetts and New Hampshire clauses instead provided that "[n]o magistrate or court of law *shall* . . . inflict cruel or unusual punishments."¹⁹³

Other states took their own approaches, with language variants—whether subtle or otherwise—emerging in the eighteenth century. New York's Bill of Rights—approved on January 26, 1787—used more hortatory language, reading "[t]hat excessive bail *ought not* to be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."¹⁹⁴ For its part, Pennsylvania's 1776 constitution—which lasted until 1790, when a new constitution took effect barring "cruel punishments"¹⁹⁵—chose to bar sanguinary and disproportionate punishments. Pennsylvania's 1776 constitution specifically provided that "[t]he penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less *sanguinary*, and in general *more proportionate* to the crimes."¹⁹⁶ In the founding era, the term "sanguinary" was often used interchangeably with, or as a synonym for, "cruel."¹⁹⁷

¹⁹¹ N.C. DECLARATION OF RIGHTS, § X (1776) (emphasis added).

¹⁹² MASS. DECLARATION OF RIGHTS, art. XXVI (1780) (emphasis added); N.H. BILL OF RIGHTS, art. XXXIII (1784) (emphasis added).

¹⁹³ *Id.*

¹⁹⁴ N.Y. BILL OF RIGHTS (1787). There was even internal division in Maryland's 1776 Declaration of Rights as it prohibited both "cruel *and* unusual pains and penalties" while simultaneously barring "cruel *or* unusual punishments." MD. DECLARATION OF RIGHTS §§ XIV, XXII (Aug. 14, 1776). The U.S. Constitution—which explicitly outlaws bills of attainder—has consistently been read to bar bills of pains and penalties, too, even though the Constitution itself makes no reference to "bills of pains and penalties." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) ("At common law, bills of attainder often imposed the death penalty; lesser punishments were imposed by bills of pains and penalties. The Constitution proscribes these less penalties as well as those imposing death.").

¹⁹⁵ PA. CONST., art. IX, § XIII (1790).

¹⁹⁶ PA. CONST., § 38 (1776) (emphasis added); *id.* at § 38 (calling for prisons to be constructed "to make sanguinary punishments less necessary"). South Carolina's 1778 constitution also indicated that penal laws were to be reformed so that punishments would be "made in some cases less sanguinary, and in general more proportionate to the crime." S.C. CONST., art. XL (1778).

¹⁹⁷ See *United States v. Burr*, 25 F. Cas. 55, 157 (C.C. Va. 1807) (the infamous English judge George Jeffreys is described as "bloodthirsty," with Jeffreys further characterized as "[t]hat sanguinary and cruel judge" who "treated every man who came to be tried before him as a traitor"); *Case of Fries*, 9 F. Cas. 924, 946 (C.C. Pa. 1800) (a reference to "[c]ruel measures" follows a sentence containing the phrase "sanguinary bosom"). The word "murderous," according to *Webster's New International Dictionary*, is itself "characterized by, or causing murder or bloodshed; having the purpose or quality of

The First Congress actually voted to approve both the “cruel *and* unusual” and “cruel *or* unusual” language variants within weeks of one another.¹⁹⁸ The Northwest Ordinance, first adopted by the Continental Congress on July 13, 1787, then re-approved by the First Congress on July 14, 1789, contained the following provision: “All fines shall be moderate; and no cruel or unusual punishments shall be inflicted.”¹⁹⁹ The Northwest Ordinance, adopted to govern territory “northwest of the river Ohio,” was drafted by Massachusetts lawyer Nathan Dane and its “cruel or unusual” provision was—not surprisingly—based in part on the language in Massachusetts’ 1780 constitution.²⁰⁰ That constitution—still in effect to this day, making it America’s oldest operating constitution—was largely the handiwork of John Adams, later the second President of the United States.²⁰¹ Adams passionately quoted Beccaria’s treatise in 1770 in his defense of British soldiers accused of murder following the Boston Massacre, and in 1786 he also copied the following Beccaria quotation into his diary: “Every Act of Authority, of one Man over another for which there is not an absolute Necessity, is tyrannical.”²⁰²

The Eighth Amendment text itself, crafted by James Madison and introduced to the First Congress on June 8, 1789, borrowed the “cruel and unusual punishments” language from the Virginia Declaration of Rights in his home state.²⁰³ Because executions were then the standard punishment for various crimes, it is unsurprising that members of Congress adopted the Eighth Amendment language with little debate. As death sentences were then *mandatory* for certain crimes, the founders certainly had little reason to engage in extended debate about whether executions were *unusual*. At that time, they clearly weren’t. Some early Americans, such as Dr. Benjamin Rush, plainly thought executions *cruel*,²⁰⁴ but it was not realistic to then argue that executions were *unusual*. The record reflects that Congress approved the language of the Eighth Amendment in September 1789²⁰⁵ by a “considerable majority,” having previously adopted “without issue” the “cruel or unusual punishments” provision of Northwest Ordinance just weeks earlier.²⁰⁶

murder; bloody; sanguinary, bloodthirsty, fell savage, cruel.” Savannah News-Press, Inc. v. J. R. Harley, 111 S.E.2 259, 263 (Ga. Ct. App. 1959).

¹⁹⁸ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 118-19.

¹⁹⁹ *Id.*; Northwest Ordinance of 1787, art. II, 1 Stat. 50, 52 (1789).

²⁰⁰ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 118.

²⁰¹ Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 569 (1989).

²⁰² BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 50.

²⁰³ *Id.* at 119.

²⁰⁴ *Id.* at 66-84.

²⁰⁵ The first ten amendments to the U.S. Constitution were submitted to the states by Congress on September 25, 1789. 1 Stat. 97 (1789).

²⁰⁶ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 119. A more detailed history of the adoption of the Northwest Ordinance and the debate surrounding the Eighth

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The “cruel and unusual” catchphrase was not limited to its use in the Eighth Amendment. That language also came to be used extensively in legal proceedings relating to whether slaves or seamen had been mistreated, indicating that the “cruel and unusual” terminology carried with it an element of adjudicatory fact-finding, whether for judge or jury.²⁰⁷ Alabama, Florida and Mississippi laws, to protect slave owners’ interests, prohibited the infliction of “cruel or unusual punishments”²⁰⁸ while other laws prohibited “cruel treatment” or “cruel punishment” or barred chastisements carried out with “unusual rigor.”²⁰⁹ In *Mann v. Trabue*,²¹⁰ for instance, the Missouri Supreme Court wrote in 1827 that a slave’s death was brought about by “cruel and unusual treatment.”²¹¹ And in *State v. Maner*,²¹² an 1834 case, the South Carolina Court of Appeals—in construing that state’s 1740 prohibition of “cruel punishment”—wrote that the state’s law “makes any unusual and cruel treatment of a slave an indictable offense.”²¹³

Early American laws, in fact, frequently regulated the treatment of slaves, with the concept of cruelty—and sometimes unusualness—present in such laws.²¹⁴ For example, an early South Carolina law—known as “the negro Act of 1740”—expressly forbade anyone from “willfully” cutting out a slave’s tongue; putting out a slave’s eye; castrating or “cruelly” scalding, burning or depriving a slave “of any limb, or member”; or from inflicting “any other cruel punishment, other than by whipping, or beating with a horse-whip, cow-skin, switch, or small stick, or by putting irons on, or

Amendment’s ratification can be found in my recent book, *Cruel and Unusual: The American Death Penalty and the Founders’ Eighth Amendment*. *Id.* at 118-19, 162-71.

²⁰⁷ Ryan, *supra* note 67, at 557 (“Historically, juries have been trusted to decide issues like Eighth Amendment cruelty that we might today consider questions of law.”).

²⁰⁸ “An Act respecting slaves,” ch. 1, § 16 (passed Mar. 6, 1805), *reprinted in* HARRY TOULMIN, ED., A DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING THE STATUTES AND RESOLUTIONS IN FORCE AT THE END OF THE GENERAL ASSEMBLY IN JANUARY, 1823, at 631 (1823); “An act, to reduce into one, the several acts, concerning slaves, free negroes, and mulattoes,” ch. 73, § 44 (passed June 18, 1822), *reprinted in* THE REVISED CODE OF THE LAWS OF MISSISSIPPI 379 (1824); “An Act relating to Crimes and Misdemeanors committed by Slaves, free Negroes, and Mulattoes,” § 31 (approved Nov. 21, 1828), *reprinted in* JOHN P. DUVAL, ED., COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, at 223 (1839); ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 111 (1992) (discussing Alabama’s law); *see also id.* at 112 (“There are several cases in which masters were indicted for cruel and unusual punishment.”); *id.* (“The only reported conviction for a master for cruel punishment is reported in the 1843 Alabama case of *Turnipseed v. State*. The master was fined the minimum sum—fifty dollars.”).

²⁰⁹ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 217.

²¹⁰ 1 Mo. 709, 1827 WL 1987 (1827).

²¹¹ *Id.* at *1.

²¹² 2 Hill 453, 1834 WL 1528 (S.C. App. 1834).

²¹³ *Id.* at *1.

²¹⁴ THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 182-91 (1999).

confining, or imprisoning such slave.”²¹⁵ In enacting that law, South Carolina’s legislature recited that “cruelty is not only highly unbecoming those who profess themselves *Christians*, but is odious in the eyes of all men who have any sense of virtue or humanity.”²¹⁶

Seamen, too, were expressly protected from “cruel and unusual punishment.” Thus, a federal law, passed by Congress and approved on March 3, 1835, provided in pertinent part:

[I]f any master or other officer, of any American ship or vessel on the high seas . . . shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food or nourishment, or inflict upon them any cruel and unusual punishment, every such person so offending shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.²¹⁷

Five years later, Congress added another provision respecting mariners that spoke of “unusual or cruel treatment.”²¹⁸ One mid-nineteenth-century American pleading guide, reflecting the sentiment of the time, dedicated an entire section to the topic that was titled: “*For inflicting cruel and unusual punishment on one of the crew of a vessel, &c.*”²¹⁹

In Southern states, the “unusual” language was often seen as a way to validate then-prevailing customs in relation to the treatment and punishment of slaves. In discussing Louisiana’s prohibition on chastising slaves with “unusual rigor,” anti-slavery activist William Goodell—a journalist

²¹⁵ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 217.

²¹⁶ GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 39 (1827), *reprinted in* PAUL FINKELMAN, ED., SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM 1700-1872, at 195 (2007).

²¹⁷ “An Act in amendment of the acts for the punishment of offenses against the United States,” Public Law No. 28, § 3, *reprinted in* GEORGE SHARSWOOD, ED., THE PUBLIC AND GENERAL STATUTES PASSED BY THE CONGRESS OF THE UNITED STATES OF AMERICA (FROM 1828 TO 1836 INCLUSIVE) 2417 (1837) & 5 THE MILITARY AND NAVAL MAGAZINE OF THE UNITED STATES, FROM MARCH, 1835, TO SEPTEMBER, 1835, at 316 (1835).

²¹⁸ That law provided as follows:

In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts; and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged, and receive, in addition to his wages to the time of the discharge, three months’ pay; and the officer discharging him shall enter upon the crew-list and shipping articles the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially.

“An Act in addition to the several acts regulating the shipment and discharge of seamen, and the duties of consuls,” 26th Cong., Sess. 1, ch. XLVIII, § 17, *reprinted in* RICHARD PETERS, ED., THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA, FROM THE ORGANIZATION OF THE GOVERNMENT IN 1789, TO MARCH 3, 1845, at 396-97 (1846).

²¹⁹ FRANCIS WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS, ADAPTED TO THE USE BOTH OF THE COURTS OF THE UNITED STATES AND THOSE OF ALL THE SEVERAL STATES 540 (1849) (italics in original).

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who wrote extensively about slavery²²⁰—saw “something in this singular phraseology that requires study.”²²¹ “Such a law, instead of *correcting* prevailing usages,” Goodell lamented, “receives its definition *from* them.”²²² As Goodell explained: “That which is ‘*usual*’ is *authorized*, whatever it may be, short of maiming mutilation, and murder. And the more rigorous, severe, and cruel may be the prevailing usages of a community, the more rigorous, severe, and cruel they are expressly *authorized* to be.”²²³ In other words, even apart from their use by judges in criminal cases and in ordinary parlance by the public at-large, the *cruel* and *unusual* concepts—by virtue of their placement in various laws—would have been familiar to masters and slave overseers in the context of legal proceedings.

In England and the United States, the concepts of cruelty and unusualness have, in fact, long been associated with both the criminal law and the institution of slavery.²²⁴ “The individual is referred, as a standard of lawful action,” Goodell emphasized in his book, “to the common practices of his neighbors around him. What is ‘*usual*’ among *them* is lawful for *him*.”²²⁵ “‘*Unusual* rigor,’” Goodell added, “must be defined in the light of

²²⁰ *Biography of William Goodell*, RG 30/29 -William Goodell Family Papers, Oberlin College Archives, *available at*

<http://www.oberlin.edu/archive/holdings/finding/RG30/SG29/biography.html>.

²²¹ WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 161 (2d ed. 1853).

²²² *Id.* at 161-62 (italics in original).

²²³ *Id.* at 162 (italics in original).

²²⁴ THE MIGHTY DESTROYER DISPLAYED, IN SOME ACCOUNT OF THE DREADFUL HAVOCK MADE BY THE MISTAKEN USE AS WELL AS ABUSE OF DISTILLED SPIRITUOUS LIQUORS 26 (1774) (“Sir *I Dalrymple* in his memoirs says that the Parliament in the declaration of right asserted, that *pitying and respecting human nature, no cruel and unusual punishment should be inflicted. How Britons* can so readily admit of a change in their disposition and sentiments, as to practice in *America* what they abhor and detested in *Britain*, can be accounted for on no other principle, but as being the natural effect of slave-keeping, which as the celebrated *Montesquieu* observes, ‘insensibly accustoms those who are in the practice of it, to want all moral virtues, to become haughty, hasty hard hearted, passionate, voluptuous and cruel.’”) (italics in original); *Trials of Major Bonnet and others*, 5 *George* 1 (Nov. 10, 1718) (“May it please your honours, and you gentlemen of the Jury; the prisoner who now stands arraigned at the bar, has been guilty of many piracies, committed many robberies, ruined many families, and been the occasion of many most cruel and inhuman murders ...”), *reprinted in* XV T. B. HOWELL, COMP., *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783*, at 1291 (1816).

²²⁵ WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 162 (2d ed. 1853) (italics in original). Writing at a time before the Fourteenth Amendment’s ratification, William Goodell elaborated further in this vein: If it is “*usual*” to “chastise” a slave by inflicting on him a hundred lashes, it is *lawful* to do so. If it is “*usual*” to add five hundred lashes more, it is equally *lawful*! In short, the current *usages* of the fraternity of slaveholders (with the exceptions specified) are proclaimed, by the Civil Code of Louisiana, to constitute *the law*. This approximates

what is *usual*.”²²⁶ “We may infer,” he said, considering what was usually done in places like Louisiana and South Carolina, “that ‘cruel punishment’ by ‘whipping or beating with a horsewhip, cowskin, switch, or small stick, or by putting irons on, or confining or imprisoning,’ was not ‘unusual’ and consequently not forbidden by the new Civil Code.”²²⁷ Not only were executions used in places such as Virginia to quell slave rebellions, but the use of the lash to punish slaves was extraordinarily common, too.²²⁸

Some legal commentators, noting their close proximity in codes, even saw the “cruel” and “unusual” terms as synonymous. In 1827, Pennsylv-

closely to the abrogation of law, so far as slaveholders are concerned, or the abdication of supremacy by the civil government in their favor. The condition of this great nation of twenty millions of people, controlled by a little more than one hundred thousand slaveholders, seem but an expansion of this idea.

Id. (italics in original).

²²⁶ *Id.* (italics in original).

²²⁷ *Id.* at 162-63. In discussing North Carolina’s 1798 law that exempted from the state’s murder statute situations in which the slave was resisting “his lawful owner or master” or in which any slave died through the use of “moderate correction,” Goodell also argued: “In the light of this, we may understand also the prohibition of ‘*unusual* punishment.’ It does not always reach the case of those who die under the lash, for even this may be ‘moderate correction,’ and consequently not ‘unusual.’” *Id.* at 180-82 (italics in original). Elsewhere, Goodell emphasized as follows:

If any further light is wanted on that feature of the Slave Code that insultingly proffers to the slave its protection from “*unusual*” punishments, the inquirer might see what punishments are “*usual*” by looking over the advertisements and paragraphs of a dozen leading Southern journals, from as many different States, for twelve months. Cut out, arranged, and pasted in a scrap-book, with an index, they would furnish him with a copious and authentic commentary on the slave laws....

He will find there numerous advertisements of runaway slaves, and of jailers’ notices of apprehension and commitments of them, in which the descriptions specify scars from whipping, from iron collars, from gun-shots, from brandings, &c., &c.... All this, as the reader now knows, is *authorized by law*—not prohibited as “*unusual*.”

Then comes another class, which, if not expressly authorized, are found by their *frequency* to be outside of the prohibited pale of “*unusual*.” ...

....

One case, on page 15 of Mr. Weld’s book, is doubtless a specimen of tens, if not hundreds of thousands; assuredly it does not come under the condemnation of being “unusual.” The “owner” of a female slave, who was a Methodist, proposed a criminal intercourse with her: she refused. He sent her to the “overseer” to be flogged. Again he made advances—again she refused, and again she was flogged! Afterwards she yielded to his adulterous wishes! And now, the attentive reader of the preceding pages will have learned that all this was strictly within the protection of the law!

Id. at 218-20 (italics in original); see also CLAYTON E. JEWETT & JOHN O. ALLEN, *SLAVERY IN THE SOUTH: A STATE-BY-STATE HISTORY* 245 (2004) (“Though slaves in theory were protected from cruel and unusual punishment, practice reveals uncountable instances of physical abuse through whipping. Most owners did not view this method of punishment as cruel or unusual.”).

²²⁸ DOUGLAS R. EGERTON, *GABRIEL’S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802*, at 111-12, 187 (1993); KENNETH S. GREENBERG, ED., *NAT TURNER: A SLAVE REBELLION IN HISTORY AND MEMORY* 3, 71, 73, 146, 195 (2003).

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nia lawyer George M. Stroud,²²⁹ in commenting on Mississippi's law prohibiting the "cruel or unusual punishment" of slaves, wrote: "'*Cruel*' and '*unusual*,' connected as they are by the disjunctive '*or*,' mean precisely the same thing, and will be so construed by the court. And what horrible barbarities may be exposed under the name of *usual* punishments, the reader will be enabled to judge by recurring to the laws of South Carolina and Louisiana, contained on the preceding pages."²³⁰ Stroud also emphasized that, as a practical matter, such anti-cruelty laws "cannot be enforced" because of "the exclusion of the testimony" of "those who are *not white*" during "the trial of a *white* person."²³¹

²²⁹ An 1817 graduate of Princeton College, George Stroud served in the Pennsylvania legislature in 1824, published his book on the laws of slavery in 1827, and later became a judge in Philadelphia. 8 WAYNE CUTLER, ED., CORRESPONDENCE OF JAMES K. POLK 7 (1993).

²³⁰ GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 42 (1827), reprinted in PAUL FINKELMAN, ED., SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM 1700-1872, at 198 (2007). In commenting on that same law, Charles Elliott—an opponent of slavery—said much the same thing in 1850, writing: "Besides, *cruel* or *unusual* mean precisely the same thing, and will be so construed by the court." 1 CHARLES ELLIOTT, SINFULNESS OF AMERICAN SLAVERY 194 (1850) (italics in original). As Elliot, paraphrasing Stroud's earlier work, wrote: "And what horrible cruelties may be inflicted under the name of *usual* punishments," that writer lamented, "may be gathered from the laws of South Carolina and Louisiana." *Id.* at 194-95 (italics in original).

In construing Mississippi's "cruel or unusual punishment" prohibition, William Goodell emphasized that a slave was treated as "a 'chattel'—a 'thing'—not a person." WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 165 (2d ed. 1853). "And it is only an '*unusual*' punishment that is forbidden!" Goodell recorded, adding: "The masters and overseers have only to repeat their excessive punishments so frequently that they become '*usual*,' and the statute does not apply to them! In this view it holds out an inducement to render the most cruel inflictions *usual*." *Id.* (italics in original). "It is incredible," Goodell concluded, "that owners and overseers should be much restrained by the provisions of this act." *Id.*

²³¹ GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 36 (1827), reprinted in PAUL FINKELMAN, ED., SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM 1700-1872, at 192 (2007)). This comment was made under the following heading: "Prop. III. THE MASTER MAY, AT HIS DISCRETION, INFLICT ANY SPECIES OF PUNISHMENT UPON THE PERSON OF HIS SLAVE." *Id.* at 35. In that section, Stroud added that at least "*so far as regards the pages of the statute book*" were concerned "the *life* at least of the slave, is safe from the *authorized* violence of the master." *Id.* at 36 (italics in original). Stroud then added: "There was a time in many, if not in all the slave-holding districts of our country, when the murder of a slave was followed by a pecuniary fine only. In one state, a change of the law in this respect has been very recent. At the present date, I am happy to say, the wilful, malicious and deliberate murder of a slave, by whomsoever perpetrated, is declared to be punishable with death in every state." *Id.* As Stroud concluded that section of his book: Upon a fair review of what has been written on the subject of this proposition, the result is found to be—That the master's power to inflict corporal punishments to any extent, short of life and limb, is fully sanctioned by law, in *all* the slave-holding states—that the

D. “Cruel” and “Unusual” Homicides and Beatings

The “cruel and unusual” and “cruel or unusual” terminology has often likewise been used to describe beatings or assess the severity—or blameworthiness—of a killing.²³² For example, in *State v. Norris*,²³³ the defendant Norris quarreled with a man and was beaten up, but then left the scene, got a deadly weapon, and returned to kill his antagonist, Nathaniel Daves.²³⁴ Just a few days later, Norris was charged and tried for the

master, in at least two states, is expressly protected in using the *horsewhip* and *cowskin*, as instruments for beating his slave—that he may, with entire impunity, in the same states, load his slave with irons, or subject him to perpetual imprisonment whenever he may so choose—that for cruelly scalding, *wilfully* cutting out the tongue, putting out an eye, and for any other dismemberment, if *proved*, a fine of one hundred pounds currency only is incurred in South Carolina—that though in all the states the wilful, deliberate and malicious murder of the slave is now *directed* to be punished with death, yet, as in the case of a *white* offender, none except whites can give evidence, a conviction can seldom, if ever, take place.

Id. at 43-44 (italics in original).

²³² *State v. Norris*, 2 N.C. 429, 1796 WL 327 (N.C. Super. L. & Eq. 1796); see also *In re Kottman*, 2 Hill (SC) 363, 1834 WL 1576 *1 (“[T]o shew that the Court ought not to interpose in favor of the father, affidavits were read, that the father had beaten this son in a cruel and unusual manner without any just cause.”); *People v. Rector*, 19 Wend. 569 (N.Y. Sup. Ct. Judicature 1838) (“Where there is no intent to kill, the offense may be either murder or manslaughter; the graduation of the crime depending on the manner in which it was committed and the other attending circumstances. When the act is done in committing, or attempting to commit a misdemeanor below the grade of felony, and the deceased is killed by misadventure; and when the killing is in a heat of passion, but in a cruel or unusual manner, or by a dangerous weapon, the crime may be only manslaughter: (2 R. S. 661, § 6, 10, 12;) but when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, it will be murder. (*Id.* p. 657, § 5.)”); “Court of Oyer and Terminer,” NEW-YORK DAILY TRIBUNE (New-York, N.Y.), Sept. 24, 1850, at 3 (noting that Robert Moffat was “found guilty of manslaughter in the second degree” in causing the death of his wife where “the Court and Jury considered it taking life in a cruel and unusual manner, but not intending to take life”); see also *Jacob v. State*, 22 Tenn. 493, 1842 WL 1984 *2 (Tenn. 1842) (using the “cruel and unusual manner” phrase as regards a beating); *Commonwealth v. Green*, 17 Mass. 515, 551, 1822 WL 1507 *22 (Mass. 1822) (“The man, with whose murder the prisoner is charged, was found beaten and mangled in a cruel manner.”); *Eckart v. Wilson*, 1823 WL 2203 *4 (Pa. 1823) (referring to “cruel, deliberate murder”); “An Outrage at Fort McHenry,” THE JEFFERSONIAN (Stroudsburg, Pa.), July 19, 1855, at 2 (referring to “the most cruel and unusual chastisement” of a soldier).

²³³ 2 N.C. 429, 1796 WL 327 (N.C. Super. L. & Eq. 1796).

²³⁴ *Id.* at *5. The quarrel started on a Saturday night in a piazza after Norris and another man went to the house of a Mrs. Ramsay, where Daves and others were gathered. Though what happened and what led up to the fight was disputed, it was clear that Norris and Daves exchanged words, Daves called Norris “a damned liar,” and Norris—in turn—call Daves “a damned liar” for accusing Norris of trying “to breed a riot.” In the ensuing fistacuffs, Daves gave Norris “three or four blows, upon which Norris ran off towards his own house.” After Norris ran to his house, which was several yards away, he returned and stabbed Daves in the belly, a three- or four inch wound that proved lethal. *Id.* at *3-5.

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victim's murder.²³⁵ The solicitor general—in the context of discussing the difference between murder and manslaughter²³⁶ just five years after the U.S. Bill of Rights was ratified—told a North Carolina court in 1796 that the beating that led to the death was done in a “cruel or unusual manner.”²³⁷

The solicitor general's use of the “cruel or unusual” terminology sheds light on how that phrase was commonly understood in the late eighteenth century. “The grand distinction between murder and manslaughter is,” he emphasized, “that murder is accompanied with the circumstances of malice aforethought.”²³⁸ “The true legal idea of malice, as applied to the case of killing,” he said, is where “the fact of killing is attended with such circumstances” as show “the slayer to have a cruel and diabolical temper and disposition, above what is ordinarily found amongst mankind.”²³⁹ The solicitor

²³⁵ *Id.* at *1-2.

²³⁶ The solicitor general was of the view that the homicide at issue was “either murder or manslaughter.” *Id.* at *5.

²³⁷ *Id.*

²³⁸ *Id.* A similar statement is found in *State v. Weaver*, 3 N.C. 54, 1798 WL 102 (N.C. Super. L. & Eq., 1797). The North Carolina judge, using cruel and punishments in the same context, instructed in that case:

Murder is where the homicide with malice aforethought, which means not what is commonly understood, but a doing the act under such circumstances as shews the heart to be exceedingly malignant and cruel, above what is ordinarily found amongst mankind; & the wickedness of heart is collected either from the express words and conduct of the party, or from the manner in which the deed is done—in the first instance, by threatening expressions, former grounds, or schemes to do him mischief, as by lying in wait for him and the like; in the latter instance, by the excessiveness of punishment or dangerous weapon, or means made use of to punish; as if for a slight offense which deserved only moderate correction, any man should take up his servant and beat him so excessively as to ... cause his death; if in such a case for such an offense, he should beat out his brains with an axe, shoot him with a gun, or kill him with a sword; from all these circumstances, it is allowed that the heart is exceedingly depraved and cruel, and that the killing has not proceeded from the frailty of human nature, and therefore the offense is deemed murder. *Id.* at *1; compare *State v. Boon*, Tay. 246, 1801 WL 701 *5 (N.C. Conf. 1801)

(Johnston, J.) (“The murder of a slave appears to me a crime of the most atrocious and barbarous nature; much more so than killing a person who is free, and on an equal footing. It is an evidence of a most depraved and cruel disposition to murder one so much in your power that he is incapable of making resistance, even in his own defense ... ”)

²³⁹ *Norris*, 1796 WL 327 at *5; see also *id.* (“It is the cruelty of the action, and the malignity of heart the action discovers, to which the law attributes the crime of murder.”); *id.* (“This cruelty and malignity of heart is discoverable from the action itself, and the causes that lead to it.”); *id.* (“The law deems it proper he should answer for all the consequences of his cruelty, to their utmost extent; and that one who has behaved himself with so much obduracy and perverseness, should no longer be regarded as entitled to that compassion which the frailties of human nature may justly claim. He has acted not from the frailty of his nature, but from the unfeeling ferocity of a savage heart; and this circumstance causes the law to impute to him the crime of murder.”).

tor general thus argued that a murder—as opposed to a manslaughter—had been committed.²⁴⁰

The solicitor general’s argument—reported in some detail—thus shows the prototypical context in which the “cruel or unusual” language was used. In his argument, North Carolina’s solicitor general repeatedly referred to the legal distinction between murder and manslaughter. “Whenever this excess of cruelty appears, this disposition of the mind to enormous revenge,” he argued, “the crime of homicide amounts to murder.”²⁴¹ “Disputes, and fighting in consequence of them, happen every day in the streets and elsewhere,” he emphasized, asking the following question: “will the law say, when one is worsted he may quit the affray, go home, provide himself with a knife, return and plunge it into the body of his adversary, and that he shall be guilty of no more than manslaughter?”²⁴² “Would other men in general in his situation have taken up the cruel, purpose of seeking so deadly a revenge?” the solicitor general asked.²⁴³ His reply: “I think they would not; and it seems to me the act can appear no otherwise that as the effect of a cruel disposition, not of human weakness deserving of our compassion; and if it be the effect of cruelty it amounts to murder.”²⁴⁴

In other words, the solicitor general viewed the defendant’s cruelty as indicative of the defendant’s relative blameworthiness. After noting that Norris had gone eighty or a hundred yards before returning to stab his ad-

²⁴⁰ *Id.* As the solicitor general argued:

If the cause that lead to it be such a conduct on the part of the person slain, as would in ordinary tempers have produced only a slight resentment, not rising so high as to aim at the life of the offender, but only to a punishment proportionable to the offense, and yet the person offended has attacked and beaten the other, in such a manner or with such a weapon as shews an intent to kill, and not only to chastise; and in beating he has killed the other, the law will deem it murder: because the beating in a *cruel or unusual* manner, or with such a weapon, are circumstances at ending the fact which shew the heart of the slayer to have been more than ordinarily cruel and regardless of another's woe.

Id. (italics added) (citing Foster, p. 259).

²⁴¹ *Id.* “[I]t is murder,” he said, where “a heart” is “excessively cruel and turned to inhuman revenge.” *Id.* “What can be more cruel, more indicative of a malignant heart, than this deed of the prisoner?” *Id.*

²⁴² *Id.* at *5.

²⁴³ *Id.*

²⁴⁴ *Id.* One of the presiding judges agreed with this view, saying:

I cannot think it an excuse to reduce the offense to manslaughter, where two persons quarrel and fight, and one goes some distance, gets a knife, returns and kills the other with it—such disputes happen every day. If we say it is not murder to kill shortly after, under such circumstances as this man was killed, much blood will be spilt in a very short time—it will be establishing a dreadful precedent. Norris ran off from the first combat and went home, he got into his house, his castle of refuge and defense, where no one would have offered to molest him—why did he not remain there? Why take his knife and return back eighty or an hundred yards to an enraged man? Did not this show a murderous intent, and that his heart was bent upon cruelty?

Id. at *7 (Williams, J.).

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versary, the solicitor general again characterized the killing as a murder.²⁴⁵ “The heart that could so long entertain the hideous fiend,” he argued, “must have been familiarized to its lessons—the cruelty of the act demonstrates it murder; and here is that cruelty in its most heightened colours.”²⁴⁶ “Any circumstance of deliberation accompanying the fact of killing, though the falling out is sudden and the killing a short time after,” he contended, “will cause the slayer to fall under the imputation of murder.”²⁴⁷ By contrast, defense counsel made an effective appeal to the jury,²⁴⁸ seeking an acquittal of the murder charge by citing *Rowley’s Case* as a precedent. In that case, two boys fought, one bloodying the nose of the other, before one of the boys ran three quarters of a mile to his father, who came back and killed the other boy with a staff—a crime “adjudged manslaughter only, owing to the heat of the passions at the time the blow was given.”²⁴⁹

In other words, the “cruel and unusual” terminology became, among other things, a means to distinguish between types of homicides.²⁵⁰ To this

²⁴⁵ The report of the solicitor general’s arguments reads as follows:

If two persons suddenly fall out and fight, and in the contest one kills the other, that is manslaughter: the blood is heated, the passions boil, rage dictates his conduct, and whilst the blows are passing, there is no leisure for reflection, nor time for reason to assume its empire. Keeling 56. That is not like the case before us: here the combatants were separated, and the fatal blow not given till three or four minutes afterwards; not until the slayer had gone eighty or an hundred yards, and returned after arming himself with a deadly weapon.

Id. at *5.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Norris was ultimately acquitted of the murder charge. *Id.* at *8. An editorial note in the case reporter gives a flavor for public sentiment at the time. It reads:

The cause of reporting this case with so much minuteness, is that the public opinion ran very high against the prisoner before and after his trial, and he was pronounced guilty of murder by many who were present at his trial. The jury who acquitted him, were highly censured. Perhaps the learned may be of opinion, when they meet with this case, that the jury gave a proper verdict. It is possible that may become the general opinion. If so, probably some of those who are to be hereafter concerned in trials of this sort, may be led to reflect on the rapidity with which a wrong opinion sometimes spreads its influence over the public mind, and to be cautioned, that a popular sentiment, however honest and well meaning it may be, may sometimes become current for want of sufficient consideration or information, and as frequently so respecting matters of judicial deliberation as any others.

Id.

²⁴⁹ *Id.* at *6 (citing *Rowley’s case*, Cro. J. 296).

²⁵⁰ 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAWS 645 (1824) (“Malice may be *express* or *implied*; *express*, as if one form a deliberate design to kill a man, and kills him; this is malice *express*, and murder, and is evidenced in many ways, as in duels, lying in wait, &c.; so it is *express malice* and murder, if A, even on a sudden provocation, beats B in a cruel and unusual manner, so that he dies, though he did not intend death; for here is *an express evil design*; as where the park keeper found a boy stealing wood, and tied him to a horse’s tail, and he was killed; held, it was murder by *express malice*. So where a master corrected a servant with an iron bar, and killed him;

day, the “cruel and unusual” catchphrase—or variants thereof—remain on the books in many jurisdictions. Indeed, the “cruel and unusual” and “cruel or unusual” terminology is still found in federal statutes,²⁵¹ state constitutions,²⁵² and state laws.²⁵³ For instance, the Uniform Code of Military Justice—in a provision associating the phrase “cruel or unusual” with *non-lethal* corporal penalties—provides: “Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter.”²⁵⁴ In short, particular acts—be they homicides, manslaughters, or bodily punishments of a non-lethal nature—have long been associated with the “cruel” and “unusual” language.

In state statutes, the “cruel” and “unusual” terminology is even still found in laws on the subject of homicide,²⁵⁵ manslaughter,²⁵⁶ and punish-

held, this was murder, because such excessive correction could but be attended probably by death or bloodshed, and could proceed but from a wicked heart.”) (citations omitted).

²⁵¹ See 22 U.S.C. § 6912(a)(6) (a commission set up to monitor human rights in the People’s Republic of China is charged with monitoring “the right to be free from torture and other forms of cruel or unusual punishment”); 25 U.S.C. § 1302(a)(7)(A) (“No Indian tribe in exercising powers of self-government shall ... inflict cruel and unusual punishments”); see also 42 U.S.C. § 2000dd(a) (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”); 42 U.S.C. § 2000dd(d) (“In this section, the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States ...”); U.S. Ct. of App. 9th Cir. Rule 34-3 (“Civil appeals in the following categories will receive hearing or submission priority: ... (4) Appeals alleging deprivation of medical care to the incarcerated or other cruel or unusual punishment ...”). “Cruel and unusual punishments” are also specifically prohibited in Guam and the Virgin Islands. 48 U.S.C. § 1421b(h); 48 U.S.C. § 1561.

²⁵² See Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York’s Death Penalty*, 4 J.L. POL’Y 161, 177-78 (1995). Some state-law provisions explicitly prohibit “corporal” punishments, too. S.C. CONST., art. I, § 15 (“Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted ...”); compare D.C. CODE, art. I, § 11 (the “Constitution of the State of New Columbia” reads in part: “The State shall not require excessive fines, nor impose cruel, corporal, or unusual punishment, or sentence of death.”).

²⁵³ ALA. CODE § 16-1-24.1(g) (“Except in the case of excessive force or cruel and unusual punishment, no certified or noncertified employee of the State Board of Education or any local board of education shall be civilly liable for any action carried out in conformity with state law and system or school rules regarding the control, discipline, suspension, and expulsion of students.”).

²⁵⁴ 10 U.S.C. § 855 (emphasis added).

²⁵⁵ CAL. PENAL CODE § 195 (“Homicide is excusable in the following cases ... 2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.”); MISS. CODE ANN. § 97-3-17 (“The killing of any human being by the act, procurement, or

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ment.²⁵⁷ For example, in some places, the killing of a human being by “accident or misfortune” is considered “excusable” so long as the killing was not done in a “cruel or unusual manner.”²⁵⁸ The “cruel” and “unusual”

omission of another shall be excusable: ... (c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.”).

²⁵⁶ MISS. CODE ANN. § 97-3-35 (“The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter.”); 21 OKLA. STAT. ANN. § 711 (“Homicide is manslaughter in the first degree in the following cases: ... 2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.”); S.D. CODIFIED LAWS § 22-16-15 (“Homicide is manslaughter in the first degree if perpetrated: ... (2) Without any design to effect death, including an unborn child, and in a heat of passion, but in a cruel and unusual manner ... ”); *Ward v. State*, 935 So.2d 1047, 1055 (Miss. App. 2005) (“The elements of manslaughter are laid out in Mississippi Code Annotated section 97-3-35, and include (1) the killing of a human being, (2) without malice, (3) in the heat of passion, (4) but in a cruel or unusual manner, or by the use of a dangerous weapon, (5) without authority of law, (6) and not in necessary self-defense.”); *compare* *Martin v. State*, 818 So.2d 380, 382 (Miss. App. 2002) (“We conclude that the use of a knife to stab the victim to death, if found to have been done in the heat of passion without malice and not in necessary self-defense, would be sufficient evidence to convict of manslaughter through the use of a deadly weapon without the necessity of a specific finding that the stabbing was undertaken in a cruel or unusual manner.”).

²⁵⁷ MINN. STAT. ANN. § 631.43 (“When no punishment is provided by statute, the court shall sentence the convicted person to a term of imprisonment that, in view of the degree and aggravation of the offense, is not cruel, unusual, or repugnant to the person’s constitutional rights.”); 21 OKLA. STAT. ANN. § 443a (“[A]ll prisoners who escape from either of the aforesaid prisons either while confined therein, or while at large as a trusty, when apprehended and returned to the prison, shall be punishable by the prison authorities in such manner as may be prescribed by the rules and regulations of the prison provided that such punishment shall not be cruel or unusual.”); ORE. REV. STAT. § 138.040(2) (“If the appellate court determines the disposition imposed exceeds the maximum allowable by law or is unconstitutionally cruel and unusual, the appellate court shall direct the court from which the appeal is taken to impose the disposition that should be imposed.”).

²⁵⁸ FLA. STAT. ANN. § 782.03 (“Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.”); IDAHO CODE § 18-4012 (“Homicide is excusable in the following cases ... 2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat when no undue advantage is taken nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.”); N.M. STAT. ANN. § 30-2-5 (“Homicide is excusable in the following cases: ... B. when committed by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, if no undue advantage is taken, nor any dangerous weapon used and the killing is not done in a cruel or unusual manner.”); 21 OKLA. STAT. ANN. § 731 (“Homicide is excusable in the following cases ... 2. When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a

words are also currently employed to protect animals,²⁵⁹ students,²⁶⁰ juvenile inmates,²⁶¹ prisoners,²⁶² and the residents of treatment facilities²⁶³ and nursing homes.²⁶⁴ In California, such language also appears in laws forbidding any “cruel, corporal or unusual punishment” in a jail or prison set-

sudden combat provided that no undue advantage is taken, nor any dangerous weapon used, and that the killing is not done in a cruel or unusual manner.”); S.D. CODIFIED LAWS § 22-16-31 (“Homicide is excusable if committed by accident and misfortune in the heat of passion, upon sudden and sufficient provocation, or upon a sudden combat. However, to be excusable, no undue advantage may be taken nor any dangerous weapon used and the killing may not be done in a cruel or unusual manner.”); 14 V.I. CODE ANN. § 926 (“Homicide is excusable ... when committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.”).

²⁵⁹ TEX. PENAL CODE § 49.02(a) (“A person commits an offense if the person intentionally or knowingly: ... (4) transports or confines a livestock animal in a cruel and unusual manner ...”).

²⁶⁰ FLA. STAT. ANN. § 1006.11(2) (“Except in the case of excessive force or cruel and unusual punishment, a teacher or other member of the instructional staff, a principal or the principal’s designated representative, or a school bus driver shall not be civilly or criminally liable for any action carried out in conformity with the State Board of Education and district school board rules regarding the control, discipline, suspension, and expulsion of students ...”); FLA. STAT. ANN. § 1012.75.11(1) (“Except in the case of excessive force or cruel and unusual punishment, a teacher or other member of the instructional staff, a principal or the principal’s designated representative, or a bus driver shall not be civilly or criminally liable for any action carried out in conformity with State Board of Education and district school board rules regarding the control, discipline, suspension, and expulsion of students ...”); MISS. CODE ANN. § 37-11-57 (“Except in the case of excessive force or cruel and unusual punishment, a teacher, assistant teacher, principal, or an assistant principal acting within the course and scope of his employment shall not be liable for any action carried out in conformity with state or federal law or rules or regulations of the State Board of Education or the local school board regarding the control, discipline, suspension and expulsion of students.”).

²⁶¹ ORE. REV. STAT. § 421.105(1) (“The superintendent may enforce obedience to the rules for the government of the inmates in the institution under the supervision of the superintendent by appropriate punishment but neither the superintendent nor any other prison official or employee may strike or inflict physical violence except in self-defense, or inflict any cruel or unusual punishment.”).

²⁶² TEX. CODE CRIM. PRO., art. 16.21 (“Every sheriff shall keep safely a person committed to his custody. He shall use no cruel or unusual means to secure this end, but shall adopt all necessary measures to prevent the escape of a prisoner.”).

²⁶³ 16 DEL. CODE ANN. § 2220(18) (“Every patient shall be free from verbal, physical or mental abuse, cruel and unusual punishment, involuntary seclusion, withholding of monetary allowance, withholding of food and deprivation of sleep.”); 16 DEL. CODE ANN. § 5182(17) (“Every patient shall be free from verbal, physical or mental abuse, cruel and unusual punishment, involuntary seclusion, withholding of monetary allowance, withholding of food and deprivation of sleep.”).

²⁶⁴ 16 DEL. CODE ANN. § 1121(24) (“Every patient and resident shall be free from verbal, physical or mental abuse, cruel and unusual punishment, involuntary seclusion, withholding of monetary allowance, withholding of food and deprivation of sleep.”).

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ting.²⁶⁵ In each of those contexts, the fact-finder is expected to determine what so qualifies, just as judges are tasked on a daily basis with making bail determinations, their discretionary judgments constrained only, if found to be “excessive,” by the Bail Clause.²⁶⁶

E. Early American Cases

i. An Overview: 1791 to 1830

In the pre-1830 period, the Eighth Amendment and comparable state-law provisions were considered only a minimal amount by American judges. In 1799, Virginia’s excessive fines clause was held to forbid the imposition of a joint fine on people jointly indicted for assaulting a magistrate.²⁶⁷ In 1801, a North Carolina judge agreed with counsel that the common-law punishment of pressing to death—also known as *peine forte et dure*²⁶⁸—

²⁶⁵ CAL. PENAL CODE § 673 (“It shall be unlawful to use in the reformatories, institutions, jails, state hospitals or any other state, county, or city institution any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate, or person confined; and punishment by the use of the strait jacket, gag, thumbscrew, shower bath or the tricing up of a prisoner, inmate or person confined is hereby prohibited.”); CAL. PENAL CODE § 2652 (“It shall be unlawful to use in the prisons, any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate or person confined; and punishment by the use of the strait-jacket, gag, thumb-screw, shower-bath or the tricing up of prisoners, inmates or persons confined is hereby prohibited.”).

²⁶⁶ *Cf.* *Evans v. Foster*, 1 N.H. 374, 1819 WL 470 *3 (1819) (in interpreting New Hampshire’s “cruel or unusual punishments” clause, the New Hampshire court ruled that “the determination of ‘what bail shall be called excessive must be left to the courts on considering the circumstances of the case’”) (quoting 4 BLACKSTONE, *supra* note 110, at 297). As the Superior Court of Judicature of New Hampshire held in 1819 in interpreting its state constitutional provision:

The constitution forbids all “courts of law” as well as single “magistrates” to require “excessive bail.” If the members of a higher court therefore, violate this prohibition, they are equally liable with a justice of the peace: and an indictment or an impeachment would seem to be sufficient remedies. Any suffering to individuals, that may be apprehended from the great number and limited knowledge of single magistrates, can always be soon obviated; as the person, committed for a failure to procure bail, which appears excessive, possesses the right to be brought before a judge of this court by a Habeas Corpus, and to have the sum reduced, if under all the circumstances it is thought too large.

Id. at *4.

²⁶⁷ *Jones v. Commonwealth*, 5 Va. 555, 1799 WL 260 *1 (Va. 1799).

²⁶⁸ This form of torture, used on those who refused to plead to a crime, involved crushing the body with heavy loads of stones or iron. Douglas M. Coulson, *Distorted Records in “Benito Cereno” and the Slave Rebellion Tradition*, 22 YALE J.L. & HUM. 1, 24 (2010); see also Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 587 n.295 (2008) (“The effect of pressing on an uncooperative accused was, and was intended to be, fatal. As early as 1426, pressing was used in England, though it never seems to have enjoyed wide popularity with the courts. Its sole recorded use in this country seems to have been

could not be inflicted because North Carolina's bill of rights prohibited cruel and unusual punishments.²⁶⁹ And in 1810, in a challenge to a Virginia law requiring attorneys to take an anti-dueling oath before being admitted to the bar, an attorney in the case cited Virginia's cruel and unusual punishments clause. "If not against the WORD, is it not against the SPIRIT, which declares, 'that cruel and unusual punishments ought not to be inflicted?'" the attorney argued in challenging the state law.²⁷⁰

Other pre-1830 cases found a bail determination not "excessive" under New Hampshire's "cruel or unusual punishments" clause;²⁷¹ upheld the constitutionality of anti-gaming laws;²⁷² and found that disenfranchisement imposed for dueling under a New York anti-dueling statute "is not an unusual punishment" in violation of the Eighth Amendment.²⁷³ In one case, *In re Turner*,²⁷⁴ a Maine court—in a decision issued in 1825—rejected a claim that it was a cruel and unusual punishment to chain a black seaman to the deck of a vessel.²⁷⁵ In that case, Isaac Turner had filed a petition for habeas corpus stating that he was a cook on board the brig *Effort*, then at the wharf in the port of Portland, Maine, and that he had been confined on board, with his leg chained, for several days and nights successively.²⁷⁶

Corporal punishments—though their overuse had been questioned by the likes of Montesquieu²⁷⁷—were frequently authorized²⁷⁸ and used in co-

during the notorious Salem witchcraft trials, in 1692, when one Giles Cory was pressed to death for refusal to plead to the charge of witchcraft.”).

²⁶⁹ *State v. Gainer*, 3 N.C. 140, 1801 WL 710 (N.C. Super. L. & Eq., 1801).

²⁷⁰ *In re Leigh*, 1 Munf. 468, 1810 WL 547 (Va. 1810).

²⁷¹ *Evans v. Foster*, 1 N.H. 374, 1819 WL 470 *2 (N.H. 1819).

²⁷² *Commonwealth v. Wyatt*, 6 Rand. 694, 1828 WL 860 (Va. 1828) (a Virginia act making those convicted of gaming subject to stripes was held not to constitute a cruel and unusual punishment under state law); *State v. Smith*, 10 Tenn. 272, 1829 WL 501 *5 (Tenn. Err. & App. 1829) (state law declaring those convicted of gaming disqualified from holding office was not unconstitutional).

²⁷³ *Barker v. People*, 20 Johns. 457 (N.Y. Sup. Ct., 1823); *see also* *Barker v. People*, 3 Cow. 686 (N.Y. Sup. Ct. 1824) (“Without inquiring whether disqualification to hold office, is a punishment either cruel or unusual, I consider this provision of the national constitution, inapplicable to offenses against a state.”).

²⁷⁴ 1 Ware 83, 24 F. Cas. 340 (D.C. Me. 1825).

²⁷⁵ *Id.* at 340-42.

²⁷⁶ *Id.* In rejecting the seaman's claim, the court ruled:

The chaining of a man to the deck of a vessel does indeed carry with it a harsh sound, and suggests to the imagination images of cruelty and suffering. But it does not appear that the mode of confinement was such as to give much bodily pain, for though some complaint of the kind is suggested now, none was made at the time, nor is there the smallest indication of a cruel and vindictive disposition on the part of the master.

Id. at 342.

²⁷⁷ 1 CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* 100 (3d ed. 1762) (“A good legislator takes a just medium; he ordains neither always pecuniary, nor always corporal punishments.”); *compare id.* at 203 (“But as those who have no property are generally the readiest to attack the property of others, it has been found necessary, instead of a pecuniary, to substitute a corporal punishment.”).

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lonial America.²⁷⁹ “Through the colonies,” write historian Caroline Cox, “corporal punishment not only reinforced the authority of the state but also aided in defining social status,” as the slaves and the poor were generally the ones punished corporally.²⁸⁰ “When not resorting to capital sentences,” Cox explains, “colonial courts used fines, various forms of public humiliation,” and corporal punishments such as whipping, often adhering to biblical injunctions.²⁸¹ “Slaves, at the bottom of the social ladder, experienced only corporal punishment,” she writes.²⁸²

Indeed, corporal punishments, especially the lash, were regularly used by the military on enlisted soldiers, with George Washington and other commanders ordering such punishments.²⁸³ “For officers,” however, Cox notes, “there was no corporal punishment,” with “a private or public reprimand from a superior officer” being the norm and “dismissal from the service being the harshest punishment.”²⁸⁴ In the pre-Fourteenth Amendment era, punishments were thus not meted out equally to offenders. Those with a higher social status might be spared humiliating corporal punishments; slaves, privates and seaman were not so fortunate.

During and after the Revolutionary War, corporal punishments of varying types were consequently regularly handed out in criminal and courts-martial cases.²⁸⁵ “During the post Revolutionary period,” writes historian Myra Glenn, “a series of regulations and statutes legitimized the practice of corporal punishment in the new republic.”²⁸⁶ “The United

²⁷⁸ *State v. Fleming*, 1848 WL 2457 *1 (S.C. App. Law 1848) (“manslaughter at the common law was punished by branding in the hand and imprisonment”); *State v. Raines*, 3 McCord 533, 1826 WL 710 *6 (S.C. App. 1826) (noting that the common-law punishment of manslaughter is “branding in the hand and imprisonment”).

²⁷⁹ *Smith v. Doe*, 538 U.S. 84, 97-98 (2003) (noting the some colonial punishments were meant to inflict public disgrace and that “whipping, pillory, and branding inflicted physical pain”; “[a] murderer might be branded with an ‘M,’ and a thief with a ‘T.’”).

²⁸⁰ CAROLINE COX, *A PROPER SENSE OF HONOR: SERVICE AND SACRIFICE IN GEORGE WASHINGTON’S ARMY* 154 (2004).

²⁸¹ *Id.* at 151. As Cox writes: “Deuteronomy 25:3 laid out the limit for whipping: ‘Forty stripes he may give him, and not exceed ... Most colonies followed that example and only occasionally exceeded it, as in Pennsylvania, for example, where fifty lashes were sometimes given for third offenses.’” *Id.* at 151-52; *compare id.* at 152 (noting that in New York and the Carolinas, “lash punishments for whites regularly rose above 39 lashes, ranging as high as 150 in New York and to several hundred during the vigilante Regulator movements in the Carolina backcountry”).

²⁸² *Id.* at 154.

²⁸³ *Id.* at 157, 187, 203-04, 451.

²⁸⁴ *Id.* at 134.

²⁸⁵ *Fults v. State*, 1854 WL 2165 *1 (Tenn. 1854) (noting that “the judgment of the court in manslaughter” before “the Code of 1829” was “branding in the hand”); *Van Buren v. State*, 1852 WL 2044 *1 (Miss. Err. App. 1852) (noting that a slave was indicted for burglary, tried and convicted, and sentenced to be branded in the hand and to receive twenty-five lashes each day for four successive days).

²⁸⁶ MYRA C. GLENN, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA* 9 (1984).

States Congress, for example,” she explains, “authorized flogging aboard American men-of-war,” with the first of these regulations drawn up by John Adams in 1775 when he served on the Naval Committee of the Continental Congress.²⁸⁷ The “Rules for the Regulation of the Navy” permitted naval commanders to inflict up to twelve lashes on any enlisted man.²⁸⁸ In 1797, the Congress would endorse those “Rules,” and two years later Congress, in its “Articles for the Government of the Navy,” authorized flogging for specific offenses such as swearing or drunkenness.²⁸⁹ “An Act for the better government of the navy of the United States,” which governed naval operations from 1800 to 1850, also extended to a naval court martial the use of the lash as punishment.²⁹⁰ Congress did not abolish naval flogging until September 28, 1850.²⁹¹

In early America, legislatures experimented with doing away with corporal punishment of offenders. In 1786, for instance, the Commonwealth of Pennsylvania established a system of solitary confinement at hard labor and criminals who formerly might have been punished capitally or corporally were instead incarcerated.²⁹² “In 1796,” writes Myra Glenn, “New York State followed Pennsylvania’s lead” by authorizing Newgate State Prison and by prohibiting the whipping of convicts.²⁹³ “These successes in prison reform, however, were shortlived,” Glenn notes.²⁹⁴ “During the first two decades of the nineteenth century,” she explains, “there was a discernible trend toward the corporal punishment of criminals.”²⁹⁵ For instance, after opening in 1805, the Massachusetts State Prison at Charlestown inflicted harsh corporal punishments, especially flogging.²⁹⁶ Likewise, a mutiny in Newgate Prison prompted New York legislators in 1819 to repeal their earlier prohibition on prison whippings.²⁹⁷ Thus, in the Founding Fathers’ time, corporal punishment—then a relatively common, or usual, sanction—was a flash point of controversy. The use of corporal punishments ebbed and flowed, though in many places such punishments remained a gritty reality of early American life.²⁹⁸

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 9-10.

²⁹¹ *Id.* at 9 n.*.

²⁹² *Id.* at 10.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 11.

²⁹⁷ *Id.*

²⁹⁸ MATTHEW PATE & LAURIE A. GOULD, CORPORAL PUNISHMENT AROUND THE WORLD 94 (2012).

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ii. Early Jurists on Cruelty and Race

The most interesting cases—at least in terms of understanding how early American jurists understood the prohibition against “cruel and unusual punishments”—dealt with non-lethal corporal punishments and the issue of race. In *James v. Commonwealth*,²⁹⁹ an 1825 case, the Pennsylvania Supreme Court specifically addressed the corporal punishment known as “ducking.” In that case, a woman, Nancy James, had been convicted of being a common scold and, on October 29, 1824, was sentenced “to be placed in a certain engine of correction, called a cucking or ducking-stool, on Wednesday, the third day of November, then next ensuing, between the hours of ten and twelve o’clock in the morning, and being so placed therein, to be plunged three times into the water.”³⁰⁰ James’ counsel argued the sentence was “illegal,” alleging that it violated both the U.S. Constitution and Pennsylvania’s constitution.³⁰¹

Finding the Eighth Amendment inapplicable to state cases, the Pennsylvania Supreme Court first found that state courts “are left at liberty to regulate their own criminal codes as they may deem proper, without reference to the laws or constitution of the United States.”³⁰² At the same time, Pennsylvania’s highest court emphasized that Nancy James’ sentence “has created much ferment and excitement in the public mind; it is considered as a cruel, unusual, unnatural and ludicrous judgment.”³⁰³ “[B]ut whatever prejudices may exist against it,” the court noted, “still, if it be the law of the land, the court must pronounce judgment for it.”³⁰⁴ “But,” the court clarified, “as it is revolting to humanity, and is of that description that only could have been invented in an age of barbarism, we ought to be well persuaded, either that it is the appropriate judgment of the common law, or is

²⁹⁹ 1825 WL 1899 (Pa. 1825).

³⁰⁰ *Id.* at *1. As noted earlier, a ducking or “cucking” stool was a chair connected to a pulley system whereby offenders were plunged into the water. Meskell, *supra* note 140, at 841-42. John Adams made notes pertaining to the crime of scolding in 1766—in particular, as regards its frequency—in the case of “Dus. Rex vs. Mary Gardiner, for a common Scold, Quarreller and Disturber of the Peace” in the Suffolk Court of General Sessions. Diary of John Adams, “Suffolk Sessions July 1766,” available at <http://www.masshist.org/publications/apde/portia.php?id=DJA01d426> (“Hawkins—a common Scold is punishable by putting into the Ducking Stool. Prosecutions rare, ‘tho the offense frequent.”).

³⁰¹ *James*, 1825 WL 1899 at *1. Pennsylvania’s 1790 constitution omitted any reference to “unusual,” providing “[t]hat excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.” PA. CONST. art. IX, § XIII (1790).

³⁰² *Id.* at *2. Elsewhere in the *James* case report, it was noted: “*Common scolding* has been recognized as an indictable offense in two of our sister states, New York and Massachusetts; and though it was in both held to be punishable only by fine and imprisonment, that might be under peculiar provisions of their laws or constitutions, which would not affect a decision in Pennsylvania.” *Id.* at *4 (italics in original).

³⁰³ *Id.* at *5.

³⁰⁴ *Id.*

inflicted by some positive law; and that that common law or statutory provision has been adopted here, and is now in force.”³⁰⁵

Associate Justice Thomas Duncan³⁰⁶—who delivered the court’s ruling—noted at the outset how much time he had spent researching the punishment of ducking: “I have employed some time, not very pleasantly, certainly not very profitably, in tracing the punishment *ad ludibrium*, to its source, and have followed this stream until it has sunk in oblivion, in the general improvement of society, and the reformation of criminal punishment, and been dried up by time, that great innovator.”³⁰⁷ In his lengthy opinion, Duncan emphasized the oddity of the scolding offense. “It must strike all, as a peculiar feature of this offence,” he said, “that it is of the feminine gender, that it degraded woman to a mere *thing*, to a *nuisance*, and does not consider her as a person.”³⁰⁸ “But this is not to be wondered at,” he added, “when we reflect on the general degraded state of woman, when this punishment was introduced; she was, in some respects, the servant or slave of the husband; so that he might correct her with a stick as thick as his own thumb.”³⁰⁹

Before passing on James’ sentence, Justice Duncan—very much concerned, it seems, with human dignity—also gave an extensive history of the punishment being considered. After focusing on the varied and wide-ranging instrumentalities that had been used to inflict the punishment,³¹⁰

³⁰⁵ *Id.*

³⁰⁶ See 17 THOMAS SERGEANT & WILLIAM RAWLE, EDS., REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF PENNSYLVANIA 459 (3d ed. 1874) (describing Thomas Duncan’s legal career).

³⁰⁷ *James*, 1825 WL 1899 at *5 (italics in original).

³⁰⁸ *Id.* at *6 (italics in original).

³⁰⁹ *Id.* “There is a tradition,” Justice Duncan offered in his opinion, “that at the publication of Bracton’s learned work, in which the dimension of this instrument of correction was first stated, the women of the town in which he lived, seized him and ducked him in a horse-pond.” *Id.* Bracton, a thirteenth-century English jurist, wrote a long treatise, *De legibus et consuetudinibus Angliae* (On the Laws and Customs of England) that attempted to describe the whole of English law. *Bracton: De Legibus et Consuetudinibus Angliae*, HARVARD LAW SCHOOL LIBRARY, <http://hls15.law.harvard.edu/bracton/> (last visited Nov. 19, 2011). In it, Bracton spoke of the “ducking-stool.” *Id.* (Thorne ed., Vol. 2, pp. 290, 299, 340).

³¹⁰ As Justice Duncan noted:

The punishment of the ducking or cucking-stool, is from the cuckoo, *qui odiose jurgat et rixatur*, as Lord COKE has it, in 3 Inst. 219; or, as Jacob has it, in his dictionary, the gogen-stool, and by some thought to be corrupted from the choke-stool; and the instrument is called in Stat. 51 Hen. III., a trebucket, a pitfall, and in law, as Lord COKE says, signifies a stool that falls into a pit of water; whereas, the last instrument that was seen in England, as Morgan, an editor of Jacob’s Dictionary mentions, consisted of a beam or rafter, moving on a fulcrum, and extending to the centre of a large pond, on which end the stool used to be placed; while, on the other hand, Daines Barrington, a learned antiquarian, in his Observations on the Statutes 40, says, it is a machine anciently used in the siege of towns, and the etymology is from the Celtic, *tre*, that is, *ville*, and our own bucket, and signifies a town-bucket.

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Duncan—on behalf of the court, and in light of the many different kinds of ducking or cucking stools—noted: “Thus, in our very outset, we are involved in doubt, and who shall decide, where there is such a difference among the learned? The officer would not know what to do, whether to fix Nancy James on a stool, or in a bucket, whether she is to be run into the river on wheels, or to be soused into a pond, from a beam or rafter.”³¹¹ Justice Duncan then proceeded to recount how the punishment of ducking was so antiquated in England that examples of the instruments used to inflict it could not be readily located.³¹² Duncan referenced the repeal of “two bloody statutes . . . by the voice of humanity,” saying “that it seems most probable, that hanging of women as witches and gypsies, and ducking them as scolds, ceased about the same time, viz: the time of the restoration, and before the charter to William Penn.”³¹³ “Indeed,” he concluded, “it appears, that at the same period, the race of witches and scolds became extinct, when the law ceased to hang the witches and duck the scolds.”³¹⁴

In his opinion, Justice Duncan next explained that “[t]he instances are numerous of statutes being repealed in fact—a kind of silent legislation.”³¹⁵ Duncan explained: “As to the abrogation of statutes by ‘*non user*,’ there may rest some doubt; for myself, I own, my opinion is, that ‘*non user*’ may be such as to render them obsolete, when their objects vanish or their reason ceases.”³¹⁶ “The common law (and this is but a customary punishment), what is it, but common usage?” Duncan offered. “The long disue-

James, 1825 WL 1899 at *6.

³¹¹ *Id.* at *7.

³¹² Justice Duncan, in discussing England’s experience with the punishment, put it this way:

From the country from which, it is suggested, we have borrowed it, we could obtain no information, nor expect a model, for not a vestige of it is there to be found; unless, perhaps, alongside of the rack (the Duke of Exeter’s daughter), which is still shown as a curiosity, by a yeoman of the King’s guard, as an instrument of punishment, which, like the trebucket, was once used in England (Barrington 366); for no poor woman, in that country, has suffered under the edge of a law so barbarous, for the last century; like unsoured armor, it is hung up by the wall; like the law of witchcraft, it has remained unused; for no one has suffered under that law, either at the stake or on the gibbet, since the reign of Charles II.; although the law stood unrepealed on the statute book, until 9 Geo. II., as our own law against the same offense, until several years after the revolution; or, like the act against the gypsies, which punished those with death, without the benefit of clergy, who remained one month within the realm; and Lord HALE, in his Pleas of the Crown 671, says, “I have not known these statutes put much in execution, only about twenty years since, at the assizes at Bury, about thirteen were condemned and executed for this offense. On this judgment, BLACKSTONE, 4th vol. 166, remarks, “but to the honor of our national humanity, there are no instances more modern.”

James, 1825 WL 1899 at *7.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at *8.

³¹⁶ *Id.* (italics in original).

tude of any law,” he said, “amounts to its repeal.”³¹⁷ A “villeinous judgment, by long disuse,” he concluded of one species of punishment, “has become obsolete, it not having been pronounced for ages.”³¹⁸ “The barbarous writ of attaint, which has as strong a foundation as any principle in common law,” he added, “has been long banished.”³¹⁹

Justice Duncan—writing less than thirty-five years after the ratification of the Bill of Rights—thus concluded that punishments, even those still on the statute books, could become improper through disuse. “That such crimes and punishments existed at the common law,” he acknowledged of the prior punishments he referenced, “every treatise to the present day states; but this does not prove,” he clarified, “that they now exist.”³²⁰ “They are nothing more,” he emphasized, “than the memorials of times that are past, as the usages of our uncivilized ancestors; and in nothing is the gradual change of the common law more apparent, and in nothing does it accommodate itself more to the change of manners and effect of education, than in the silent and gradual disuse of barbarous criminal punishments.”³²¹

In ruling on the illegality of the corporal punishment put before the court, fact-finding is evident in the discussion. After citing a treatise from

³¹⁷ *Id.* Duncan’s opinion was as follows:

Mr. Woodeson, in his second lecture (vol. 1st, 63) of civil, positive and instituted laws, observes, “that the last consideration is the period of their existence;” they may be repealed either expressly or by implication founded on disuse: he cites this passage from the Digest, “*rectissime illud receptum est--ut magis non solus suffragio legislatorum, sed etiam tacito consensu omnium, per desuetudinem abrogatur*.” It certainly requires very strong grounds to presume a law obsolete, yet as the whole community includes as well the legislative power as its subjects, total disuse of any civil institution for ages past, may afford just and rational objections against disrespected and superannuated ordinances. Judge WILSON (2d Wilson’s Works 38, 39), observes, “that it is the characteristic of a system of common law, that it may be accommodated to the circumstances, the exigencies and the conveniences of the people by whom it is appointed. Now, as these circumstances, exigencies and conveniences silently change, a proportionate change in time and in degree must take place in the accommodated system. Time silently and gradually introduces; it silently and gradually withdraws its customary laws.”

James, 1825 WL 1899 at *8 (italics in original).

³¹⁸ *Id.*

³¹⁹ *Id.* The concept of “attainder” under English law was “the stain or corruption of blood which arises from being condemned” for a crime, while a “bill of attainder” was a bill brought into Parliament “for attainting persons condemned for high treason.” 1 JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 102 (1839) (1993). Bills of attainder—once frequently used by legislators to sentence people to death in the absence of judicial proceedings—were outlawed by the U.S. Constitution. MARTIN J. WADE & WILLIAM F. RUSSELL, THE SHORT CONSTITUTION 153 (3d rev. ed. 1921). At common law, a person convicted of treason or a felony would be considered “attainted.” 2 DAVID ROBERTSON, TRIAL OF AARON BURR FOR TREASON 92 (1875).

³²⁰ *James*, 1825 WL 1899 at *8.

³²¹ *Id.*

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1581 that distinguished between capital and non-capital corporal punishments, Justice Duncan emphasized that corporal punishments were diminishing and that he could find no evidence of the punishment of ducking for scolding being lawfully inflicted for many decades.³²² Duncan referenced both English authorities³²³ and the well-known Pennsylvania lawyer James Wilson—a Founding Father and an Associate Justice of the U.S. Supreme Court from 1789 to 1798—in support of his position that the ducking of scolds was an impermissible and antiquated punishment.³²⁴ Duncan noted

³²² The opinion in *James* stated as follows:

Lambarde, who first published his *Treatise on the Office of Justice of the Peace*, in 1581, lib. i. ch. 12, states that corporal punishments are either *capital*, or not *capital*; that capital are inflicted “sundrie ways; as by hanging, burning, boiling, pressing; not capital, are of divers sorts, as cutting off the hand or ear, burning or branding the hand, face, shoulders, whipping, imprisonment, stocking, sitting in the pillory, or on the cucking-stool.” Of this kind of punishment our old laws had more sorts than we now have; as pulling out the tongue for false rumors, cutting off the nose, and for adultery, taking away the privy parts. So they had more sorts of punishments, when Lambarde wrote, than we now have. Blessed be GOD! I feel a conviction (and I have examined every book upon which I could lay my hands), that there is no judicial record, certainly no report, of this punishment being inflicted for more than one hundred years. The case in 2 Strange 849, *The King v. Taylor*, was quashed generally; it was not against her as *communis vexatrix*, but as *calumniatrix et communis perturbatrix*; and in *The King v. Margaret Cooper*, *id.* 1246, the judgment was not rendered as for a common scold; and the last of them was as long ago as 19 Geo. II., nearly eighty years ago.

James, 1825 WL 1899 at *8.

³²³ *James*, 1825 WL 1899 at *9:

In the *Queen v. Foxby*, 6 Mod. 11, in the second of Anne, the judgment was likewise arrested for mistake in the indictment. The note of the reporter is, the punishment of a scold is ducking, but the counsel for the prisoner said, “he knew no law for ducking of scolds.” Lord HOLT did not give any opinion as to the judgment; he only mentioned that it was indictable in the *Leet*, “and that it was better ducking in a *Trinity* than a *Michaelmas* term;” better in warm than in cold weather. But it was too much even for the gravity of the grave and learned Chief Justice of the King’s Bench, to treat the subject with any solemnity. In page 178, she was brought up again (for the sheriff had let her go at large), and the court let her run again until the next term. HOLT could not conceal his contempt for this farce of ducking; he sneered at the trebucket, declaring that ducking would only harden the criminal; and, if she were once ducked, she would scold all the days of her life. I think, that the trebucket then made its final exit, or afterwards was only heard of in the courts of justice, as John Doe and Richard Roe, pledges of prosecution; a mere nominal thing.

³²⁴ *James*, 1825 WL 1899 at *9:

Judge WILSON, certainly a learned and eminent person, to whom the state committed the revision of her laws, in his third volume, page 311, treats the trebucket with the same contempt with which Lord HOLT had done before him. After giving the judgment against a common scold, in a public lecture, he sneeringly says—“so she shall be plunged into the water, by way of punishment and prevention;” and thus scornfully winds up the trebucket—“our modern men of gallantry would not surely decline the honor of her company; I therefore humbly propose, that in future, the cucking-stool shall be made to hold double.” And those only who knew that great man, can form an idea what that look of scorn was. This cucking-stool was a species of the *tumbrellum*; Lord COKE laments

that scolds were once “indictable in the sheriff’s tourn,”³²⁵ but ultimately concluded that ducking was no longer an authorized punishment for such offenders. “There is no ground, whatever may be the antiquated theory of the law,” Duncan explained, “that it now exists, in fact and in practice, as a legal punishment.”³²⁶

Justice Duncan—in delivering his opinion—noted that all the members of the Pennsylvania Supreme Court might not agree on everything, but they were unanimous as to the question before the court. As Duncan explained: “I do not know that all the members of the court agree with me in the conclusion, as to the abrogation of this punishment in England, by disuse; but in the inquiry most important, there is no difference of opinion. We all agree in this, that this customary ancient punishment for ducking scolds, was never adopted, and therefore, is not the common law of Pennsylvania.”³²⁷ After emphasizing that “the ducking-stool, cucking-stool, or choking-stool,” as well as “the pillory, the *collisstrigium*, or neck-stretch, are punishments *ejusdem generis*, of the same family,” Duncan cited authorities for the proposition that putting someone “in the pillory” was intended to “disgrace” the offender.³²⁸ “[I]t is very certain,” Duncan explained, “that the legislature never considered the ducking-stool a legal

that there was no good *Latin* word for the dung-cart, and says, that the pillory and the trebucket were of the dung-cart family.

³²⁵ *James*, 1825 WL 1899 at *10. Duncan noted that a “cucking-stool” had been defined as “an engine, invented for the punishment of scolding and unquiet women.” *Id.* He then proceeded to explain the rationale in earlier years for this instrument of punishment: Very possibly, as both men and women were, in those days, rude and disorderly, the women were put in the trebucket and the men in the pillory, for disturbing or making a noise in this great court; and Lord COKE, 3 Inst. 219, says, “*furea, pillore et tumbrel appendant al view de frank-pledge*, and every one who hath a leet or market, ought to have a pillory and trebucket to punish offenders; for want whereof, the lord may be fined, or his liberty seized.”

James, 1825 WL 1899 at *10.

³²⁶ *James*, 1825 WL 1899 at *10. In support of this proposition, Duncan gave the following recitation of authorities:

Barrington says, it was a punishment formerly used in this country, for female offenders, and not confined to the offense of scolding; and Jacob says, the punishment is disused. Mr. Morgan, one of his editors, informs us, that he saw the remains of one, on a private estate, in Warwickshire; and Mr. Tomlins, in his last edition of this work, mentions there had been one, which had lately been removed, at Banbury, in Oxfordshire, but that was not a machine for legal punishment, but was used to make sport for the mob, in ducking common women; for this usage, this propensity to ducking women, was pretty inveterate. Old women were generally ducked by the common people, by way of primary or experimental trial, before they were delivered over to the civil magistrate to be hanged as witches; many of the accused died under the experiment. This does not depend on a work of fiction (many of which, in the present day, present the real manners and habits of the times in which they lay the scenes), but on authentic history.

Id.

³²⁷ *Id.*

³²⁸ *Id.* (italics in original).

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punishment, which could be inflicted by the sentence of the law, or when they abolished the pillory and whipping-post, &c., they would have included it.”³²⁹

In 1790, the Pennsylvania legislature had adopted “An Act to reform the Penal Laws of this state.”³³⁰ Among other things, that law substituted prison sentences and hard labor for “whipping” and other previously authorized punishments, listed in the act as “burning in the hand,” “cutting off the ears,” “nailing the ear or ears to the pillory,” and “placing in and upon the pillory.”³³¹ “The object of the framers of the act of 1790,” Justice Duncan opined, “was the abolition of all infamous, disgraceful, public punishments—all cruel and unnatural punishments—for all the classes of minor offences and misdemeanors, to which they had been before applied.” “This was the object of the author of our humane penal code,” Duncan said, adding, “I need not mention the name of Mr. Bradford, to whom the civilized world is so much indebted.”³³² In 1793, William Bradford—a close friend of James Madison from their days together at the College of New Jersey—penned a lengthy and influential essay, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania*, advocating the cur-

³²⁹ *Id.*

³³⁰ Act of Apr. 5, 1790, reprinted in 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 440-54 (1803).

³³¹ *Id.*, § 4. Prior to 1790, ear cropping, public whipping, and the pillory were explicitly authorized by Pennsylvania law. See, e.g., Act of Mar. 21, 1772 (any person or persons breaking and entering a house at night “shall stand in the pillory during the space of one hour, have his, her or their ears cut off, and nailed to the pillory, be publicly whipped with thirty-nine lashes on the bare back, well laid on”), reprinted in 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 55-56 (1803); Act of Feb. 26, 1773 (counterfeiters “shall be sentenced to the pillory, and have both his or her ears cut off, and nailed to the pillory, and be publicly whipped on his or her bare back, with thirty-one lashes, well laid on”), reprinted in 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 82-83 (1803); Act of Mar. 10, 1780 (any person or persons guilty of stealing a horse “for the first offense, shall stand in the pillory for one hour, and shall be publicly whipped on his, her or their backs with thirty-nine lashes, well laid on, and at the same time shall have his, her or their ears cut off, and nailed to the pillory; and for the second offense shall be whipped and pillored in like manner, and be branded on the forehead, in a plain and visible manner, with the letters H. T.”), reprinted in 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 255-56 (1803); Act of Mar. 16, 1785 (counterfeiters “shall be sentenced to the pillory, and to have both his or her ears cut off, and nailed to the pillory”), reprinted in 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 24-25 (1803).

³³² Justice Duncan noted:

[T]he wisdom, humanity, and policy of our Pennsylvania plan, has crossed the Atlantic. England, attached as she is to her own system, has adopted ours; and very lately, by stat. 56 Geo. III., has abolished pillory in all cases but perjury and subornation of perjury. Long before, to the honor of her humanity, in the case of punishments inflicted for clergyable offenses, she had extended the benefit of clergy to women, provided that the whipping should be in private, and in the presence of the female sex alone, 19 Geo. II., ch. 26; and I believe the punishment of whipping, as to females, has been altogether abolished.

James, 1825 WL 1899 at *10.

tailment of death sentences.³³³

In addition to crediting the much-heralded work of William Bradford, Justice Duncan's opinion also mentioned the efforts of Jared Ingersoll, another prominent local figure.³³⁴ "The late Judge INGERSOLL," Duncan noted, "a name respected and honored, when attorney-general, in his report to the legislature, in 1813, stated that by several acts of assembly, 'cruel and unnatural punishments, which tended only to harden and confirm the criminal, had been abolished for all inferior offences.'"³³⁵ "It is apparent," Duncan emphasized, referring to Bradford and Ingersoll, "that those two distinguished men were of opinion that all infamous corporal punishments, and disgraceful public spectacles, *ad ludibrium*, were abolished; and that the legislature so considered it when they passed the several acts reforming the penal laws, I think, we have the most conclusive evidence."³³⁶

In his analysis, Justice Duncan spent a lot of time recounting the history of laws punishing scolding, whether by fine, gagging, or confinement at hard labor.³³⁷ After referencing laws passed in 1682 and 1683 that punished scolding, Duncan emphasized that those laws "continued in force until 1700, when another act against scolding passed, inflicting the same penalty of imprisonment, five days at hard labor, or to be gagged and stand at some convenient place, at the discretion of the magistrate."³³⁸ "The act of 1700 was repealed by the Queen in council, but I have not been able to find the repeal of the acts of 1682 and 1683," Duncan added.³³⁹ "Whatever be the fact," he ruled, "the conclusion is the same—that the common-law punishment of ducking was not received nor embodied by usage so as

³³³ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 85.

³³⁴ Jared Ingersoll served as Pennsylvania's attorney general from 1790 to 1799 and also from 1811 to 1817. In 1821, Ingersoll became the presiding judge of the District Court for the City and County of Philadelphia, but died a year later. Robert J. Lukens, *Jared Ingersoll's Rejection of Appointment as One of the "Midnight Judges" of 1801: Foolhardy or Farsighted?*, 70 TEMP. L. REV. 189, 203-205 (1997).

³³⁵ *James*, 1825 WL 1899 at *11.

³³⁶ *Id.* Noting the Quaker heritage of Pennsylvania, Justice Duncan added:

The sanguinary code of England could be no favorite with William Penn and his followers, who fled from persecution. Cruel punishments were not likely to be introduced by a society who denied the right to touch the life of man, even for the most atrocious crime. For had they brought with them the whole body of the British criminal law, then we should have had the appeal of death, and the impious spectacle of a trial by battle in a Quaker colony; and it is worthy of remembrance, that the charter of William Penn empowered him with the advice and assent of the freemen, to make laws for their own government, and until this was done, the laws of England, in respect to real and personal property, and as to *felonies* were to continue the same. Thus, as to misdemeanors, the common-law punishments were not brought over by the first settlers.

Id.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

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to become a part of the common law of Pennsylvania.”³⁴⁰ As Duncan emphasized: “It was rejected, as not accommodated to the circumstances of the country, and against all the notions of punishment entertained by this primitive and humane community; and, though they adopted the common-law doctrines as to inferior offences, yet they did not follow their punishment.”³⁴¹

In making his ruling, Justice Duncan spoke of the common law and its evolving nature. “I do not find the rule on this subject,” he noted, “more satisfactorily laid down than by the Chief Justice.”³⁴² “Every country, he observed,” Duncan wrote of the Chief Justice’s prior decision in *The Guardians of the Poor of Philadelphia v. Greene*,³⁴³ “had its common law—ours is composed partly of the common law of England, and partly of our own usages.”³⁴⁴ As Duncan emphasized: “Our ancestors, when they emigrated, took with them such of the English principles as were convenient for the situation in which they were about to place themselves. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants; until, before the revolution, we had formed a system of our own, founded, in general, on the English constitution, but not without considerable variation; and in nothing was the variation greater, than in the trial and punishment of crimes.”³⁴⁵

In considering the practice of ducking scolds, Duncan wrote that “all our legislation has been opposed to this punishment; judicial decisions there are none.”³⁴⁶ “I cannot give to the two precedents from the quarter sessions of Philadelphia,” he said, “the weight of decisions.”³⁴⁷ As Duncan reasoned in rejecting reliance on those precedents: “The two instances in the quarter sessions, which are principally relied upon to sustain the judgment, are too slight a foundation on which to rest a sentence, so hostile to all the policy and humanity of our penal code, and so much opposed to the

³⁴⁰ *Id.*

³⁴¹ *Id.* “It is not true,” Duncan held, “that our ancestors brought with them all the common-law offenses; for instance, that of champerty and maintenance, this court decided in *Stoeper v. Whitman’s Lessee*, 6 Binn. 416, did not exist here.” *Id.* at *12.

³⁴² *Id.* at *12.

³⁴³ 5 Binn. 554, 558 (Pa. 1813).

³⁴⁴ *James*, 1825 WL 1899 at *12.

³⁴⁵ *Id.*; see also *id.* (italics in original):

Judge CHASE, in the *United States v. Worrall*, 2 Dall. 384, on the same subject, thus expresses himself: “When the American colonies were first settled by our ancestors, it was held, as well among the settlers, as by the judges and lawyers of England, that they brought hither, as their birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances; but each colony judged for itself what part of the common law was applicable to its new condition, and by various modes--by legislative acts, by judicial decisions, or by *constant usage*--adopted some parts and rejected others.”

³⁴⁶ *James*, 1825 WL 1899 at *12.

³⁴⁷ *Id.*

sense of the community.”³⁴⁸ “Common-law rights,” Duncan emphasized, “are to be found in the opinions of lawyers, delivered by axioms; or in judicial decisions, well considered and established; or to be collected from the universal usage through the country.”³⁴⁹

Justice Duncan thus took a practical, non-rigid approach to the question before him, looking at the facts as any good judge is supposed to do. “What is the evidence here?” Duncan asked, before proceeding to recount the only instances he could locate of women being ordered ducked for the offense of scolding.³⁵⁰ In one notorious case from the 1781-1782 time period, Duncan wrote, a sentence of ducking was only “most reluctantly” given before being “humanely” suspended.³⁵¹ In that case, the court—“doubtful of the sentence to be given”—instead ordered the woman, by agreement and with her consent, to simply leave the neighborhood in which she had committed her offense.³⁵² The decisionmakers in that case, Justice Duncan editorialized, “were glad, as well as the neighborhood, to get rid of her.”³⁵³ “Mr. Bradford was then attorney-general,” Duncan added, saying that “most probably, all was transacted under his advice; we can thus readily account for this unusual judgment.”³⁵⁴

³⁴⁸ *Id.* As Judge Duncan wrote of the work of the court of quarter sessions and the absence of ducking being inflicted as punishment:

The court of quarter sessions was, when this judgment was given, composed entirely of men who (however high their standing in society, and however intelligent) were unversed in law. Since 1782, until the last case in the mayor's court, forty years ran round, and there has been no instance of this punishment. There has been one of an acquittal; that case, therefore, proves nothing.

Id.

³⁴⁹ *Id.*

³⁵⁰ *Id.* Judge Duncan described what he found as follows:

In 1769, eighty years after the settlement of the colony, in *The King v. Mary Conway*, the indictment was against her as a common scold; she pleaded guilty; the sentence was, that she should be publicly ducked at the end of Market street wharf, in the Delaware; all this passed without debate, and we may presume, without the assistance of counsel for the woman. In 1779, ten years after, there was a trial and conviction (*The State v. Ann Maize*), and the same sentence. In 1781, there was an indictment for the same offense, against Mary Swann; verdict guilty; continued for advisement; continued from March 1781, to June 1782, when there is this most extraordinary entry: “defendant having demeaned herself peaceably, kept under further advisement; and in the next term, on motion of Mr. Bankson, the defendant was recognized, that she will, within one month, leave the neighborhood and pay the costs.”

Id.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* William Bradford was Pennsylvania's attorney general from 1780 to 1791, when he was appointed to the Pennsylvania Supreme Court. In 1794 Bradford became the Attorney General of the United States, serving in that position until his death in 1795. *William Bradford (1755-1795)*, UNIVERSITY OF PENNSYLVANIA UNIVERSITY ARCHIVES, http://www.archives.upenn.edu/people/1700s/bradford_wm.html (last visited Nov. 15, 2011).

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While he discussed the common law in detail, Justice Duncan was not willing to blindly follow ideas laid down decades earlier. “I must confess,” he said of the punishment of ducking, “I am not so idolatrous a worshipper, as to tie myself to the tail of this dung-cart of the common law.”³⁵⁵ “I am far from professing the same reverence for all the degrading and ludicrous punishments of the early days of the common law,” he wrote, adding of ducking: “I am far from thinking, that this is an unbroken pillar of the common law, or that to remove this rubbish, would impair a structure, which no man can admire more than I do.”³⁵⁶ “In coming to the conclusion, that the ducking-stool is not the punishment of scolds,” Duncan wrote, “I do not take into consideration the humane provisions of the constitutions of the United States and of this state, as to cruel and unusual punishments, further than they show the sense of the whole community.”³⁵⁷

In alluding to, but not relying on, the Eighth Amendment’s language, Justice Duncan instead focused on the barbarous and undignified nature of the punishment of ducking. As Duncan reasoned: “If the reformation of the culprit, and prevention of the crime, be the just foundation and object of all punishments, nothing could be further removed from these salutary ends, than the infliction in question.”³⁵⁸ “It destroys all personal respect,” he explained, emphasizing that “the women thus punished would scold on for life, and the exhibition would be far from being beneficial to the spectators.”³⁵⁹ “What a spectacle would it exhibit!” he emphasized, worrying about “a congregation of the idle” and the disorderly and the lack of any persuasive penological justification.³⁶⁰ “[T]he day would produce more *scolding*,” he said, “in this polite city, than would otherwise take place in a year.”³⁶¹

By ruling that the ducking-stool was an instrument of the past, not the present, Justice Duncan reversed the judgment of the court of quarter sessions.³⁶² In so doing, Duncan recognized that the change in the law wrought over time was beneficial to society as a whole. “The city is rescued from this ignominious and odious show, and the state from the opprobrium of the continuance of so barbarous an institution,” Duncan wrote, noting that his ruling was in line with those of other states.³⁶³ “The courts of our sister states of New York and Massachusetts, governed by the same common law as we are,” he emphasized, “have declared that this strange

³⁵⁵ *James*, 1825 WL 1899 at *13.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* at *14.

³⁶³ *Id.* at *13.

and ludicrous punishment no longer exists with them.”³⁶⁴ “[T]he common law punishment of ducking not being received here,” Duncan concluded of Pennsylvania law, “I join in the hope of a learned antiquarian and jurist of our own country, ‘that we shall hereafter hear nothing of the ducking-stool, or other remains of the customs of barbarous ages.’”³⁶⁵

The *James* case dealt with a non-lethal corporal punishment, with the decision grounded in the humanitarian principle of human dignity. But two other cases from the pre-1830 period dealt with a thornier, much more common problem in antebellum America: the intersection of race and the prohibition on cruel punishments. In *Ely v. Thompson*,³⁶⁶ a “free person of color” brought “an action of trespass, assault, battery and imprisonment” against a justice of the peace and a constable.³⁶⁷ At issue was the legality of a Kentucky law that subjected “any negro or mulatto, or Indian” to “thirty lashes on his or her bare back, well laid on” for lifting “his or her hand in opposition to any person not being a negro, mulatto or Indian.”³⁶⁸ After the plaintiff, Rhody Ely, filed his lawsuit, the justice of the peace “pleaded his office” and the fact that “the plaintiff had lifted his hand in opposition to a white man.”³⁶⁹ The justice of the peace thus argued that the sentence he pronounced—that Ely be lashed thirty times on his bare back—was justified under state law.³⁷⁰ The constable likewise pled and interposed “his office” and “the execution of the warrant,” saying that he was entitled to inflict stripes pursuant to the sentence of the justice of the peace.³⁷¹ The lower court in the Kentucky case agreed, prompting Ely to argue on appeal that the state law “is contrary to the constitution of this state, and therefore void.”³⁷²

On appeal to the Court of Appeals of Kentucky, Ely specifically invoked the state constitution’s prohibition against “cruel punishments.” That prompted his adversaries—who conceded the cruelty of the law—to

³⁶⁴ *Id.*

³⁶⁵ *Id.* at *14 (citing Duponceau on Jurisdiction 96). In a “NOTE” that followed the opinion itself, it was added that an act of Henry VIII had once been passed for the punishment of a cook who had poisoned a bishop’s family members. *Id.* As the note stated: “[B]y an *ex post facto* law, this was made treason, and he was ordered to be thrown into boiling water; the idea of which punishment, as Barrington suggests, was because he was a *cook*.” *Id.* (citation omitted; italics in original). “Such were the barbarous institutions of the age,” the note concluded, adding: “This punishment accorded with the savage cruelty of the monarch, and was recommended by its quaintness; *to boil a cook*, was quite a royal joke; as the Duke of Clarence was drowned in a butt of Malmsey, a favor granted him by the King; a whimsical choice, says Hume, which implied that he had an extraordinary passion for that liquor.” *Id.* (italics in original).

³⁶⁶ 3 A.K. Marsh. 70, 1820 WL 1161 *2-3 (Ky. App. 1820).

³⁶⁷ *Id.* at *2.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

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take a three-pronged approach. First, they argued that the law allowing non-whites to be lashed “is consistent with, and does not contravene any of, the provisions of the constitution, and that the legislature might adopt this punishment, notwithstanding its cruelty, with regard to white persons.”³⁷³ Second, the justice of the peace and the constable alternatively contended that even if the state law was found to violate the state’s constitution, “yet free persons of color are no parties to our political compact, and of course are not entitled to its privileges or shielded by its provisions, and that they are subject to any regulation which the legislature may adopt, although such regulations are contrary to the constitution in their terms.”³⁷⁴ Finally, the justice of the peace and the constable asserted that as “a judicial officer” and “a ministerial officer” who were “bound to execute process without enquiring into its validity, neither can be responsible.”³⁷⁵

In *Ely*, the Court of Appeals of Kentucky held in 1820 that the state law in dispute was unconstitutional under Kentucky’s prohibition against “cruel punishments.”³⁷⁶ In particular, the Kentucky law was found to be unconstitutional “in so far as it subjects the free person of color to corporal punishment for raising his hand in opposition to a white person, if it be done in self defense; and in so far as it infringes the privileges secured by the 10th section of the 10th article.”³⁷⁷ The appellate court—in reaching that decision—emphasized that a “remarkable feature” of the law was that “[t]he oath of the party complaining is conclusive, and the justice must inflict the punishment, although the proof may be untrue, and he disbelieves it.”³⁷⁸ Noting “the extensive nature of the act” and that the law prevented actions not only taken “in an angry or threatening manner but also those “done in self defense, or in warding off injury, or in repelling attempts on the virtue of the female of color, by an intended ravisher,” the court in *Ely* found itself forced to confront—in its own words—“the disagreeable necessity of deciding upon” the law’s constitutionality “so far as it operates on free persons of color.”³⁷⁹

The court in *Ely* noted “the severity of the act” and lamented “its want of those mild features which characterize the rest of our code.”³⁸⁰ And the court seemed reluctant—as courts so often are—to invalidate the

³⁷³ *Id.* In other words, they argued that a state law designed to protect whites could not contravene the state’s prohibition against “cruel punishments”.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ Kentucky’s first, second and third constitutions all expressly prohibited “cruel punishments.” BENNETT H. YOUNG, HISTORY AND TEXTS OF THE THREE CONSTITUTIONS OF KENTUCKY 31, 53, 88 (1890).

³⁷⁷ *Ely*, 1820 WL 1161 at *2-3. Article X, section 10 of Kentucky’s second constitution, adopted in 1799, gave the accused in criminal prosecutions “a right to be heard by himself and counsel” and “to meet the witnesses face to face,” among other rights. Ky. Const., art. X, § 10.

³⁷⁸ *Ely*, 1820 WL 1161 at *4.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

operation of the law. As the court's opinion stated: "[H]owever severe, cruel and rigorous its features, if it does not contravene the constitution, it must be executed, till the legislative power of the government shall see cause to change it."³⁸¹ Yet, the court found itself unwilling to ignore the state constitution's long-standing prohibition on "cruel punishments."³⁸² As the court noted: "It would, however, be difficult to exempt this section [of the code] from the imputation of cruelty, within the meaning of the 15th section of the 10th article of the constitution, so far as the act subjects a free person of color to thirty lashes for lifting his hand in oppression to a white person who was attempting wantonly to violate his or her person, contrary to the peace and good order of society."³⁸³ The court concluded: "If a justice of the peace, or any other tribunal, should, under this act, inflict the stripes against a free person of color, who lifted his hand to save him or herself from death or severe bodily harm, all men must pronounce the punishment cruel indeed."³⁸⁴

As to the argument "that free persons of color are not parties to the political compact," the court in *Ely* thought that argument had been taken too far.³⁸⁵ "This we can not admit, to the extent contended for," the court began, noting that free persons of color "are certainly, in some measure, parties."³⁸⁶ The court—aware of the political environment in which it operated—walked a thin line. "Although they have not every benefit or privilege which the constitution secures," the court ruled, "yet they have many secured by it."³⁸⁷ The court, in its very next sentence, then clarified, however: "We need not take the trouble of inquiring how far they are, or are not, parties. For, suppose the premises are admitted, the conclusion would not follow, that the legislature had a right to do with them as it chose, and that their acts on that subject could never be brought to a constitutional test."³⁸⁸ "Although they are not parties to the compact," the court held of free persons of color, "yet they are entitled to repose under its shadow, and thus secure themselves from the heated vengeance of the organs of government."³⁸⁹

³⁸¹ *Id.*

³⁸² *Id.* Article XII, section 15 of the Kentucky Constitution of 1792 provided: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Kentucky's second constitution, adopted in 1799, contained an identical provision in Article X, section 15.

³⁸³ *Ely*, 1820 WL 1161 at *4.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at *5.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.* The court in *Ely* then compared the rights of free persons of color to those of aliens, ruling as follows: "Aliens, who sojourn here, and belong to another, and claim nothing of our government, but the right of passage, could not be taken up and hung by a justice of the peace, without a hearing, without an opportunity of proving themselves innocent, and without a jury, even if the legislature, by a solemn act, should direct it to be done." *Id.*

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By contrast, in *Aldridge v. Commonwealth*,³⁹⁰ the General Court of Virginia held in 1824 that Virginia's cruel and unusual punishments clause had no relevance whatsoever to a free person of color.³⁹¹ In that case, the petitioner—"a free man of color"—was indicted for grand larceny of bank notes valued at one hundred and fifty dollars.³⁹² The petitioner was convicted of the crime, and the jury determined that thirty-nine stripes should be inflicted upon him.³⁹³ Thereafter, the Superior Court—following the provisions of a new Virginia law—ordered that the petitioner "receive thirty-nine stripes on his bare back on the 26th of June next, and that after that day, he be sold as a slave, and transported and banished beyond the limits of the United States, in the manner prescribed by Law."³⁹⁴

After the verdict, the petitioner in *Aldridge* then moved to have the judgment arrested, arguing to the Superior Court—which rejected all of his arguments—that the 1823 state law under which he was punished was unconstitutional as a cruel and unusual punishment.³⁹⁵ That Virginia law provided that in cases of grand larceny committed by "free negroes" or "mulattoes," the free person of color could be sold as a slave and transported and banished beyond the limits of the United States.³⁹⁶ The law allowing such persons to be sold as slaves, the petitioner had argued, "is contrary to the Bill of Rights of Virginia, and therefore, unconstitutional and void."³⁹⁷ Writing for the General Court of Virginia, Judge William Dade³⁹⁸

"The tenth section of the constitution, which we have quoted," the court held, "restricts the powers of the legislature and every department of government." *Id.* As the court emphasized: "The powers which they are therein forbidden to exercise, they do not possess, and can not exercise over any man or class of men, be they aliens, free persons of color, or citizens." *Id.* "Although free persons of color are not parties to our social compact," the court concluded, "yet they have many privileges secured thereby, and have a right to its protection." *Id.*

³⁹⁰ 2 Va. Cas. 447, 1824 WL 1072 *3 (Va. Gen. 1824).

³⁹¹ *Id.* at *2-4.

³⁹² *Id.* at *1.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ See Andrew T. Fede, *Gender in the Law of Slavery in the Antebellum United States*, 18 CARDOZO L. REV. 411, 420-21 (1996) (discussing another ruling of Judge William Dade, who held in *Commonwealth v. Turner*, 5 Rand. 678, 1827 WL 1087 (Va. Gen. 1827), that only the legislature—and not the common law—could declare a master's cruelty to a slave to be a criminal battery). In *Turner*, a master had been indicted for "wilfully and maliciously, violently, cruelly, immoderately, and excessively" beating, scourging and whipping his own slave "with certain rods, whips and sticks." *Turner*, 1827 WL 1087 at *1. "It is said to be the boast of the common law," Judge Dade ruled for the court, "that it continually conforms itself to the ever-changing condition of society." *Id.* at *2. But after comparing the beating of a slave with the beating of a horse and tracing the origins of slavery itself, Dade called common-law prosecutions of masters for cruelty "a new idea" and a "contested" subject, noting that "great changes are not to be made by the Courts."

announced for the judges “that there is nothing in the Constitution or Bill of Rights, repugnant to the power which the Legislature has exercised in the punishment of this crime.”³⁹⁹

In analyzing Virginia’s bill of rights, the General Court of Virginia began with the following observation: “Notwithstanding the general terms used in the Bill of Rights, it is undeniable that it never was contemplated, or considered, to extend to the whole population of the State.”⁴⁰⁰ As Judge Dade ruled on the court’s behalf: “Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it?”⁴⁰¹ “The leading and most prominent feature” of Virginia’s bill of rights, Dade acknowledged, “is the equality of civil rights and liberty.”⁴⁰² “And yet,” he pointed out, “nobody

Id. at *2-5. “It is greatly to be deplored that an offense so odious and revolting as this,” he said, “should exist to the reproach of humanity.” “This Court,” he wrote, however, “has little hesitation in saying that the power of correction does not belong to *it*.” *Id.* at *5 (italics in original). Slaves in Virginia were not only then marginalized and powerless, but they were quite literally without constitutional rights and subject to an incredibly harsh state-law punishment regime. See, e.g., Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only as an Enemy”: The Legitimization of Racial Powerlessness through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 977 (1992) (“Slaves could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct either was at most punishable by imprisonment or was not a crime at all.”).

Only one judge, William Brockenbrough, dissented in *Turner*, opining that slaves should be protected under the common law from “all unnecessary, cruel, and inhuman punishments.” *Turner*, 1827 WL 1087 at *6 (Brockenbrough, J., dissenting). “I admit,” he wrote, “that whilst a statute existed which exempted a master from punishment for killing his slave, by reason of a blow given during his correction, or for the manslaughter of a slave, any beating, however cruel and severe, could not be the subject of a prosecution.” *Id.* “But,” Brockenbrough added, “this ferocious and sanguinary system of legislation was abolished by the act of November, 1788.” *Id.* (citing 12 Hen. Stat. at Large, 681). “By that repeal,” he explained, “the common law was expressly revived: by that repeal, the law again extended its ægis over the slave to protect him from all inhuman torture, though that torture should be inflicted by the hand of a master.” *Id.* As Brockenbrough argued: I had not supposed that I was stretching the principles of the common law to an unreasonable and unprecedented extent. I had supposed that if, in England, the mere attempt, though ineffectual, to commit a felony, or the solicitation to commit one, be a misdemeanour, (3 *Bac. Ab.* 549;) if an Indictment will be allowed in Massachusetts for poisoning a cow, (1 *Mass. T. Rep.* 59;) or in Pennsylvania for killing a horse, (1 *Dall.* 335.) an Indictment might be sustained in Virginia for maliciously and inhumanly beating a slave almost to death. In other words, I had supposed, that whilst the common law protected all persons in the just exercise of any authority or power conferred on them by the law; yet, for the abuse of that authority, or an excess in the exercise of it, they were liable to be prosecuted as delinquents.

Turner, 1827 WL 1087 at *6 (italics in original).

³⁹⁹ *Aldridge*, 1824 WL 1072 at *3.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

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has ever questioned the power of the Legislature, to deny to free blacks and mulattoes, one of the first privileges of a citizen; that of voting at elections, although they might in every particular, except color, be in precisely the same condition as those qualified to vote.”⁴⁰³

In focusing on Virginia’s cruel and unusual punishments prohibition in particular, the General Court of Virginia ruled that “we have no notion that it has any bearing on this case.” As the court held: “That provision was never designed to control the Legislative right to determine *ad libitum* upon the *adequacy* of punishment, but is merely applicable to the modes of punishment.”⁴⁰⁴ As Judge Dade, emphasizing that “the best heads and hearts of the land of our ancestors” had “long and loudly declaimed against the wanton cruelty” of many punishments imposed “in other countries,” ruled for a unanimous court: “[T]his section in the Bill of Rights, was framed effectually to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment.”⁴⁰⁵ Ultimately, the General Court of Virginia overruled the petitioner’s request for a writ of error.⁴⁰⁶

The two southern cases intersecting with race were both decided before the Civil War and the adoption of the Reconstruction Amendments—amendments that would fundamentally reshape American law. The Thirteenth Amendment, adopted in 1865, abolished slavery, providing: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁴⁰⁷ The Fourteenth Amendment, adopted in 1868, later conferred citizenship rights by providing in Section 1: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”⁴⁰⁸ That section also provided: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴⁰⁹ The Fifteenth Amendment, conferring the right of citizens to vote regardless “of

⁴⁰³ *Id.* As Dade emphasized: “The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population.” *Id.*

⁴⁰⁴ *Id.* (italics in original).

⁴⁰⁵ *Id.* at *3-4.

⁴⁰⁶ *Id.* at *7.

⁴⁰⁷ U.S. Const., amend. XIII.

⁴⁰⁸ U.S. Const., amend. XIV.

⁴⁰⁹ *Id.*

race, color, or previous condition of servitude,”⁴¹⁰ would—like the other Reconstruction Amendments—change the course of American history and U.S. law.

iii. The Supreme Court’s Pre-1900 Cases

*Wilkerson v. Utah*⁴¹¹ was the first case in which the U.S. Supreme Court wrestled with the Eighth Amendment’s meaning. In that 1878 case, an Eighth Amendment challenge was lodged against a Utah law by a person sentenced to be shot by a firing squad for pre-meditated murder. At the time, the Utah law—codified in 1876—provided that any person convicted of first-degree murder “shall suffer death.”⁴¹² Following the jury’s guilty verdict, the presiding judge—in accordance with Utah’s mandatory sentencing scheme—had sentenced the prisoner as follows: “That ‘you be taken from hence to some place in this Territory, where you shall be safely kept until Friday, the fourteenth day of December next; that between the hours of ten o’clock in the forenoon and three o’clock in the afternoon of the last-named day you be taken from your place of confinement to some place within this district, and that you there be publicly shot until you are dead.’”⁴¹³

In deciding that the prisoner’s death sentence was not unconstitutional, the Supreme Court in *Wilkerson* first pointed out that hanging and shooting were then common methods of execution.⁴¹⁴ “Cruel and unusual

⁴¹⁰ U.S. Const., amend. XV (ratified Feb. 3, 1870).

⁴¹¹ 99 U.S. 130 (1878).

⁴¹² *Id.* at 129. Utah’s 1876 law did provide that, upon recommendation of the jury, a person guilty of first-degree murder might be imprisoned at hard labor in the penitentiary for life at the discretion of the court. *Id.* at 132, 136. Utah’s prior law, in force from 1852 to 1876, provided that “when any person shall be convicted of any crime the punishment of which is death, ... he shall suffer death by being shot, hung, or beheaded, as the court my direct,” or as the convicted person may choose. *Id.* at 132 (quoting Comp. Laws Utah, 1876, 564).

⁴¹³ *Id.* at 130-31. In that era, public executions were still common in some parts of the country. See JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 41-56 (1997). The last public execution took place in the United States in Kentucky in 1936. *Id.* at 31-33.

⁴¹⁴ *Wilkerson*, 99 U.S. at 133 (“the usages of the army to the present day are that sentences of the kind may in certain cases be executed by shooting, and in others by hanging”); *id.* at 134 (“[T]he custom of war, says a learned writer upon the subject, has, in the absence of statutory law, determined that capital punishment be inflicted by shooting or hanging; and the same author adds to the effect that mutiny, meaning mutiny not resulting in loss of life, desertion, or other military crime, if a capital offense, is commonly punished by shooting; that a spy is always hanged, and that mutiny, if accompanied by loss of life, is punished in the same manner,—that is, by hanging.”) (citation omitted); *id.* (“Military laws, says another learned author, do not say how a criminal offending against such laws shall be put to death, but leave it entirely to the custom of war; and his statement is that shooting or hanging is the method determined by such custom. Like the preceding author, he also proceeds to state that a spy is generally hanged, and that mutiny unaccompanied with loss of life is punished by the same means; and he also concurs with Benet, that

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punishments are forbidden by the Constitution,” it noted, but then held that “the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.”⁴¹⁵ As the Court explained: “Soldiers convicted of desertion or other capital military offences are *in the great majority of cases* sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial.”⁴¹⁶ The Court further cited William Blackstone’s treatise, *Commentaries on the Laws of England*, for the proposition that capital offenders are often “hanged by the neck till dead.”⁴¹⁷

The Court in *Wilkerson*, though approving the prisoner’s sentence to be shot, stated in dicta that the Eighth Amendment would prohibit certain cruel, painful or disgraceful punishments. “Difficulty,” the Court wrote, “would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that [a]mendment to the Constitution.”⁴¹⁸ Blackstone—the referenced commentator—had, in the Supreme Court’s words, admitted “that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded.”⁴¹⁹ As the Court in *Wilkerson* elaborated: “Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason.”⁴²⁰ “Mention,” the Court added, continuing its discussion of Blackstone’s *Commentaries*, “is also made of public dissection in murder, and burning alive in treason committed by a female.”⁴²¹ The Court in

desertion, disobedience of orders, or other capital crimes are usually punished by shooting, adding, that the mode in all cases, that is, either shooting or hanging, may be declared in the sentence.”) (citation omitted).

⁴¹⁵ *Id.* at 134-35.

⁴¹⁶ *Id.* at 135 (italics added). The italicized language seems to focus on the usualness or unusualness of the punishment in question.

⁴¹⁷ *Id.* (citing 4 BLACKSTONE, *supra* note 110, at 377).

⁴¹⁸ *Id.* at 135-35 (citations omitted).

⁴¹⁹ *Id.* at 135.

⁴²⁰ *Id.*

⁴²¹ *Id.* After recounting these cruel practices, the Court in *Wilkerson* editorialized: “History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect.” *Id.* In the context of its decision of how the Cruel and Unusual Punishments Clause barred “punishments of torture,” the Court further noted that another commentator, Chitty, had discussed “instances” in which “the ignominious or more painful parts of the punishment of high treason have been remitted ...” *Id.*

Wilkerson thus looked backed and to the then-current frequency of the punishment's use as it made its ruling.

In re Kemmler,⁴²² the Supreme Court's next case to grapple with the Eighth Amendment's meaning, dealt with a completely novel method of execution, one not tried before and certainly not around in Blackstone's day. That case involved the fate of a man, William Kemmler, sentenced to be electrocuted in New York for first-degree murder.⁴²³ In 1886, a New York commission—led by New York City lawyer Elbridge Gerry—was created to investigate and report on “the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.”⁴²⁴ As a result of its work, the New York legislature passed the Electrical Execution Act of 1888—a law that took effect on January 1, 1889, with William Kemmler becoming the first person to die in New York's electric chair.⁴²⁵ But Kemmler would not be executed before a legal challenge was heard—a legal challenge that made it all the way to the U.S. Supreme Court.

Before his execution, Kemmler had challenged his sentence as “a cruel and unusual punishment” under both New York's constitution and the U.S. Constitution.⁴²⁶ That allegation was contested,⁴²⁷ so the trial judge decided to have a hearing on the issue and “[a] voluminous mass of evidence was then taken as to the effect of electricity as an agent of death, and upon that evidence it was argued that the punishment in that form was cruel and unusual.”⁴²⁸ As the lower court judge described it: “[I]t is in these circumstances that I am asked to discharge the prisoner from his present detention; it being contended in his behalf that the legislative enactment under consideration provides punishment both cruel and unusual, the infliction whereof may well result in subjecting its unfortunate victim to the most extreme and protracted vigor and subtlety of cruelty and torture.”⁴²⁹

In response, the authorities contended that New York's new law was “a step forward and in keeping with the scientific progress of the age” and that “the application of electricity as proposed will result in the immediate

⁴²² 136 U.S. 436 (1890).

⁴²³ *Id.* at 438-39.

⁴²⁴ BESSLER, *supra* note 413, at 47.

⁴²⁵ *Id.* at 48-49. William Kemmler was convicted of first-degree murder in the court of oyer and terminer in Buffalo, New York. *In re Kemmler*, 7 N.Y.S. 145, 146 (1889).

⁴²⁶ *In re Kemmler*, 136 U.S. at 439, 441.

⁴²⁷ *Id.* at 440-41.

⁴²⁸ *Id.* at 442. The appointment of a referee was agreed upon for the taking of testimony, and the referee, Tracy C. Becker, Esq., was accordingly named. Becker later made a report, transmitting the “large amount of testimony taken by him.” *In re Kemmler*, 7 N.Y.S. at 146-47; see also *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 24 N.E. 6 (N.Y. 1890) (“[C]ounsel for the respective parties agreed that a referee be appointed for the purpose of taking the testimony in pursuance of the offer. In this way a mass of testimony was given upon both sides, certified by the referee to the county judge, and embraced in the extended record before us.”).

⁴²⁹ *In re Kemmler*, 7 N.Y.S. at 148.

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and painless death of the culprit, so that the unsightly and horrifying spectacles which now not infrequently attend executions by hanging will effectually be prevented.”⁴³⁰ Ultimately, the county judge—who saw the question as “one largely of fact”⁴³¹—sided with the State of New York, holding that William Kemmler had not overcome the presumption of constitutionality afforded to the New York law.⁴³² The county court ruled that certain methods of executions, including hanging, “death by gunshot,” and electrocution, were constitutional.⁴³³ He also found that the Eighth Amend-

⁴³⁰ *Id.*

⁴³¹ *Id.* at 149. As the lower court judge put it: “[I]t was because the burden of satisfying the judicial mind of the cruel and unusual, and therefore unconstitutional, character of the law in question was upon the defendant and to afford him opportunity to present the facts as he claimed them to be, that, as the better course, the reference was ordered ...” *Id.* The judge emphasized that because “scientific questions were involved ... an intelligent decision of the question would seem to require that there be furnished to those called upon to decide all the light that scientists, experts, and others having large experience in electrical matters should be able to give ...” *Id.*

⁴³² *In re Kemmler*, 136 U.S. at 442.

⁴³³ The lower court judge ruled as follows:

Although the phrase “cruel and unusual punishments” has a history of 200 years, it is not an easy task to define it. It was said in *Wilkerson v. Utah*, 99 U.S. 130, that “difficulty would attend the effort to define with exactness the extent of the constitutional provision.” Courts have rarely been called upon to construe it. Nor is it now at all needful, in the view which I entertain of the present case, and of my duty in regard to it, to attempt any accurate and comprehensive definition. Beyond doubt, many of the methods used for the infliction of the death penalty in other times and countries would to-day and in our land be held illegal. As among these may be mentioned crucifixion, boiling in water, oil, or lead, blowing from cannon’s mouth, burning, breaking on the wheel, dismemberment, burying alive. But not death itself is a cruel and unusual punishment, nor is death by gunshot or by hanging, though there seems to be an element of cruelty inseparable from any taking of human life as punishment for crime; but it is clearly not against this that the constitutional prohibition is directed. It was held by the supreme court of the United States in the *Wilkerson Case* above cited, that a sentence to death by shooting was not illegal in Utah. Death was the penalty for murder at the common law, and of its infliction, Blackstone said: “If upon judgment to be hanged by the neck till he is dead the criminal be not thoroughly killed, but revives, the sheriff must hang him again; for the former hanging was no execution of the sentence. And if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force, such a criminal, so reviving, was not allowed to take sanctuary, and abjure the realm, but his fleeing to sanctuary was held an escape in the officer.” 4 Comm. 406. “Any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense.” Cooley, Const. Lim. 329. The common-law rule applied in this state when the constitutional provision under consideration was adopted, and long before and after, until the act of 1888 took effect; and no question was made as to the legality of death by hanging. That statute but changed the means whereby to produce death. And can it be said that in this case it has been plainly and beyond doubt established that electricity as a death-dealing agent is likely to prove less quick and sure in operation than the rope? I believe not.

Id. at 149-50.

ment was of no concern in the case because it was “addressed solely to the national government” and “has no reference to punishments inflicted in state courts for crimes against the state.”⁴³⁴

The New York appellate courts affirmed that order.⁴³⁵ While it was determined that the state constitution’s prohibition against “cruel and unusual punishments” imposed a restriction on the legislature⁴³⁶ and that certain methods of execution would be barred by it,⁴³⁷ New York’s appellate judges—also seeing the issue as one of fact,⁴³⁸ though to be determined by

⁴³⁴ *In re Kemmler*, 136 U.S. at 442; *In re Kemmler*, 7 N.Y.S. at 148. In the lower court, the judge emphasized that “[t]he constitution of the United States and that of the state of New York, in language almost identical, provide against cruel and inhuman punishment ...” *Id.* “[O]ur own state fundamental law,” the lower court judge added, “is so benignant that not even he who cruelly murders can be cruelly punished.” *Id.*

⁴³⁵ *People ex rel. Kemmler v. Durston*, 55 Hun 64, 7 N.Y.S. 813, 815 (1889) (“[T]hough the mode of death prescribed is conceded to be unusual, there is no common knowledge or consent that it is cruel; on the contrary, there is a belief, more or less common, that death by an electric current, under favorable circumstances, is instantaneous and without pain.”); *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 577, 24 N.E. 6, 8 (N.Y. 1890):

We entertain no doubt in regard to the power of the legislature to change the manner of inflicting the penalty of death. The general power of the legislature over crimes, and its power to define and punish the crime of murder, is not and cannot be disputed. The amendments prescribed no new punishment for this offense. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with, what might be considered in this age, some degree of cruelty, and it is resorted to only because it is considered necessary for the protection of society.

⁴³⁶ *People ex rel. Kemmler v. Durston*, 55 Hun 64, 7 N.Y.S. 813, 815 (1889) (“it would seem that the provision in the state constitution against cruel and unusual punishments, if it were to have any practical operation,—if it was anything more than a mere glittering generality, calculated to please the popular fancy, and gratify the popular taste for a ‘declaration of rights,’—must have been intended as a restriction upon the legislative authority”).

⁴³⁷ *People ex rel. Kemmler v. Durston*, 55 Hun 64, 7 N.Y.S. 813, 815 (1889):

We have no doubt that if the legislature of this state should undertake to prescribe, for any offense against its laws, the punishment of burning at the stake, breaking on the wheel, disembowelling, or hanging in chains, to perish by exhaustion, it would be the duty of the courts to pronounce upon such attempt the condemnation of the constitution. In the case supposed, no doubt could exist, because the statute would be, on its face, repugnant to the provision of the constitution against cruel and unusual punishments. It is common knowledge that the punishments mentioned are unusual, and, by the common consent of mankind, they are cruel punishments, because they involve torture and a lingering death.

⁴³⁸ *People ex rel. Kemmler v. Durston*, 55 Hun 64, 7 N.Y.S. 813, 815-16 (1889) (“It was therefore a question of fact whether an electric current, of sufficient intensity, and skillfully applied, will produce death without unnecessary suffering.”); *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 577, 24 N.E. 6, 8 (N.Y. 1890) (“we think that its presence in the constitution of this state confers power upon the courts to declare void legislative acts prescribing punishments for crime in fact cruel and unusual”).

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New York's legislature⁴³⁹—concluded that death by electrocution was not among them.⁴⁴⁰ As the New York Court of Appeals ruled in 1890: “Whether the use of electricity, as an agency for producing death, constituted a more humane method of executing the judgment of the court in capital cases, was a question for the determination of the legislature.”⁴⁴¹ As that court emphasized: “It was a question peculiarly within its province, and the means at its command for ascertaining whether such a mode of producing death involved cruelty, within the meaning of the constitutional prohibition, were certainly as satisfactory and reliable as any that are consistent with the limited functions of an appellate court.”⁴⁴²

The New York Court of Appeals, after examining the testimony taken in the case, concluded that it “can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the constitution, though it is certainly unusual.”⁴⁴³ The appellate court thus rejected

⁴³⁹ Both of New York's appellate courts deferred to the *legislative* fact-finding that led to the adoption of electrocution as the new means of execution, seeing the court's own role as extremely limited. *People ex rel. Kemmler v. Durston*, 55 Hun 64, 7 N.Y.S. 813, 816 (1889) (“There is nothing in the constitution of our government, or in the nature of things, which gives any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of the court is superior to that of the legislature itself; nor is there any authority for the proposition that, in respect to such question, relating either to the manner or the matter of legislation the decision of the legislature can be reviewed by the court.”); *id.* at 817 (“It is not merely upon principles of comity between co-ordinate branches of the government of the state, but because of the separate province and responsibility of the legislature from that of the courts, that we hold that the latter are not permitted to inquire whether the former was ignorant of the facts necessary to determine the meaning and effect of the laws which it has enacted; and, in respect to the particular statute in question, that the presumption that the legislature had ascertained the facts necessary to determine that death by the mode prescribed was not a cruel punishment is conclusive upon the court.”); *see also id.* at 816-17:

In the case of *In re Railroad Co.*, *supra*, it was said that the courts cannot take proofs aliunde for the purpose of ascertaining whether a statute, valid and regular on its face, is unconstitutional; that they cannot go behind the statute itself; that they cannot assume to know that facts necessary to the constitutionality of the legislative act did not exist, but, on the contrary, may assume that the legislature found that those facts did exist. So, too, in respect to the manner of the passage of a bill, whether the constitutional quorum was present, and a vote of a constitutional majority was given in its favor, the statute must be its own evidence, and cannot be rebutted. The question is not one of fact, but of law, to be determined by the record.

⁴⁴⁰ *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 579, 24 N.E. 6, 8 (N.Y. 1890) (“The amendment to the Code of Criminal Procedure, changing the mode of inflicting the death penalty, does not, upon its face nor in its general purpose and intent, violate any provision of the constitution.”).

⁴⁴¹ *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 579, 24 N.E. 6, 8 (N.Y. 1890). “The determination of the legislature of this question,” the New York Court of Appeals ruled, “is conclusive upon this court.” *Id.*

⁴⁴² *Id.*

⁴⁴³ *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 579, 24 N.E. 6, 9 (N.Y. 1890) (quoted in *In re Kemmler*, 136 U.S. at 443).

the notion that electrocution—admittedly a novel means of execution—was cruel. “On the contrary,” that court noted, “we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.”⁴⁴⁴ “It would be a strange result, indeed,” that court emphasized, speaking of the efforts of the New York legislature, “if it could now be held that its efforts to devise a more humane method of carrying out the sentence of death in capital cases have culminated in the enactment of a law in conflict with the provisions of the constitution prohibiting cruel and unusual punishments.”⁴⁴⁵

In affirming the constitutionality of electrocution as a mode of execution, the U.S. Supreme Court in *In re Kemmler* emphasized that the New York legislature had appointed a commission to inquire into “the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.”⁴⁴⁶ The Supreme Court further noted that New York’s governor had said this in an annual message in calling for the law change: “The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature.”⁴⁴⁷

In its 1890 decision in *In re Kemmler*, the U.S. Supreme Court wrestled with the applicability of the Fourteenth Amendment to the dispute. The Court summarized the condemned inmate’s argument as follows: “It is not contended, as it could not be, that the eighth amendment was intended to apply to the states, but it is urged that the provision of the fourteenth amendment, which forbids a state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition on the state from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term ‘due process of law.’”⁴⁴⁸ Of course, the U.S. Supreme Court—many decades later—determined that the Fourteenth Amendment *did* make the

⁴⁴⁴ *Id.* The New York Court of Appeals also ruled that “[t]he testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature some provision of the constitution may possibly be violated.” *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 578, 24 N.E. 6, 8 (N.Y. 1890). “If the act upon its face is not in conflict with the constitution,” the court ruled, “then extraneous proof cannot be used to condemn it.” *Id.*; see also *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 579, 24 N.E. 6, 8-9 (N.Y. 1890) (“The testimony taken by the referee, while not available to impeach the validity of the legislation, may, we think, be regarded as a valuable collection of facts and opinions touching the use of electricity as a means of producing death, and for that reason as part of the argument for the relator, but nothing more.”).

⁴⁴⁵ *People ex rel. Kemmler v. Durston*, 74 Sickels 569, 579, 24 N.E. 6, 8 (N.Y. 1890).

⁴⁴⁶ *In re Kemmler*, 136 U.S. at 444.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 446.

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Eighth Amendment applicable to the states—a fact that must be kept in mind as one analyzes the *In re Kemmler* ruling.⁴⁴⁹

In *In re Kemmler*, the U.S. Supreme Court noted that New York's bar on "cruel and unusual punishments"⁴⁵⁰ "was intended particularly to operate upon the legislature of the state, to whose control the punishment of crime was almost wholly confided."⁴⁵¹ In dicta, however, the Supreme Court did opine that the Eighth Amendment's language barred "burning at the stake, crucifixion, breaking on the wheel, or the like."⁴⁵² "[I]f the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual," the Court concluded, "it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."⁴⁵³ "And we think this is equally true" of the Eighth Amendment "in its application to [C]ongress," the Court emphasized.⁴⁵⁴ The Court—while seeing the Eighth Amendment as only constraining the federal government in the late nineteenth century—thus focused on particularly painful methods of executions when it thought about the Eighth Amendment.

While approving electrocution as a means of execution, the Supreme Court in *In re Kemmler* specifically rejected the prisoner's Fourteenth Amendment argument,⁴⁵⁵ offered only limited guidance in determining what punishments are "cruel," and utterly deferred to the state court judgment.⁴⁵⁶ "The decision of the state courts sustaining the validity of the act under the state constitution is not re-examinable here," the Court determined, saying that "nor was that decision against any title, right, privilege, or immunity specially set up or claimed by the petitioner under the constitution of the United States."⁴⁵⁷ The Fourteenth Amendment, the Court held, acknowledging the 1868 amendment was intended to forbid

⁴⁴⁹ *Robinson v. California*, 370 U.S. 660 (1962).

⁴⁵⁰ *In re Kemmler*, 136 U.S. at 445.

⁴⁵¹ *Id.* at 446.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 446-47.

⁴⁵⁵ In speaking of New York's new law, the Court wrote:

The enactment of this statute was, in itself, within the legitimate sphere of the legislative power of the state, and in the observance of those general rules prescribed by our systems of jurisprudence; and the legislature of the state of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the state has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.

Id. at 449.

⁴⁵⁶ "In order to reverse the judgment of the highest court of the state of New York," the Court emphasized, "we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the state of due process of law to one accused of crime, or of some right secured to him by the constitution of the United States." *Id.* at 449. "We have no hesitation in saying that this we cannot do upon the record before us," the Court concluded. *Id.*

⁴⁵⁷ *Id.* at 447.

any “arbitrary deprivation” of life,⁴⁵⁸ “did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people.”⁴⁵⁹

Still, the Court in *In re Kemmler* did grapple with the concept of cruelty, though it spoke of cruelty in its “constitutional” sense. “As to the cruelty of punishments, the Court ruled: ‘Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.’”⁴⁶⁰ The Court, at a time when the Fourteenth Amendment was still not being read to apply the provisions of the U.S. Bill of Rights to the states, nonetheless gave an indication of the Fourteenth Amendment’s purpose. The Court said that the Fourteenth Amendment prohibited the “arbitrary” deprivation of life while disclaiming the Fourteenth Amendment’s relevance to the dispute.

And more cases, in a similar vein, were to come. In 1891, the Supreme Court also rejected an Eighth Amendment challenge to the imposition of solitary confinement. In *McElvaine v. Brush*,⁴⁶¹ the prisoner, Charles McElvaine, was convicted in New York of first-degree murder and sentenced to death.⁴⁶² The prisoner then sought a writ of habeas corpus from the Court, challenging the portion of New York’s penal code requiring the

⁴⁵⁸ *Id.* at 448. In particular, the Court wrote:

Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the state to protect the lives, liberties, and property of its citizens, and to promote their health, peace, morals, education, and good order.

Id. at 448-49.

⁴⁵⁹ *Id.* at 448. The Court, relying in part on its highly questionable ruling in *Slaughter-House Cases*, put it this way:

The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests, primarily, with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States.

Id. at 448 (citing *United States v. Cruikshank*, 92 U.S. 542 (1875) & *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)).

⁴⁶⁰ *Id.* at 447. As to the New York state court finding that electrocution “might be said to be ‘unusual,’” the Supreme Court did not delve into the propriety of that finding, the Court’s finding of no cruelty making it unnecessary to reach that issue. *Id.*

⁴⁶¹ 142 U.S. 155 (1891).

⁴⁶² *Id.* at 156-57.

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warden at Sing Sing to keep inmates in solitary confinement prior to their execution.⁴⁶³ In rejecting the contention that solitary confinement constituted a “cruel and unusual punishment” in violation of the Eighth Amendment, the Court first emphasized that “[t]he first 10 articles of amendment were not intended to limit the powers of the states in respect of their own people, but to operate on the federal government only.”⁴⁶⁴

In *McElvaine*, the Supreme Court summarized the prisoner’s Fourteenth Amendment contention as follows: “[T]he argument is that, so far as those amendments secure the fundamental rights of the individual, they make them his privileges and immunities as a citizen of the United States, which cannot now, under the fourteenth amendment, be abridged by a state; that the prohibition of cruel and unusual [sic] punishments is one of these; and that that prohibition is also included in that ‘due process of law’ without which no state can deprive any person of life, liberty, or property.”⁴⁶⁵ Finding no violation, the Supreme Court again deferred to the state’s judgment.⁴⁶⁶ Again, the Court—in that late nineteenth-century case—gave short-shrift to important Fourteenth Amendment principles, finding that they did not apply at all.

The last nineteenth-century Supreme Court case to discuss the Eighth Amendment was *O’Neil v. State of Vermont*.⁴⁶⁷ In that case, a New Yorker, John O’Neil, was convicted of 307 separate offenses against the Vermont liquor laws and ordered to pay a fine of \$6,638.72. If the fine was not paid by a certain date, the court ordered that O’Neil be imprisoned at hard labor for 19,914 days.⁴⁶⁸ After that ruling, O’Neil challenged Vermont’s law as imposing a “cruel and unusual punishment” under both Vermont’s constitution and the U.S. Constitution.⁴⁶⁹ Before the case reached the U.S. Supreme Court, the Vermont Supreme Court rejected O’Neil’s claims.⁴⁷⁰ The U.S. Supreme Court, for its part, deferred again,

⁴⁶³ *Id.* at 157-58.

⁴⁶⁴ *Id.* at 158. The Court found its decision in *In re Kemmler* “decisive” of the issue before it, noting that, in that ruling, “we were unable to perceive that the state had thereby abridged the privileges or immunities of petitioner, or deprived him of due process of law.” *Id.* at 159.

⁴⁶⁵ *Id.* at 158.

⁴⁶⁶ *Id.* at 160. “The general rule of decision,” the Court held, “is that this court will follow the adjudication of the highest court of a state in the construction of its own statutes, and there is nothing in this case to take it out of that rule.” *Id.* at 160. The Supreme Court reached a similar result in *Trezza v. Brush*, 142 U.S. 160 (1891), another case in which a first-degree murderer in New York was sentenced to death and ordered to be held at Sing Sing in solitary confinement. *Id.* at 160-61.

⁴⁶⁷ 144 U.S. 323 (1892).

⁴⁶⁸ *Id.* at 327, 330.

⁴⁶⁹ *Id.* at 331.

⁴⁷⁰ The Vermont Supreme Court ruled as follows:

“The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense with which the respondent, O’Neil, is charged, cannot be said to be excessive or oppressive. If he has

holding that “so far as it is a question arising under the constitution of Vermont, it is not within our province.”⁴⁷¹ “[A]s a federal question,” the Court continued, “it has always been ruled that the eighth amendment to the constitution of the United States does not apply to the states.”⁴⁷² As a result, the nation’s highest court dismissed the case for “want of jurisdiction.”⁴⁷³

The *O’Neil* case, however, brought the Fourteenth Amendment—and its relationship to the Eighth Amendment—into starker relief than ever before. In a dissent, Justice Stephen Field—one of Abraham Lincoln’s appointments—wrote that he was “compelled to disagree with my associates in their disposition of this case.”⁴⁷⁴ A pioneer of the concept of substantive due process, Justice Field wrote that “[t]he punishment imposed was one exceeding in severity . . . anything which I have been able to find in the records of our courts for the present century.”⁴⁷⁵ “Had he been found guilty of burglary or highway robbery,” Field wrote of *O’Neil*, “he would have received less punishment than for the offenses of which he was convicted.”⁴⁷⁶ “It was,” he emphasized, “six times as great as any court in Vermont could have imposed for manslaughter, forgery, or perjury.”⁴⁷⁷ “It was,” Field concluded, “one which, in its severity, considering the offenses of which he was convicted, may justly be termed both ‘unusual and cruel.’”⁴⁷⁸

Before making that assessment, Justice Field noted that the cruel and unusual designation “is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering.”⁴⁷⁹

subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.’

Id. at 331 (citation omitted).

⁴⁷¹ *Id.* at 331-32.

⁴⁷² *Id.* at 332.

⁴⁷³ *Id.* at 334-35.

⁴⁷⁴ *Id.* at 337 (Field, J., dissenting).

⁴⁷⁵ *Id.* at 338.

⁴⁷⁶ *Id.* at 339.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* As Justice Field wrote:

Such punishments were at one time inflicted in England, but they were rendered impossible by the declaration of rights, adopted by parliament on the successful termination of the revolution of 1688, and subsequently confirmed in the bill of rights. It was there declared that excessive bail ought not to be required, nor excessive fines

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The concept of cruel and unusual punishments, Field explained, “is embodied in the eighth amendment to the constitution of the United States, and in the constitutions of several of the states, though Mr. Justice Story states in his *Commentaries on the Constitution* ‘that the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.’”⁴⁸⁰ As Field wrote of the prohibition:

The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted. Fifty-four years' confinement at hard labor, away from one's home and relatives, and thereby prevented from giving assistance to them or receiving comfort from them, is a punishment at the severity of which, considering the offenses, it is hard to believe that any man of right feeling and heart can refrain from shuddering. It is no matter that by cumulative offenses, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any humane law for the offenses.⁴⁸¹

Justice Field saw the sentence under review as both cruel and unusual⁴⁸² and he was especially concerned about the large number of crimes O'Neil had been convicted of—as well as the resulting sentence. As Field's dissent emphasized:

The state may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass, and make thereby a thousand offenses, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration. The state has the power to inflict personal chastisement, by directing whipping for petty offenses, repulsive as such mode of punishment is, and should it, for each offense, inflict 20 stripes, it might not be considered, as applied to a single offense, a severe punishment, but yet, if there had been 307 offenses committed, the number of which the defendant was convicted in this case, and 6,140 stripes were to be inflicted for these accumulated offenses, the judgment of mankind would be that the punishment was not only an unusual, but a cruel, one, and a cry of horror would rise from every civilized

imposed, nor cruel and unusual punishments inflicted. From that period this doctrine has been the established law of England, intended as a perpetual security against the oppression of the subject from any of those causes.

Id.

⁴⁸⁰ *Id.* (citing Story, *Commentaries on the Constitution* § 1903).

⁴⁸¹ *Id.* at 339-40.

⁴⁸² *Id.* at 360 (Field, J., dissenting) (“In opening the record in this case we not only see that the exclusive power of congress to regulate commerce was invaded, but we see that a cruel, as well as an unusual, punishment was inflicted upon the accused, and that the objection was taken in the court below, and immunity therefrom was specially claimed.”).

and Christian community of the country against it. It does not alter its character as cruel and unusual that for each distinct offense there is a small punishment, if, when they are brought together, and one punishment for the whole is inflicted, it becomes one of excessive severity. And the cruelty of it, in this case, by the imprisonment at hard labor, is further increased by the offenses being thus made infamous crimes.⁴⁸³

Justice Field then turned his attention to whether there was a way to set aside O'Neil's draconian sentence. "I have stated these particulars of the proceedings and of the judgment of the state courts to show what great wrongs were inflicted," Field wrote.⁴⁸⁴ "If there is no remedy for them," he observed, "there is a defect in our laws or in their administration which cannot be too soon corrected."⁴⁸⁵ "I think there is a remedy," Field then clarified, noting that "it should be afforded by this court."⁴⁸⁶ "The fourteenth amendment," he wrote, "declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no state shall deprive any person of life, liberty, or property without due process of law."⁴⁸⁷ "I agree," Field wrote, "that those inhibitions do not invest congress with any power to legislate upon subjects which are within the domain of state legislation."⁴⁸⁸

Justice Field also commented on the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses. "They only operate," he said, "as restraints upon state action, like the prohibitions upon legislation by the states impairing the obligation of contracts, or to pass a bill of attainder or an ex post facto law."⁴⁸⁹ "But in all cases touching life or liberty," Field emphasized, "I deem it the duty of this court, when once it has jurisdiction of a case, to enforce these restraints for the protection of the citizen where they have been disregarded in the court below, though called to its attention." This was necessary, Field wrote, so that "the life or liberty of the citizen is not wantonly sacrificed because of some imperfect statement of the party's rights."⁴⁹⁰

Justice Field's dissent also spoke presciently of how the Fourteenth Amendment had altered the scope of the Eighth Amendment protection. "The eighth amendment of the constitution of the United States, relating to punishments of this kind," he began, "was formerly held to be directed only against the authorities of the United States, and as not applicable to the states."⁴⁹¹ As Field explained: "Such was undoubtedly the case previous to the fourteenth amendment, and such must be its limitation now, unless

⁴⁸³ *Id.* at 339-40.

⁴⁸⁴ *Id.* at 341.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 359.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* at 360 (citing *Barron v. Baltimore*).

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exemption from such punishment is one of the privileges or immunities of citizens of the United States, which can be enforced under the clause declaring that ‘NO STATE SHALL MAKE OR ENFORCE ANY LAW Which shall abridge’ those privileges or immunities.”⁴⁹²

In his dissent, Field emphasized that the Supreme Court had previously held in *Slaughter-House Cases*⁴⁹³ that the Fourteenth Amendment only protected “against abridging the privileges or immunities of citizens of the United States as distinguished from privileges and immunities of citizens of the states.”⁴⁹⁴ “Assuming such to be the case,” Field wrote, “the question arises, what are the privileges and immunities of citizens of the United States which are thus protected?”⁴⁹⁵ Justice Field answered that question by concluding that the U.S. Constitution—including its Bill of Rights—set forth citizens’ “privileges” and “immunities.” “It may be difficult,” Field wrote, “to define the terms so as to cover all the privileges and immunities of citizens of the United States, but, after much reflection, I think the definition given at one time before this court by a distinguished advocate—Mr. John Randolph Tucker, of Virginia—is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the constitution of the United States.”⁴⁹⁶

In particular, Field referenced “the first 10 amendments to the constitution” and “the amendments which followed the late civil war.”⁴⁹⁷ “The rights thus recognized and declared,” Field wrote of the Bill of Rights, “are rights of citizens of the United States under their constitution, which could not be violated by federal authority.”⁴⁹⁸ The Fourteenth Amendment, Field added, made “freedmen” in “former slaveholding states” U.S. citizens and thus “entitled in the future to all the privileges and immunities of such citizens.”⁴⁹⁹ In Justice Field’s view, the Fourteenth Amendment forbade any state from violating any citizens’ “privileges” or “immunities.”⁵⁰⁰

⁴⁹² *Id.* at 360-61.

⁴⁹³ 83 U.S. (16 Wall.) 36 (1872).

⁴⁹⁴ *O’Neil*, 144 U.S. at 361 (Field, J., dissenting).

⁴⁹⁵ *Id.* In discussing “privileges” and “immunities,” Justice Field emphasized that “[t]hese terms are not idle words, to be treated as meaningless,” but “are of momentous import.”

Id. They provided, he wrote, “a great guaranty to the citizens of the United States of those privileges and immunities against any possible state invasion.” *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* at 362.

⁴⁹⁹ *Id.* at 362-63.

⁵⁰⁰ As Field wrote:

While, therefore, the 10 amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the federal government, and not to the states, yet so far as they declare or recognize the rights of persons they are rights belonging to them as citizens of the United States under the constitution; and the fourteenth amendment, as to all such rights, places a limit upon state power by ordaining that no state shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from

Given his reading of the Eighth and Fourteenth Amendments, Justice Field found the Vermont Supreme Court's ruling unsatisfactory.⁵⁰¹ Speaking of the Constitution's prohibition on cruel and unusual punishments, Field wrote:

The inhibition is directed against cruel and unusual punishments, whether inflicted for one or many offenses. A convict is not to be scourged until the flesh fall from his body, and he die under the lash, though he may have committed a hundred offenses, for each of which, separately, a whipping of 20 stripes might be inflicted. An imprisonment at hard labor for a few days or weeks for a minor offense may be within the direction of a humane government; but, if the minor offenses are numerous, no authority exists to convert the imprisonment into one of perpetual confinement at hard labor, such as would be appropriate only for felonies of an atrocious nature. It is against the excessive severity of the punishment, as applied to the offenses for which it is inflicted, that the inhibition is directed.⁵⁰²

In other words, Justice Field opined that severe and disproportionate corporal punishments, such as the lash, could be found to be unconstitutional.

Justice John Marshall Harlan also wrote a separate dissent endorsing Justice Field's views.⁵⁰³ Thus, Justice Harlan also found the punishment at issue "cruel and unusual," with Harlan writing:

A judgment, therefore, of a state court, even if rendered pursuant to a statute, inflicting, or allowing the infliction of a cruel and unusual punishment, is inconsistent with the supreme law of the land. The judgment before us, by which the defendant is confined at hard labor in a house of correction for the term of 19,914 days, or 54 years and 204 days, inflicts punishment which, in view of the character of the offenses committed, must be deemed cruel and unusual.⁵⁰⁴

punishments which are cruel and unusual. It is an immunity which belongs to him, against both state and federal action. The state cannot apply to him, any more than the United States, the torture, the rack, or thumb-screw, or any cruel and unusual punishment, or any more than it can deny to him security in his house, papers, and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights, as those of citizens of the United States, find their recognition and guaranty against federal action in the constitution of the United States, and against state action in the fourteenth amendment.

Id. at 363.

⁵⁰¹ *Id.* at 364.

⁵⁰² *Id.* Justice Field added that the denial of relief was of the "gravest character, leaving the defendant to a life of misery, one of perpetual imprisonment and hard labor." *Id.* at 364-65.

⁵⁰³ Harlan's dissent added that "Mr. Justice BREWER authorizes me to say that in the main he concurs with the views expressed in this opinion." *Id.* at 371 (Harlan, J., dissenting).

⁵⁰⁴ *Id.* at 370-71 (Harlan, J., dissenting). On the issue of the Fourteenth Amendment, Justice Harlan added:

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The dissents in *O'Neil* foreshadowed the U.S. Supreme Court later taking the Fourteenth Amendment—and its principles—more seriously. The Court, inexplicably, however, continues to look the other way when it encounters arbitrariness and racial bias in America's death penalty system.⁵⁰⁵

III. THE STATE OF THE NATION

A. The American Death Penalty

America's death penalty has been in the news a lot lately along with state-by-state efforts to halt executions. In California, which has the country's largest death row population, Gov. Jerry Brown cancelled plans to build a new death row facility in that state in April 2011.⁵⁰⁶ Jeanne Woodford—who, as San Quentin's warden, once oversaw executions—even led a referendum effort there to try to abolish capital punishment.⁵⁰⁷ A California ballot initiative to replace death sentences with life-without-parole sentences was launched in 2011 and taken to voters in 2012, narrowly failing by a vote of 52 to 48 percent.⁵⁰⁸ The long-running legal challenge to Cali-

I fully concur with Mr. Justice FIELD that, since the adoption of the fourteenth amendment, no one of the fundamental rights of life, liberty, or property, recognized and guarantied by the constitution of the United States, can be denied or abridged by a state in respect to any person within its jurisdiction. These rights are principally enumerated in the earlier amendments of the constitution. They were deemed so vital to the safety and security of the people that the absence from the constitution, adopted by the convention of 1787, of express guaranties of them, came very near defeating the acceptance of that instrument by the requisite number of states. The constitution was ratified in the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the government of the Union, articles of amendment would be submitted to the people recognizing those essential rights of life, liberty, and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country. Among those rights is immunity from cruel and unusual punishments secured by the eighth amendment against federal action, and by the fourteenth amendment against denial or abridgment by the states.

Id. at 370.

⁵⁰⁵ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁵⁰⁶ *California - Retentionist*, HANDS OFF CAIN (AGAINST THE DEATH PENALTY IN THE WORLD),

<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=15000138&idcontinente=26> (last visited Dec. 7, 2012) (Apr. 26, 2011 entry).

⁵⁰⁷ Carol J. Williams, *Former California Prisons Leader Joins Fight Against Death Penalty*, L.A. TIMES, May 12, 2011.

⁵⁰⁸ Howard Mintz, *Defeat of Proposition 34: California's Death Penalty Battle Will Continue*, Nov. 7, 2012, available at http://www.mercurynews.com/crime-courts/ci_21951068/defeat-proposition-34-californias-death-penalty-battle-will; Franklin E. Zimring, *Endgame for Death Penalty in California*, SAN FRANCISCO CHRON., Dec. 8, 2012, available at <http://www.sfgate.com/opinion/article/Endgame-for-death-penalty-in-California-4101011.php>; California Secretary of State Debra Brown, *Initiatives and Referenda Cleared for Circulation*, No. 1512 (11-0035) ("Death Penalty Repeal. Initiative Statute."), available at <http://www.sos.ca.gov/elections/ballot-measures/cleared-for>

ifornia's lethal-injection protocol, meanwhile, has led to a de facto moratorium on executions in that state.⁵⁰⁹

Abolition and moratoria efforts have also been taking place elsewhere. In late November 2011, Gov. John Kitzhaber, of Oregon, declared a moratorium on executions in that state "for the duration" of his term, which doesn't end until January 2015.⁵¹⁰ And in 2013, Gov. Martin O'Malley, of Maryland, testified before the state legislature to abolish the death penalty in that state. "The death penalty is expensive, and the overwhelming evidence tells us that it does not work," O'Malley told the Senate Judiciary Committee. Also, as the Associated Press reported of Maryland's successful 2013 repeal effort: "NAACP President and CEO Ben Jealous made the plea against the death penalty by highlighting a series of exonerations, including that of Kirk Bloodsworth, a Maryland man who spent two years on death row and was later released from prison because of DNA evidence."⁵¹¹

In the last ten years, a number of other states had already repealed death penalty laws or declared executions—or particular lethal-injection procedures—unconstitutional. Connecticut abolished the death penalty in 2012; Illinois did so in 2011; New Mexico abolished capital punishment in 2009; and New Jersey did so in 2007, too.⁵¹² The New York Court of Appeals declared that state's death penalty scheme to be facially invalid in 2004,⁵¹³ and judges in Arkansas and Montana recently ruled specific execution methods unconstitutional.⁵¹⁴ Even before Gov. Martin O'Malley testified in favor of repealing Maryland's death penalty in 2012, an administra-

circulation.htm. More than 500,000 signatures were necessary for the ballot initiative to move forward. Kevin Fagan, *Death Penalty Foes Launch Initiative Drive*, SAN FRANCISCO CHRONICLE, Oct. 26, 2011.

⁵⁰⁹ Howard Mintz, *No California Executions in 2012 as Legal Battle Over Lethal Injection Continues*, MercuryNews.com, available at http://www.mercurynews.com/crime-courts/ci_19249256.

⁵¹⁰ Helen Jung, *Gov. John Kitzhaber Stops Executions in Oregon, Calls System "Compromised and Inequitable"*, OREGONIAN, Nov. 22, 2011.

⁵¹¹ Associated Press, *Gov. O'Malley Urges State Lawmakers to Repeal Death Penalty in Maryland*, WASHINGTON POST (Feb. 14, 2013), http://www.washingtonpost.com/local/md-governor-to-testify-on-capital-punishment-ban/2013/02/14/12284114-767f-11e2-b102-948929030e64_story.html.

⁵¹² David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN, Apr. 25; *State v. Hayes*, No. CR070241859, 2010 WL 3328076 *4 n.3 (Conn. Super., July 28, 2010); *People v. Gomez*, 2011 Ill. App. (1st 092,185, 2011 WL 4580559 *19 n.1 (Ill. App., Sept. 30, 2011); Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's "Evolving Standards of Decency"*, 15 MICH. J. RACE & L. 223, 223 (2009).

⁵¹³ *Parker v. Phillips*, 717 F. Supp. 2d 310, 323 n.2 (W.D.N.Y. 2010).

⁵¹⁴ Associated Press, *Judge Rules Montana Execution Method Unconstitutional*, HELENA INDEPENDENT RECORD (Sept. 8, 2012, 12:00 AM), http://helenair.com/news/local/crime-and-courts/judge-rules-montana-execution-method-unconstitutional/article_c7e713b8-f94d-11e1-ba67-001a4bcf887a.html; *Hobbs v. Jones*, 2012 Ark. 293, __ S.W.3d __ (June 22, 2012).

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tive law argument in the case of *Evans v. Maryland*⁵¹⁵ succeeded in halting the execution of a Maryland death row inmate and the state's death penalty more broadly.⁵¹⁶

The legal profession is also beginning to take closer notice of executions and the haphazard way they are being carried out. On December 7, 2011, the American Bar Association issued a report calling for a halt to executions in the State of Kentucky. That report, by the Kentucky Assessment Team on the Death Penalty, was prepared by law professors, former state supreme court justices, and practicing lawyers. The review found an error rate of more than sixty percent in the trials of those sentenced to death. It also found that 10 of the 78 defendants sentenced to death had been represented by attorneys who were later disbarred.⁵¹⁷ In 2011, the Chief Justice of Ohio's Supreme Court, Maureen O'Connor, also announced the formation of a Joint Task Force of the Supreme Court of Ohio and the Ohio State Bar Association to review the administration of Ohio's death penalty.⁵¹⁸

The public's growing ambivalence toward executions—as reflected in such actions and in a number of public opinion polls—has become increasingly apparent. A 2011 Gallup Poll found that only 61% of respondents supported the death penalty in the abstract, down from 64% the prior year and down from 80% in 1994.⁵¹⁹ Even more telling, a recent CNN poll showed that when given a choice between life-without-parole sentences or death sentences, more Americans (50%) opted for life-without-parole than death (48%) for murderers.⁵²⁰ This represents a significant shift, no doubt driven by the rise in popularity of life-without-parole sentences. All thirty-two of the states that still retain capital punishment now offer life-without-parole sentences as an alternative to the death penalty, making life-without-possibility-of-parole a viable substitute for death sentences.⁵²¹

⁵¹⁵ 396 Md. 256, 914 A.2d 25 (2006).

⁵¹⁶ Arnold Rochvarg, *How Administrative Law Halted the Death Penalty in Maryland*, 37 UNIV. BALT. L. F. 119 (2007).

⁵¹⁷ Press Release, "Two Year Assessment of Death Penalty Procedures Prompts Call for Suspension of Executions in Kentucky," American Bar Association, Dec. 7, 2011.

⁵¹⁸ Speech of Chief Justice Maureen O'Connor, *First State of the Judiciary Address*, THE SUPREME COURT OF OHIO (Sept. 8, 2011), http://www.supremecourt.ohio.gov/PIO/Speeches/2011/SOJ_090811.asp.

⁵¹⁹ Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP (Oct. 13, 2011), <http://www.gallup.com/poll/150089/Support-Death-Penalty-Falls-Year-Low.aspx>.

⁵²⁰ CNN Political Unit, *CNN Poll: Number Who Prefer Death Penalty on Decline*, POLITICAL TICKER (Oct. 12, 2011, 05:35 PM), <http://politicalticker.blogs.cnn.com/2011/10/12/cnn-poll-number-who-prefer-death-penalty-on-decline/>.

⁵²¹ *Death Penalty States Offering Life Without Parole*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/life-without-parole> (last visited Dec. 8, 2011). The Supreme Court itself already requires, as a matter of due process, that jurors be instructed on the availability of life-without-parole where a defendant's future

Most troubling for America's death penalty, miscarriages of justice continue to occur, with concrete and mounting evidence that innocent people are frequently convicted—and sometimes even executed.⁵²² The Innocence Project—started in 1992⁵²³—continues to draw attention to the court system's human fallibility through DNA exonerations,⁵²⁴ with various polls and statistics showing Americans' declining support for death sentences, especially when offered the viable alternative of life-without-parole sentences.⁵²⁵ High-profile cases, such as Georgia's 2011 execution of Troy Davis,⁵²⁶ drew much of the media coverage, with future cases sure to draw even more as America's death penalty debate plays out.⁵²⁷

dangerousness is at issue. *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Shafter v. South Carolina*, 532 U.S. 36 (2001).

⁵²² SISTER HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* (2005); Hugo Adam Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

⁵²³ E.g., Steven M. Pincus, *It's Good to Be Free: An Essay about the Exoneration of Albert Burrell*, 28 WM. MITCHELL L. REV. 27 (2001); James S. Liebman, Shawn Crowley, Andrew Markquart, Lauren Rosenberg, Lauren Gallo White & Daniel Zharkovsky, *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711 (2012). The Innocence Project continues to examine evidence in individual cases and its work will no doubt lead to further exonerations.

⁵²⁴ The Innocence Project's website notes that "[t]here have been 302 post-conviction DNA exonerations in the United States," and that "18 of the 302 people exonerated through DNA served time on death row." "Another 16", the website notes, "were charged with capital crimes but not sentenced to death." *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Feb. 17, 2013).

⁵²⁵ *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Aug. 6, 2013) (citing polling data); Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1280 n.136 (2011); see also Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1839 (2006) ("Forty-eight states now have some form of life imprisonment without parole, with a great many of the statutes enacted over the last two decades."). The number of death sentences and executions in the United States has fallen dramatically in the last decade. There were more than 300 death sentences per year in 1995 and 1996, but less than 80 in 2011. Executions, which peaked at 98 in 1999, have not exceeded 60 per year since 2003. *Facts about the Death Penalty*, Death Penalty Info. Ctr., Washington, D.C., Aug. 6, 2013, at 1, 3, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

⁵²⁶ *Davis v. Humphrey*, 2011 WL 4386165 *1 (2011). The case of Cameron Willingham—executed in Texas in 2004 on the basis of highly suspect evidence—also drew a lot of media attention in 2009 after an investigative report published in 2009 in *The New Yorker*. David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER, Sept. 7, 2009.

⁵²⁷ Meanwhile, Europe and all other Western nations have already abandoned executions, seeing them as clear-cut human rights violations. WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3d ed. 2002); *Abolitionist and Retentionist Countries*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Nov. 16, 2011).

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The arbitrariness of executions—as well as the risk of innocent people being executed—has fueled much of the public’s ambivalence. A study of death penalty cases done at Columbia University found a sixty-eight percent error rate in capital cases, with eighty-two percent of all capital judgments reversed on appeal later replaced on retrial with a sentence less than death or no sentence at all. That study also found that seven percent of the murder conviction reversals resulted in acquittals.⁵²⁸ Another study, published in 2013, revealed that Pennsylvania’s death penalty system is likewise riddled with error.⁵²⁹ That report, which looked at Pennsylvania resentencing proceedings, found that when capital cases were retried almost all defendants (95%) received a sentence less than death.⁵³⁰ The raw statistics as regards America’s death penalty only reinforce the conclusion that the death penalty is unfairly administered.⁵³¹

Not only do pronounced geographic disparities exist that are associated with executions,⁵³² but racial prejudice is still found throughout America’s death penalty system.⁵³³ Only a small percentage of county prosecutors actively pursue death sentences,⁵³⁴ and when death sentences and executions do occur, studies show that the race of the victim often plays a deci-

⁵²⁸ James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000).

⁵²⁹ Robert Brett Dunham, comp., *The First 100 Re-Sentencings: Subsequent Dispositions of Pennsylvania Capital Cases Reversed in Post-Conviction*, DEATH PENALTY INFORMATION CENTER (Jan. 28, 2013), <http://www.deathpenaltyinfo.org/documents/RDunhamPaReversals.pdf>.

⁵³⁰ *Arbitrariness: Pennsylvania’s Costly and Broken Death Penalty System*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/arbitrariness-pennsylvanias-costly-and-broken-death-penalty-system> (last visited Feb. 18, 2013).

⁵³¹ Erwin Chemerinsky, *Evolving Standards of Decency in 2003: Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201, 207 (2004) (noting that law professor and litigator Anthony Amsterdam has said the death penalty as administered is essentially a lottery; “it’s very much the luck of the draw in terms of the prosecutor, the judge, the jury”).

⁵³² Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1288 (2011) (“History has repeated itself. The capital punishment system in America is as arbitrary as it was leading up to *Furman*.”); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 233 (2012) (“[J]ust 10% of counties in the United States account for all death sentences imposed from 2004 to 2009.”); *id.* at 237 (“[S]ince 1976, only 15% of the counties in the United States have sentenced anyone to death who subsequently has been executed. Only fifty counties (1.6%) have sentenced five or more people to death whom their respective state ultimately executed.”).

⁵³³ See, e.g., Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573; David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1738 (1998) (“[T]he problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions.”).

⁵³⁴ Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 BOSTON UNIV. L. REV. 227 (2012).

sive role at sentencing.⁵³⁵ African Americans who kill whites, it is now clear, are much more likely to be sentenced to death than other capital defendants.⁵³⁶ Meanwhile, America's condemned—at least the ones actually executed—are spending, on average, more than thirteen years on death row between conviction and execution.⁵³⁷

Even American judges have begun publicly acknowledging the cruelty, racial bias and arbitrariness of America's error-laden system. In mid-December of 2011, Ohio Supreme Court Justice Paul Pfeifer told a legislative committee that Ohio's death penalty "has become what I call a death lottery." "It's very difficult to conclude," he said, "that the death penalty, as it exists today, is anything but a bad gamble," with Pfeifer noting that only "four or five" of roughly one hundred capital indictments filed in Ohio each year result in conviction and a death sentence.⁵³⁸ On December 19, 2011, Teresa Hawthorne, a state district court judge in Dallas, Texas, came to a similar conclusion, making a judicial ruling that Texas's death penalty was unconstitutional because it could lead to arbitrary death sentences.⁵³⁹ In North Carolina, a judge there also found statistically significant racial disparities in the administration of that state's death penalty.⁵⁴⁰

In fact, Justice William O'Neill, of Ohio's Supreme Court, recently dissented in a case, issuing an opinion in which he explicitly found that the death penalty should be declared unconstitutional. In that dissent, he broke out his analysis into a discussion of whether the death penalty is cruel and whether it is unusual. "[D]eath, even by lethal injection," O'Neill wrote, "is a cruel punishment." "Capital punishment," he explained, "dates back to the days when decapitations, hangings, and brandings were also the norm." "Surely," he offered, "our society has evolved since those barbaric days." "It is clear," O'Neill also noted, "that the death penalty is becoming increasingly rare both around the world and in America." "By definition it is unusual," he emphasized.

American judges are thus starting to assess the actual cruelty and unusualness of executions. In his dissent, Justice O'Neill put it this way: "I

⁵³⁵ *Facts about the Death Penalty*, *supra* note 48, at p. 2 (citing studies).

⁵³⁶ David C. Baldus, Catherine M. Grosso, George Woodworth & Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1300 (2011) ("The data document white-victim and minority-accused/white-victim disparities in the imposition of death sentences among all death-eligible cases that are consistent with findings in numerous state systems on which comparable data are available.").

⁵³⁷ Becky Purser, *Warner Robins Inmate on Death Row among Longest Serving in Georgia*, THE TELEGRAPH (Dec. 4, 2012), <http://www.macon.com/2012/12/04/2273101/warner-robins-inmate-on-death.html>.

⁵³⁸ Jim Provance, *Ohio Justice Urges Repeal of Death Penalty*, TOL. BLADE, Dec. 15, 2011.

⁵³⁹ Jennifer Emily, *Dallas Criminal Courts Judge Rules Death Penalty Unconstitutional*, DALLAS MORN. NEWS, Dec. 24, 2011.

⁵⁴⁰ David Zucchino, *North Carolina Judge Vacates Death Penalty under Racial Justice Law*, L.A. TIMES, Apr. 20, 2012.

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would hold that capital punishment violates the Eighth Amendment to the Constitution of the United States and Article 1, Section 9 of the Ohio Constitution. The death penalty is inherently both cruel and unusual and therefore is unconstitutional.”⁵⁴¹ Multiple U.S. Supreme Court Justices have also expressed reservations about America’s death penalty.⁵⁴² For instance, before retiring, Justice John Paul Stevens specifically concluded that “the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”⁵⁴³ “A penalty with such negligible returns to the State,” he concluded, is “patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”⁵⁴⁴

B. The Supreme Court’s Jurisprudence

i. A “Progressive” Approach

The U.S. Supreme Court, as a body, has yet to hold executions unconstitutional *per se*. But the Court has already materially winnowed the categories of death-eligible offenders and imposed some procedural safeguards in capital cases.⁵⁴⁵ And despite failing to declare executions unconstitutional, the Court did strike down a harsh, non-lethal corporal punishment more than 100 years ago. In that 1910 case, *Weems v. United States*,⁵⁴⁶ the Court grappled extensively with the Eighth Amendment’s history and purpose. Ironically, it did so not in a case originating in the United States, but on its review of a “judgment of the supreme court of the Philippine Islands” that affirmed the conviction of a man for falsifying a public document.⁵⁴⁷ The *Weems* case made clear that the U.S. Supreme Court—the arbiter of the nation’s laws—would not read the Eighth Amendment in a purely historical fashion.

In that case, the criminal complaint, which started the prosecution, had charged the man—a disbursing officer of the Bureau of Coast Guard and Transportation of the U.S. Government of the Philippine Islands—with “corruptly, and with intent then and there to deceive and defraud the United States government of the Philippine Islands and its officials, falsify[ing] a public and official document.”⁵⁴⁸ The man’s sentence—for a falsification of records involving wage payments—was “the penalty of fifteen years” of

⁵⁴¹ *State v. Wogenstahl*, 1/25/2013 Case Announcements #2, 2013-Ohio-164 (O’Neill, J., dissenting), available at <http://www.deathpenaltyinfo.org/documents/2013ohio164.pdf>.

⁵⁴² John D. Bessler, *Tinkering Around the Edges: The Supreme Court’s Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913 (2012).

⁵⁴³ *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

⁵⁴⁴ *Id.*

⁵⁴⁵ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 239-40.

⁵⁴⁶ 217 U.S. 349 (1910).

⁵⁴⁷ *Id.* at 357.

⁵⁴⁸ *Id.*

*cadena*⁵⁴⁹ together with a fine and the imposition of various civil penalties.⁵⁵⁰ “The punishment of fifteen years’ imprisonment,” the man argued before the Supreme Court, “was a cruel and unusual punishment” under the Bill of Rights for the Philippine Islands.⁵⁵¹

In its ruling, the Court in *Weems* found that the corporal punishment imposed violated the bar on “cruel and unusual punishments.”⁵⁵² The law in the Philippine Islands, and the *cadena* sentence imposed under it, the Court stated, “excite wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime.”⁵⁵³ As the Court explained: “In a sense the law in controversy seems to be independent of degrees. One may be an offender against it, as we have seen, though he gain nothing and injure nobody.”⁵⁵⁴ The Court described the harsh conditions of confinement under a *cadena* sentence,⁵⁵⁵ and emphasized the punish-

⁵⁴⁹ “The punishment of *cadena temporal*,” the Supreme Court explained, “is from twelve years and one day to twenty years,” to be served in “penal institutions.” *Id.* at 364. The only two degrees of punishment higher in scale than *cadena temporal* were *cadena perpetua* and death. *Id.* at 363-64. Those sentenced to either *cadena temporal* or *cadena perpetua* were required by law to “labor for the benefit of the state.” *Id.* at 364. According to the law, prisoners so sentenced “shall always carry a chain at the ankle, hanging from the wrists”; “be employed at hard and painful labor”; and “shall receive no assistance whatsoever from without the institution.” *Id.*

⁵⁵⁰ *Id.* at 358, 363. The “accessory penalties imposed” under *cadena* were noted to be (1) “civil interdiction”; (2) “perpetual absolute disqualification”; and (3) “subjection to surveillance during life.” *Id.* at 364. Civil interdiction deprived the person punished of, among other things, the rights of parental authority and the right to dispose of one’s own property. *Id.* The penalty of perpetual absolute disqualification “is the deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to public office, the disqualification to acquire honors, etc., and the loss of retirement pay, etc.” *Id.* at 364-65. The surveillance rule obligated the person punished to fix his domicile, not being allowed to change it without the knowledge and permission of the authority in charge of the surveillance. *Id.* at 364.

⁵⁵¹ *Id.* at 359, 365.

⁵⁵² *Id.* at 377, 381-82.

⁵⁵³ *Id.* at 365.

⁵⁵⁴ *Id.*; see also *id.* (“The minimum term of imprisonment is twelve years, and that, therefore, must be imposed for ‘perverting the truth’ in a single item of a public record, though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it.”).

⁵⁵⁵ The Supreme Court described a *cadena* sentence this way:

Let us confine it to the minimum degree of the law, for it is with the law that we are most concerned. Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the ‘authority immediately in charge of his surveillance,’ and

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ment's disproportionality—one that encompassed “hard” and “painful labor” in chains—in relation to the crime.⁵⁵⁶ “Such penalties for such offenses,” the Court ruled, “amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.”⁵⁵⁷

In *Weems*, the Supreme Court described the prohibition against “cruel and unusual punishment” as “fundamental law,” saying the provision of the Philippine Bill of Rights “was taken from the Constitution of the United States, and must have the same meaning.”⁵⁵⁸ While the proportionality principle had been articulated by Beccaria almost a century and a half before, the U.S. Supreme Court felt it was treading on new ground. “What constitutes a cruel and unusual punishment,” the Court ruled, “has not been exactly decided.”⁵⁵⁹ “It has been said,” the Court noted, citing a Massachusetts case,⁵⁶⁰ “that ordinarily the terms imply something inhuman and barbarous—torture and the like.”⁵⁶¹ Yet, the Court acknowledged, reflective of the record, the Eighth Amendment itself “received very little debate in Congress.”⁵⁶²

The Congressional Register, in fact, revealed only two comments from the First Congress. Representative William Loughton Smith of South Carolina “objected to the words ‘nor cruel and unusual punishment,’ the import of them being too indefinite.” And a Representative Samuel Livermore, of New Hampshire, also opposed the language, though his comments were more extensive.⁵⁶³ The record reflects that Mr. Livermore opposed the adoption of the clause by arguing as follows:

The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms “excessive bail”? Who are to be the judges? What is understood by “excessive fines”? It lays with the

without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain.

Id. at 366-67.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.* at 367-68.

⁵⁵⁹ *Id.* at 368.

⁵⁶⁰ *McDonald v. Commonwealth*, 53 N.E. 874 (Mass. 1899).

⁵⁶¹ *Weems*, 217 U.S. at 368.

⁵⁶² *Id.*

⁵⁶³ *Id.* at 368-69; BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 186.

court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.⁵⁶⁴

In spite of this token opposition, which expressly contemplated that corporal and capital punishments might one day be considered unlawful by the judiciary, the Eighth Amendment's text was agreed to by a "considerable majority."⁵⁶⁵

The Court in *Weems* first cited its 1866 decision in *Pervear v. Massachusetts*,⁵⁶⁶ where "it was decided that the clause did not apply to state but to national legislation." But in that case, the Court in *Weems* ruled, "we went further, and said that we perceive nothing excessive, or cruel, or unusual in a fine of \$50 and imprisonment at hard labor in the house of correction for three months, which was imposed for keeping and maintaining, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors."⁵⁶⁷ The Court in *Weems*, in clarifying that point, also noted that in *Wilkerson v. Utah*⁵⁶⁸ "[t]he court pointed out that death was [a] *usual punishment* for murder, that it prevailed in the [Utah] territory for many years, and was inflicted by shooting; also that the mode of execution was usual under military law."⁵⁶⁹ The Court in *Weems* also commented on its prior decisions in *In re Kemmler*⁵⁷⁰ and *O'Neil v. Vermont*.⁵⁷¹

⁵⁶⁴ *Weems*, 217 U.S. at 369; 1 ANNALS OF CONG. 754 (1789); see also Steven R. Manley, *The Constitution, the Punishment of Death, and Misguided "Originalism,"* 1999 L. REV. MICH. ST. U. DET. C.L. 913, 930 n.76 ("While Representative Livermore's remarks are cited here for the proposition that the application of the Eighth Amendment has always been a matter of controversy, they also, of course, nicely illustrate for those bent on applying the Eighth Amendment according to contemporaneous perceptions that someone in government in 1791 saw the Cruel and Unusual Punishments Clause as implicating capital, as well as corporal, punishments. Livermore seemed also to envision the operation of the Clause evolving over time.") (citations omitted; italics in original).

⁵⁶⁵ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 369.

⁵⁶⁶ 5 Wall. 475, 18 L. Ed. 608 (1866).

⁵⁶⁷ *Weems*, 217 U.S. at 369.

⁵⁶⁸ 99 U.S. 130 (1878).

⁵⁶⁹ *Weems*, 217 U.S. at 369-70 (italics added). "It was hence concluded," the Court wrote, speaking of the firing squad, "that it was not forbidden by the Constitution of the United States." *Id.* at 370.

⁵⁷⁰ 136 U.S. 436 (1890). The Court in *Weems* emphasized that language in *In re Kemmler* "was not meant ... to give a comprehensive definition of cruel and unusual punishment, but only to explain the application of the provision to the punishment of death." *Weems*, 217 U.S. at 370-71. As the Court stated: "In other words, to describe what might make the punishment of death cruel and unusual, though of itself it is not so. It was found as a fact by the state court that death by electricity was more humane than death by hanging." *Id.* at 371.

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After combing through its precedents, the Court in *Weems* turned to the history of the Cruel and Unusual Punishments Clause, citing a legal commentator who spoke of the “cruel and unusual” words in the U.S. Constitution in their “constitutional sense.”⁵⁷² “The law writers are indefinite,” the Court noted, citing Joseph Story and Thomas Cooley. Story—in his influential treatise on the Constitution—wrote that the provision “is an exact transcript of a clause in the Bill of Rights framed at the revolution of 1688.”⁵⁷³ The Eighth Amendment, he explained, “would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.”⁵⁷⁴ Cooley—in his treatise, *Constitutional Limitations*—had expressed the “difficulty of determining precisely what is meant by cruel and unusual punishment,” but concluded, by contrast, that it was probable that “any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual, in a constitutional sense.”⁵⁷⁵

Both Patrick Henry and James Wilson, the Court in *Weems* recounted, had “referred to the tyranny of the Stuarts,” with Henry and others insisting on the adoption of a Bill of Rights to guard against government excesses.⁵⁷⁶ The Court in *Weems* also focused on the views of those who pushed for the ratification of a U.S. Bill of Rights. “Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse,” the Court noted in *Weems*.⁵⁷⁷ “But surely,” the Court emphasized, “they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts.”⁵⁷⁸ As the Court explained:

⁵⁷¹ 144 U.S. 323 (1892); see also *Weems*, 217 U.S. at 371 (discussing *O’Neil v. Vermont*).

⁵⁷² The Court in *Weems* also discussed a number of state court decisions interpreting the prohibition against cruel and unusual punishments. See *Weems*, 217 U.S. at 375-80 (citing *State v. Driver*, 78 N.C. 423 (1878); *Hobbs v. State*, 32 N.E. 1019 (Ind. 1893); *Commonwealth v. Wyatt*, 6 Rand. 694 (Va. 1828); *Foote v. State*, 59 Md. 264 (1882); *Aldridge v. Commonwealth*, 2 Va. Cas. 447 (1824); *Territory v. Ketchum*, 65 P. 169 (N.M. 1901)).

⁵⁷³ *Weems*, 217 U.S. at 371.

⁵⁷⁴ *Id.* (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1903 (5th ed. 1905)). Story explained that it was “adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts.”

Id.

⁵⁷⁵ *Id.* at 375. Cooley also doubted if the right existed “to establish the whipping post and the pillory in states where they were never recognized as instruments of punishment, or in states whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments.” *Id.* at 378 (citing THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 472 (7th ed. 1903)).

⁵⁷⁶ *Id.* at 372.

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.*

Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history.⁵⁷⁹

The Court in *Weems* thus rejected an approach to the Eighth Amendment focused solely on an eighteenth-century historical analysis.⁵⁸⁰ Indeed, the Court specifically noted that the writings of legal scholars established the “progressive” nature of the prohibition against cruel and unusual punishments.⁵⁸¹ As the Court wrote of the Cruel and Unusual Punishments Clause, foreshadowing what would, in 1958, morph into its oft-cited “evolving standards of decency” test: “The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁵⁸² Although the Court in *Weems* conceded that legislatures generally possessed the power “to define crimes and their punishment,”⁵⁸³ it emphasized that such legislative

⁵⁷⁹ *Id.* at 372-73.

⁵⁸⁰ In particular, the Court in *Weems* ruled as follows:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’ The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

Id. at 373.

⁵⁸¹ *Id.* at 378.

⁵⁸² *Id.* (citing *Ex parte Wilson*, 114 U.S. 417, 427 (1885); *Mackin v. United States*, 117 U.S. 348, 350 (1886)).

⁵⁸³ *Id.* at 378.

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power had its limits—and that it was up to the judiciary to set those limits.⁵⁸⁴

Ultimately, the Court in *Weems* determined that the law of the Philippine Islands “has no fellow in American legislation”⁵⁸⁵ and that the sentence imposed under it was “cruel and unusual.”⁵⁸⁶ As the Court spoke of the harsh *cadena* sentence:

Let us remember that it has come to us from a government of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a Federal enactment, and not taken from an alien source.⁵⁸⁷

“[E]ven if the minimum penalty of *cadena temporal* had been imposed,” the Court ruled in *Weems*, “it would have been repugnant to the Bill of Rights.”⁵⁸⁸ In short, a non-lethal corporal punishment was found to be unconstitutional.

ii. The “Evolving Standards of Decency” Test

It was in 1958, in *Trop v. Dulles*,⁵⁸⁹ that the U.S. Supreme Court first articulated its “evolving standards of decency” test.⁵⁹⁰ In that case, the petitioner—a native-born American—was a private in the U.S. Army, serving

⁵⁸⁴ As the Court in *Weems* explained:

We concede the [legislative] power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account,—that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist, and punish the crimes of men according to their forms and frequency.

Id. at 378-79.

⁵⁸⁵ *Id.* at 377.

⁵⁸⁶ *Id.* at 381.

⁵⁸⁷ *Id.* at 377.

⁵⁸⁸ *Id.* at 382.

⁵⁸⁹ 356 U.S. 86 (1958).

⁵⁹⁰ *Id.* at 101.

in French Morocco.⁵⁹¹ He had escaped from a stockade at Casablanca, where he had been confined after being disciplined, and had been picked up the next day walking along a road towards Rabat.⁵⁹² After being court-martialed, the petitioner was convicted of desertion and was sentenced to three years at hard labor, forfeiture of pay, and a dishonorable discharge.⁵⁹³ When the petitioner later applied for a passport, he was denied on the ground that under the Nationality Act of 1940, he had lost his U.S. citizenship by virtue of his conviction for wartime desertion, thus rendering him stateless.⁵⁹⁴ The issue in *Trop* was thus whether such a forfeiture of citizenship comported with the Constitution.⁵⁹⁵

In *Trop*, the Supreme Court held that the petitioner's loss of citizenship was an unlawful deprivation. "Citizenship," the Court ruled, "is not a license that expires upon misbehavior."⁵⁹⁶ "[T]he deprivation of citizenship," it held, "is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be."⁵⁹⁷ After concluding that the denationalization statute was a penal law that served to punish,⁵⁹⁸ the Court turned its attention to whether denationalization itself "is a cruel and unusual punishment within the meaning of the Eighth Amendment."⁵⁹⁹ The Court framed the issue as follows: "Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."⁶⁰⁰

Before answering that question, the Supreme Court tersely put the death penalty itself into a separate box. "At the outset," the Court wrote, "let us put to one side the death penalty as an index of the constitutional limit on punishment."⁶⁰¹ As the Court explained: "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted*, it cannot be said to violate the constitutional concept of cruelty."⁶⁰² "But it is equally plain," the Court clarified, "that the existence of the death penalty is not a license to the Government

⁵⁹¹ *Id.* at 87.

⁵⁹² *Id.*

⁵⁹³ *Id.* at 88.

⁵⁹⁴ *Id.* at 87-88, 90.

⁵⁹⁵ *Id.* at 87-88, 99.

⁵⁹⁶ *Id.* at 92.

⁵⁹⁷ *Id.* at 92-93.

⁵⁹⁸ *Id.* at 97-99.

⁵⁹⁹ *Id.* at 99.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

⁶⁰² *Id.* (italics added).

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to devise any punishment short of death within the limit of its imagination.”⁶⁰³ The Court did acknowledge, at the outset, that “[t]he exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”⁶⁰⁴

The Supreme Court in *Trop* began its discussion of the Eighth Amendment issue before it by emphasizing the origins of the “cruel and unusual punishments” prohibition. “The phrase in our Constitution,” it noted, “was taken directly from the English Declaration of Rights,” noting that the principle it represents “can be traced back to the Magna Carta.”⁶⁰⁵ “The basic concept under the Eighth Amendment,” the Court emphasized, “is nothing less than the dignity of man.”⁶⁰⁶ “While the State has the power to punish,” it wrote, “the Amendment stands to assure that this power be exercised within the limits of civilized standards.”⁶⁰⁷ “Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime,” the Court ruled, “but any technique outside the bounds of these traditional penalties is constitutionally suspect.”⁶⁰⁸

The Court then set forth its famous test. The Eighth Amendment’s words “are not precise” and the scope of the “cruel and unusual punishments” prohibition, the Court held, “is not static”; instead, the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶⁰⁹ In analyzing the Eighth Amendment, the Court in *Trop* also stated that “[w]hether the word ‘unusual’ has any qualitative meaning different from ‘cruel’ is not clear.”⁶¹⁰ As the Court explained: “On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn.”⁶¹¹ After citing *Weems*, *O’Neil*, and *Wilkerson*, the Court emphasized: “These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word ‘unusual.’”⁶¹² “If the word ‘unusual’ is to have any meaning apart from the word ‘cruel,’” the Court wrote, “the meaning should be the ordinary one, signifying something different from that which is generally done.”⁶¹³

⁶⁰³ *Id.*

⁶⁰⁴ *Id.* The Supreme Court stated, however, that “the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice.” *Id.* at 100.

⁶⁰⁵ *Id.* at 100.

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* at 100-101.

⁶¹⁰ *Id.* at 100 n.32.

⁶¹¹ *Id.*

⁶¹² *Id.* (citations omitted).

⁶¹³ *Id.*

On the specific issue before it, the Court in *Trop* ruled that denationalization “certainly” constituted a “cruel and unusual punishment.”⁶¹⁴ Denationalization, it emphasized in its 1958 decision, “was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day.”⁶¹⁵ Holding that “use of denationalization as a punishment is barred by the Eighth Amendment,” the Court reasoned as follows: “There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”⁶¹⁶ “The punishment,” it wrote, “strips the citizen of his status in the national and international political community.”⁶¹⁷ “In short,” it concluded, “the expatriate has lost the right to have rights.”⁶¹⁸

The concept of human dignity was at the core of the Court’s ruling in *Trop*. In invalidating the punitive expatriation of persons with no other nationality, the Court’s plurality opinion, written by Chief Justice Earl Warren, adopted this reasoning of a judge below: “In my faith, the American concept of man’s dignity does not comport with making even those we would punish completely ‘stateless’—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all.”⁶¹⁹ “This punishment,” Chief Justice Warren wrote, “is offensive to cardinal principles for which the Constitution stands.”⁶²⁰ The punishment, he explained, “subjects the individual to a fate of ever-increasing fear and distress.”⁶²¹ “The threat” itself, Warren added, referring to the “disastrous consequences” of banishment, “makes the punishment obnoxious.”⁶²² In holding that the Eighth Amendment barred the punishment of denationalization, the Court—in striking down another *non-lethal* punish-

⁶¹⁴ *Id.* at 100 n.32.

⁶¹⁵ *Id.*

⁶¹⁶ *Id.* at 101.

⁶¹⁷ *Id.* As the Court explained of the plight of anyone deprived of citizenship: “His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation.” *Id.*

⁶¹⁸ *Id.* at 102.

⁶¹⁹ *Id.* at 101 n.33 (citing 239 F.2d 527, 530).

⁶²⁰ *Id.* at 102.

⁶²¹ *Id.*

⁶²² *Id.* “The civilized nations of the world are in virtual unanimity,” Warren wrote, “that statelessness is not to be imposed as punishment for crime.” *Id.* As Warren explained: “The United Nations’ survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.” *Id.* at 103.

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ment—also emphasized that the Constitution had to be read as written and in light of its principles.⁶²³

iii. Existing Eighth Amendment Case Law

The U.S. Supreme Court has decided scores of Eighth Amendment cases. Those cases fall into three broad categories, corresponding with the three clauses that make up the Eighth Amendment itself. While the Bail and Excessive Fines Clauses forbid “excessive” governmental action, the Cruel and Unusual Punishments Clause forbids punishments that are “cruel and unusual.”⁶²⁴ Central to the Supreme Court’s interpretation of all three clauses is the concept of proportionality, that is, whether the fine or bail amount is excessive or whether the punishment is disproportionate in relation to the crime.⁶²⁵ For example, the Court—using the Eighth Amendment—has declared the death penalty’s use unconstitutional for those who rob or kidnap but do not kill the victim.⁶²⁶ Still, the Court—through the years—has permitted the death penalty in other contexts, with the Court continually hearing stay of execution requests.⁶²⁷

The U.S. Supreme Court’s Eighth Amendment jurisprudence as regards executions has, in actuality, been all over the map. In 1971, in *McGautha v. California*,⁶²⁸ the Supreme Court held that a defendant’s due process rights were not infringed by the death penalty’s imposition without governing standards.⁶²⁹ “In light of history, experience, and the present limitations of human knowledge,” the Court ruled, “we find it quite im-

⁶²³ *Id.* at 103-104. The Court put it this way:

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.

Id.

⁶²⁴ U.S. CONST., amend. VIII.

⁶²⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001); *United States v. Bajakajian*, 524 U.S. 321, 336-37 & n.10 (1998); *United States v. Salerno*, 481 U.S. 739, 752 (1987).

⁶²⁶ *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam); *Hooks v. Georgia*, 433 U.S. 917 (1977) (per curiam).

⁶²⁷ *Tison v. Arizona*, 481 U.S. 137 (1987); *Baze v. Rees*, 553 U.S. 35 (2008).

⁶²⁸ 402 U.S. 183 (1971).

⁶²⁹ *Id.* at 196.

possible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”⁶³⁰ In 1972, in its landmark ruling in *Furman v. Georgia*,⁶³¹ however, the Court struck down capital punishment laws as unconstitutional under the Eighth and Fourteenth Amendments.⁶³² While each Justice wrote separately, there were five votes to strike down then-existing death penalty laws as they were being applied.⁶³³

The Court’s current stance, by contrast, derives from its 1976 decision in *Gregg v. Georgia*,⁶³⁴ in which the Court upheld death penalty laws purporting to guide juror discretion.⁶³⁵ In that case, the Court stated: “We now hold that the punishment of death does not invariably violate the Constitution.”⁶³⁶ Essentially, in interpreting the Cruel and Unusual Punishments Clause, the Court bowed to public sentiment as expressed by state legislation. In the wake of *Furman*, 35 states had reenacted death penalty laws.⁶³⁷ “Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment,” the Court ruled in *Gregg*, “it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.”⁶³⁸ Still, the Court set new limits. In other cases decided in 1976, the Court explicitly refused to uphold statutes calling for *mandatory* death sentences—the very kind of sentences that had been used in the Founding Fathers’ time.⁶³⁹

In the twentieth century, the U.S. Supreme Court has heard multiple Eighth and Fourteenth Amendment challenges to executions and various aspects of capital punishment laws.⁶⁴⁰ And since its 1958 decision in *Trop v. Dulles*,⁶⁴¹ the “evolving standards of decency” test has remained the governing legal standard for assessing cruel and unusual punishment claims.⁶⁴² In evaluating such claims, the Supreme Court thus continues to

⁶³⁰ *Id.* at 207.

⁶³¹ 408 U.S. 238 (1972).

⁶³² *Id.*

⁶³³ *Id.*

⁶³⁴ 428 U.S. 153 (1976).

⁶³⁵ *Id.* at 197-98, 206-207.

⁶³⁶ *Id.* at 169.

⁶³⁷ Alice Lynd, *Unfair and Can’t Be Fixed: The Machinery of Death in Ohio*, 44 U. TOL. L. REV. 1, 10 (2012).

⁶³⁸ *Gregg*, 428 U.S. at 179. In fact, the American debate over the morality and utility of capital punishment dates back even further, to America’s founding period. BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 66-161.

⁶³⁹ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁶⁴⁰ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 236-41.

⁶⁴¹ 356 U.S. 86 (1958).

⁶⁴² *E.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). A torrent of scholarship has been written about the Supreme Court’s “evolving standards of decency” test, much of it focused on capital punishment. *E.g.*, Jennifer Carter, *Capital Punishment: A Struggle to*

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repeat that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶⁴³

In applying that test, the Court primarily examines legislative enactments and jury verdicts.⁶⁴⁴ But it also looks to state practices on a collective scale, taking notice of how often states use a particular punishment.⁶⁴⁵ The

Satisfy Evolving Standards of Decency – Reviewing the Debate in the United States and Canada, 17 SW. J. INT’L L. 237 (2011); Kathryn Klimko, *Evolving Standards as a Judicial Mandate: Necessary or Superfluous?*, 34 HARV. J.L. & PUB. POL’Y 785 (2011); Michael D. Dean, *State Legislation and the “Evolving Standards of Decency”*: *Flaws in the Constitutional Review of Death Penalty Statutes*, 35 U. DAYTON L. REV. 379 (2010); Jacob Lemon-Strauss, *The States Are Right: Arguing for the Continued Use of State Legislatures in Forming a National Consensus for the Evolving Standards of Decency*, 47 AM. CRIM. L. REV. 1319 (2010); Corinna Barrett Lain, *Lessons Learned from the Evolution of “Evolving Standards,”* 4 CHARLESTON L. REV. 661 (2010); Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365 (2009); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008); Dwight Aarons, *The Abolitionist’s Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 PIERCE L. REV. 441 (2008); William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of “Death-Is-Different” Jurisprudence*, 28 PACE L. REV. 15 (2007); Dr. Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court’s Capital Jurisprudence Post-Roper*, 45 J. CATH. LEGAL STUD. 561 (2006); William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355 (2005); Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311 (2005); Erwin Chemerinsky, *Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201 (2004); Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265 (2004); Denise LeBoeuf, *Evolving Standards of Decency: Cracks in the Foundation*, 29 U. DAYTON L. REV. 293 (2004); Mark Alan Ozimek, *The Case for a More Workable Standard in Death Penalty Jurisprudence: Atkins v. Virginia and Categorical Exemptions under the Imprudent “Evolving Standards of Decency” Doctrine*, 34 U. TOL. L. REV. 651 (2003); Candace Ada Mueller, *The Evolving Standards in Prison Condition Cases: An Analysis of Wilson v. Seiter and the Cruel and Unusual Punishments Clause*, 13 B.C. THIRD WORLD L.J. 155 (1993); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards of the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

⁶⁴³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁶⁴⁴ *Graham*, 130 S. Ct. at 222 (“The Court first considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against the sentencing practice at issue.”); *Enmund v. Florida*, 458 U.S. 782, 788-89 (1982) (“[T]he Court [in *Coker v. Georgia*, 433 U.S. 584 (1977)] looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter. We proceed to analyze the punishment at issue in this case in a similar manner.”).

⁶⁴⁵ *Graham*, 130 S. Ct. at 223 (“Actual sentencing practices are an important part of the Court’s inquiry into consensus.”).

Court considers the outcomes of jury verdicts even though it allows death penalty sentences to be imposed by more conviction-prone, “death-qualified” juries.⁶⁴⁶ Such “death-qualified juries” are stripped in advance of death penalty opponents, thus skewing the Court’s Eighth Amendment calculus.⁶⁴⁷ Obviously, juries stripped of death penalty opponents will return more death sentences, especially since—because of the American tradition of juror unanimity—all it takes is one hold-out juror to reject a death sentence.⁶⁴⁸ Although the Court says juries are supposed to express the “conscience of the community,”⁶⁴⁹ it is hard to see how they can when death penalty opponents are systematically excluded from sitting in judgment in the first place.⁶⁵⁰

In practice, the Supreme Court—in applying its “evolving standards” test—routinely does a nose-count of jurisdictions either prohibiting or permitting a specific punishment, also looking at how often it is inflicted in practice.⁶⁵¹ For instance, the paucity of executions for juvenile offenders was a significant factor in the Court declaring such executions unconstitutional in 2005.⁶⁵² This tallying—of states and numbers—is expressly done for the purpose of identifying whether or not a “national consensus” has been reached as to a societal practice.⁶⁵³ The Court has also, at times, looked at the “consistency of the direction of change.”⁶⁵⁴ The Eighth Amendment, of course, nowhere mentions “evolving standards” or “con-

⁶⁴⁶ Margaret C. Stevenson, Bette L. Bottoms & Shari S. S. Diamond, *Jurors’ Discussions of a Defendant’s History of Child Abuse and Alcohol Abuse in Capital Sentencing Deliberations*, 16 PSYCHOL. PUB. POL’Y & L. 1, 8 (2010) (citing studies).

⁶⁴⁷ See *Wainwright v. Witt*, 470 U.S. 1039 (1985); *Lockhart v. McCree*, 476 U.S. 162 (1986); *Uttecht v. Brown*, 551 U.S. 1 (2007).

⁶⁴⁸ Donald M. Houser, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH. & LEE L. REV. 349, 356 (2007).

⁶⁴⁹ *Witherspoon v. State of Illinois*, 391 U.S. 510, 519 (1968).

⁶⁵⁰ See *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring):

Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a “death qualified jury” is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction.

⁶⁵¹ See, e.g., Calabresi & Agudo, *supra* note 83, at 13 (“The Supreme Court in recent years has frequently done nose counts or tallies of state law to determine the evolving meaning of the Eighth Amendment prohibition on cruel and unusual punishments.”).

⁶⁵² *Roper*, 543 U.S. at 564-65 (“[E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past ten years, only three have done so: Oklahoma, Texas, and Virginia.”).

⁶⁵³ *Graham*, 130 S. Ct. at 2022 (“The Court first considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against the sentencing practice at issue.”) (citation omitted).

⁶⁵⁴ *Atkins*, 536 U.S. at 315 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”).

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sensus,” let alone trending public sentiment, but speaks of prohibiting “cruel and unusual punishments.”⁶⁵⁵

In resolving disputes over the meaning of the “cruel and unusual punishments” language, the Justices also focus, at times, on their own “independent judgment”⁶⁵⁶ or the Eighth Amendment’s general wording.⁶⁵⁷ This makes sense because judicial independence is a firmly rooted American value and life-tenured judges should be the ones to determine what the Constitution means. The power of judicial review has been established since *Marbury v. Madison*,⁶⁵⁸ and the U.S. Supreme Court has repeatedly asserted its judicial independence.⁶⁵⁹ That America’s judiciary is independent—and must remain so—is thus a settled principle of law.⁶⁶⁰ As St. George Tucker, a professor of law at the College of William and Mary, wrote in the 1790s: “The American Constitutions appear to be the first in which this absolute Independence of the Judiciary has been carried into full Effect.”⁶⁶¹

⁶⁵⁵ U.S. CONST., amend. VIII.

⁶⁵⁶ *Graham*, 130 S. Ct. at 222 (“the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution”).

⁶⁵⁷ *Weems v. United States*, 217 U.S. 349, 373 (1910) (“general language should not, therefore, be necessarily confined to the form that evil had theretofore taken”); Joy M. Donham, *Third Strike or Merely a Foul Tip?: The Gross Disproportionality of Lockyer v. Andrade*, 38 AKRON L. REV. 369, 395 n.166 (2005) (“[s]ince the Eighth Amendment contains such general language, the Framers intended future generations to define the clause”); compare J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1236 (1989) (“Judge Richard Posner has observed, while reading the general language of the cruel and unusual punishments clause of the eighth amendment, that ‘[p]articuliarizing not only would have been time-consuming but might have sparked debilitating controversy, since it is easier to agree on generalities than on particulars.’”) (quoting RICHARD POSNER, LAW AND LITERATURE 226-27 (1988)).

⁶⁵⁸ 1 Cranch 137, 5 U.S. 137 (1803).

⁶⁵⁹ *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001); *Miller v. French*, 530 U.S. 327, 350 (2000); *Weiss v. United States*, 510 U.S. 163, 179-80 (1994); *Commodity Futures Trading Com’n v. Schor*, 478 U.S. 833, 848 (1986); *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60 (1982); *United States v. Will*, 449 U.S. 200, 217-21 (1980); *Bradley v. Fisher*, 80 U.S. 335, 356 (1871); *Greely v. Thompson*, 51 U.S. 225, 240 (1850).

⁶⁶⁰ NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 123-24 (1793) (“To prevent both legislative and executive abuses, the intervention of an independent judiciary is of no small importance. To the judges, the ministers of this power it belongs to interpret all acts of the legislature, agreeably to the true principles of the constitution, as founded in the principles of natural law, and to make an impartial application, in all cases of disputed right. By this provision, the rights and interests of the legislative and executive branches will be kept in union with the rights and interests of the individual citizens.”); *id.* at 160 (“The abilities, integrity, and independence of the Judges, is a shield, both to the rulers, and to the people. They give a steady nerve to the mild energy of government, and ultimate security to private rights.”).

⁶⁶¹ St. George Tucker Notebook, Law Lectures (circa 1790s), Book 5, p. 201, available at <https://digitalarchive.wm.edu/handle/10288/13361>; see also St. George Tucker Notebook, Law Lectures (circa 1790s), Book 7, p. 55, available at

Because it is *living* judges who must decide what is *cruel* and what is *unusual*, it is only logical that present-day Supreme Court Justices should have the final say on what those terms mean. After all, the Founding Fathers are no longer around to do so, and the words they chose—“cruel and unusual”—suggest a modern-day approach in any event. The concept of cruelty is in the eye of the beholder, and one cannot possibly determine if a punishment is unusual without performing some evaluation of modern-day practice. The Constitution itself certainly nowhere states that once traditional, eighteenth-century punishments are to remain forever constitutional. On the contrary, the death penalty is nowhere exempted from the Cruel and Unusual Punishments Clause, meaning that if current Justices find capital punishment both cruel and unusual, it must be declared unconstitutional.

Some Justices, attempting to divine the “original meaning” of the phrase “cruel and unusual punishments,” continue to myopically examine eighteenth-century practices in death penalty cases.⁶⁶² That emphasis on founding era mores is misguided. In America’s pre-Fourteenth Amendment era, slavery was still being used, and in the founders’ time harsh corporal punishments, such as branding, ear cropping, and the pillory, were also considered acceptable practices.⁶⁶³ To compare eighteenth-century society with twenty-first century America is to compare apples and oranges. Brutal corporal punishments, often associated with slavery, have long been abandoned and de-legitimized by America’s criminal justice system,⁶⁶⁴ so other

<https://digitalarchive.wm.edu/handle/10288/13361> (“The separation of the judiciary power from the legislative, & executive, & the perfect independence of the former, in every respect, seems to have been an Object of the particular Attention of the people of America, not only in their federal, but in their State Constitutions.”).

⁶⁶² *Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring) (“The Eighth Amendment’s prohibition on the ‘inflict[ion]’ of ‘cruel and unusual punishments’ must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights.”); *id.* at 97 (“By the late 18th century, the more violent modes of execution had ‘dwindled away,’ and would for that reason have been ‘unusual’ in the sense that they were no longer ‘regularly or customarily employed.’”) (citations omitted).

⁶⁶³ The U.S. Constitution itself forbade Congress to restrict the slave trade prior to 1808. U.S. CONST., art. I, § 9. Branding, ear cropping, the pillory, and public whipping were also still in use when the Bill of Rights was ratified. Ryan J. Huschka, *Sorry for the Jackass Sentence: A Critical Analysis of the Constitutionality of Contemporary Shaming Punishments*, 54 U. KAN. L. REV. 803, 823 (2006) (“The most convincing evidence that shaming was acceptable at the time of the Bill of Rights is that the punishment of standing in the pillory and whipping were not abolished until 1839, well after the adoption of the Bill of Rights.”); Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 U. COLO. L. REV. 667, 679 (2004) (“Most American colonies in the eighteenth century subjected vagrants to the same array of barbaric punishments as did the English at that time: whipping, branding, ear-cropping, commitment to the house of corrections, imprisonment, and even enslavement.”).

⁶⁶⁴ See, e.g., *State v. Nipper*, 81 S.E. 164, 165 (N.C. 1914) (“In view of the enlightenment of this age, and the progress which has been made in prison discipline, we have no difficulty in coming to the conclusion that corporal punishment by flogging is not reasonable

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eighteenth-century criminal justice practices—as some Justices point to—should not be considered a legitimate benchmark with which to judge current practices.⁶⁶⁵

In attempting to justify executions, some Supreme Court Justices cite language in the U.S. Constitution that contemplates the death penalty's use. For example, Justice Scalia points to the Fifth Amendment, which requires a presentment or indictment of a grand jury to hold a person to answer for a “capital” crime, and which also prohibits deprivation of “life” without due process of law.⁶⁶⁶ “This,” Scalia contends, “clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the ‘cruel and unusual punishments’ prohibited by the Eighth Amendment.”⁶⁶⁷ Originalist Justices have likewise cited the Fifth Amendment's Double Jeopardy Clause, prohibiting being “twice put in jeopardy of life” for the same offense,⁶⁶⁸ as well as the Fourteenth Amendment, which enjoins the taking of “life” without due process of law.⁶⁶⁹

Such reasoning is fallacious, however. To begin with, America's founders themselves would be appalled by the idea that a society should never advance or evolve or be forever locked into past practices.⁶⁷⁰ In *Sketches of the Principles of Government*, published in 1793, Nathaniel Chipman—who cited Beccaria's *On Crimes and Punishments* in his own treatise—wrote that punishment serves “the end of preventing crimes, and securing obedience to the laws” and that a society's limits on the right of punishment are not “permanent and invariable.”⁶⁷¹ “The right of punishing is, in practice,” Chipman wrote, “frequently limited, only by the will of the legislature, and the decisions of the judiciary.”⁶⁷² Chipman expressly emphasized that “the penalties, which, in one state of society and manners, are adequate to that end, may, in a different state, be wholly inadequate.”⁶⁷³

and cannot be sustained. That which degrades and imbrutes a man cannot be either necessary or reasonable.”).

⁶⁶⁵ *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 337, 340–348 (2002) (Scalia, J., dissenting; joined by Chief Justice Rehnquist and Justice Thomas) (“The Court makes no pretense that execution of the mildly mentally retarded would have been considered ‘cruel and unusual’ in 1791.”).

⁶⁶⁶ *Baze v. Rees*, 553 U.S. 35, 88 (2008) (Scalia, J., concurring).

⁶⁶⁷ *Callins v. Collins*, 510 U.S. 1141, 1141 (1994) (Scalia, J., concurring).

⁶⁶⁸ *Furman v. Georgia*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting).

⁶⁶⁹ *Roberts v. Louisiana*, 428 U.S. 325, 350–51 (1976) (White, J., dissenting).

⁶⁷⁰ The common law itself has always been subject to change. *See Jacob v. State*, 22 Tenn. 493, 1842 WL 1984 *13 (Tenn. 1842) (“The common law of a country will, therefore, never be entirely stationary, but will be modified, and extended by analogy, construction and custom, so as to embrace new relations, springing up from time to time, from an amelioration or change of society.”).

⁶⁷¹ NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 193, 196 (1793).

⁶⁷² *Id.* at 196.

⁶⁷³ *Id.* at 197.

In *A General Abridgement and Digest of American Law*, published in 1824, Massachusetts lawyer Nathan Dane—who also cited Beccaria—likewise included a section on punishment.⁶⁷⁴ In his treatise, Dane described the way in which punishments had already changed from colonial days to his book’s publication date. “When our country was first settled,” Dane wrote, “there were many more capital and infamous punishments, than exist at present; probably because our ancestors came from a country in which these were very numerous.”⁶⁷⁵ After discussing the laws of England, Massachusetts and elsewhere, Dane noted that “punishments have been varied in other respects; the pillory, gallows, whipping, and branding,” he emphasized “have almost disappeared,” with “solitary imprisonment, and hard labour in state prisons, having been generally substituted in their place.”⁶⁷⁶ By an act of Congress dated May 16, 1812, Dane wrote “[c]orporal punishment in the army of the United States, was abolished,”⁶⁷⁷ with Dane referencing the “Act of Massachusetts of February 27, 1813,” substituting—in the court’s discretion—corporal punishments for terms of imprisonment and hard labor.⁶⁷⁸

Indeed, what goes unstated by originalists is that the Fifth and Fourteenth Amendments were plainly intended to *protect* rights, with both constitutional amendments adopted when the death penalty itself was still the usual punishment for various crimes. Ironically, Justice Scalia—a self-described “faint-hearted originalist”—concedes that no modern-day judge would any longer countenance public lashing or the branding of criminals’ hands.⁶⁷⁹ In effect, while Justice Scalia insists that the punishment of death

⁶⁷⁴ 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAWS 636-37 (1824).

⁶⁷⁵ *Id.* at 637.

⁶⁷⁶ *Id.*

⁶⁷⁷ *Id.* (citing Act of Congress, May 16, 1812, sec. 7).

⁶⁷⁸ *Id.* (citing Act of Massachusetts, Feb. 27, 1813). The Massachusetts law read as follows:

That whenever any person or persons, shall or may be prosecuted to conviction, before the Supreme Judicial Court of this Commonwealth, for any crime or misdemeanour which is now by law punishable by whipping, standing in the pillory, sitting on the gallows, or imprisonment in the common gaol of the county, such court may at their discretion, in cases not already provided for, in lieu of the punishments aforesaid, order and sentence such convict or convicts to suffer solitary imprisonment for a term not exceeding three months, and to be confined to hard labour for a term not exceeding five years, according to the aggravation of the offense.

Id.

⁶⁷⁹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (“What if some state should enact a new law providing public lashing, or branding on the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge.”); *id.* (“I am confident that public flogging and handbranding would not be sustained by our courts, and any espousal of

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should be allowed to persist⁶⁸⁰ in American law,⁶⁸¹ he and other well-known originalists—including Robert Bork—have freely acknowledged that harsh corporal punishments would be unconstitutional.⁶⁸²

Simple rhetorical questions forcefully rebut their entire line of argument: if American judges can no longer allow an offender's "limb" to be lopped off, how can U.S. judges continue to allow an offenders "life" to be taken? And if it is "cruel and unusual" to cut off an offender's ear or to brand his hand, how can it not be "cruel and unusual" to take that offender's life? The fact that early Americans may not have viewed all executions as cruel does not mean that today's judges must reach the same conclusion. And the fact that capital punishment was not unusual in the founding era says nothing about its present status. Things have changed; the law itself has changed. A usual punishment, after all, can become unusual over time. Indeed, even a traditional punishment, if administered in an arbitrary and discriminatory manner, may become unusual in light of intervening legal principles, such as due process and equal protection.

originalism as a practical theory of exegesis must somehow come to terms with that reality."); *id.* at 865 ("I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.").

⁶⁸⁰ In the first decade of the twenty-first century, executions took place every year in the United States. The annual number of executions in that decade ranged from a high of 85 executions in 2000 to a low of 37 executions in 2008. *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER (Oct. 28, 2011).

⁶⁸¹ See Craig Haney & Richard L. Wiener, *Death Is Different: An Editorial Introduction to the Theme Issue*, 10 PSYCHOL. PUB. POL'Y & L. 373, 375 (2004) ("[S]upporters of the death penalty view the legal issues in very different terms. Some, like Supreme Court Justice Antonin Scalia, complain loudly about the 'death is different jurisprudence' that they believe complicates capital punishment law unnecessarily, delays a capital defendant's final reckoning far too long, and renders this area of law unpredictable."); Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1063 n.127 (2006) ("Justices Scalia and Thomas are consistently opposed to procedural protections in death penalty cases").

⁶⁸² See Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 823 n.173 (1994) ("Though the Court has not explicitly addressed the eighth amendment status of punishments such as whipping and limb amputation, even conservative scholars such as Judge Robert Bork have indicated their belief that such punishments would be unconstitutional."); MAY IT PLEASE THE COURT 234 (Peter Irons & Stephanie Guitton eds., 1993) (during an oral argument before the Supreme Court, Justice Potter Stewart asked the following question: "What if a state said for the most heinous kind of first-degree murders we are going to inflict breaking a man on the wheel and then disemboweling him while he is still alive and then burning him up: What would you say to that?" Bork's response: "I would say that that practice is so out of step with modern morality and modern jurisprudence that the state cannot return to it. That kind of torture was precisely what the framers thought they were outlawing when they wrote the cruel and unusual punishments clause.").

iv. Excessive and Disproportionate Punishments

The Supreme Court, in a series of cases, has already ruled that the Cruel and Unusual Punishments Clause bars *some* executions as excessive and disproportionate punishments.⁶⁸³ In 1977, in *Coker v. Georgia*,⁶⁸⁴ the Court held that the death penalty could not be imposed for the non-homicidal rape of an adult woman.⁶⁸⁵ That ruling was later extended to non-homicidal child rape in *Kennedy v. Louisiana*, a 2008 case.⁶⁸⁶ In 1982 in *Enmund v. Florida*,⁶⁸⁷ the Court likewise held that the death penalty may not be imposed upon a person “who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.”⁶⁸⁸ In 1986, in *Ford v. Wainwright*,⁶⁸⁹ the Court further held that insane offenders could not be executed.⁶⁹⁰

And the list goes on, with the Supreme Court already having addressed both juvenile offenders and those with profound intellectual disabilities. In 1998, in *Thompson v. Oklahoma*,⁶⁹¹ the Court held that America’s evolving standards no longer permitted the execution any offender under the age of sixteen.⁶⁹² Then, in 2005, in *Roper v. Simmons*,⁶⁹³ the Court—overruling a 1989 decision, *Stanford v. Kentucky*⁶⁹⁴—outlawed the execution of juvenile offenders altogether, ruling that no offender under the

⁶⁸³ Aside from restricting the death penalty’s use for certain categories of offenders and crimes, the Supreme Court has also held that the Eighth Amendment safeguards the way in which capital trials are conducted. *E.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (plurality opinion) (states must give narrow and precise definition to the “aggravating” factors that can result in a death sentence); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (in any capital prosecution a defendant has wide latitude to raise as a “mitigating” factor “any aspect” of his or her “character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”); *accord* *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Johnson v. Texas*, 509 U.S. 350, 359-62 (1993).

⁶⁸⁴ 433 U.S. 584 (1977) (plurality opinion).

⁶⁸⁵ *Id.* at 592.

⁶⁸⁶ 554 U.S. 407 (2008).

⁶⁸⁷ 458 U.S. 782 (1982).

⁶⁸⁸ *Id.* at 797. *Compare* *Tison v. Arizona*, 481 U.S. 137, 137-38, 157-58 (1987) (allowing the death penalty for certain accomplices who neither killed nor intended to kill so long as the accomplices are major participants in the underlying felony and act with reckless disregard for life).

⁶⁸⁹ 477 U.S. 399 (1986).

⁶⁹⁰ *Id.* at 410.

⁶⁹¹ 487 U.S. 815 (1988).

⁶⁹² *Id.* at 818-38.

⁶⁹³ 543 U.S. 551 (2005).

⁶⁹⁴ 492 U.S. 361 (1989). *Stanford v. Kentucky* had determined that the Eighth Amendment permitted the execution of offenders over the age of fifteen but under the age of eighteen. *Id.* at 370-71.

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age of eighteen could be put to death.⁶⁹⁵ In the Court's 2002 decision in *Atkins v. Virginia*,⁶⁹⁶ the Court—employing similar logic—overruled another 1989 case, *Penry v. Lynaugh*,⁶⁹⁷ and held that the mentally retarded could no longer be executed either.⁶⁹⁸ Although a significant number of death row inmates have severe mental illnesses,⁶⁹⁹ the Court has yet to take up whether those inmates may be executed in a manner consistent with the U.S. Constitution.⁷⁰⁰

Justices of the U.S. Supreme Court—as well as lower-court judges—have already indicated that the infliction of various *corporal* punishments would run afoul of the Eighth Amendment.⁷⁰¹ Thus, members of the Court have expressed the view that the following forms of torturous or degrading punishments are unconstitutional: the rack and the thumbscrew,⁷⁰² *cadena*

⁶⁹⁵ *Roper*, 543 U.S. at 577. The Supreme Court has yet to restrict the death penalty's imposition for the severely mentally ill, though many people believe it should do so. Lyn Entzerth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 AKRON L. REV. 529, 530-31 (2011) ("The American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill all endorse a death penalty exemption for the severely mentally ill.").

⁶⁹⁶ 536 U.S. 304 (2002).

⁶⁹⁷ 492 U.S. 302 (1989).

⁶⁹⁸ *Atkins*, 536 U.S. at 318.

⁶⁹⁹ Lyn Suzanne Entzerth, *The Illusion of Sanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, 76 TENN. L. REV. 641, 641 n.5 (2009).

⁷⁰⁰ See Jean Mattimoe, *The Death Penalty and the Mentally Ill: A Selected and Annotated Bibliography*, 5 THE CRIT: CRITICAL STUD. J. 1 (2012) ("[L]egal scholars have speculated that the Court may eventually create another categorical exemption for the severely mentally ill").

⁷⁰¹ Early American jurists, by contrast, did not classify corporal punishments as unconstitutional. *In re Turner*, 1 Ware 83, 24 F. Cas. 340, 340-42 (D.C. Me. 1825) (rejecting a claim that it was a cruel and unusual punishment to chain a black seaman to the deck of a vessel); *Commonwealth v. Wyatt*, 6 Rand. 694, 1828 WL 860 (Va. Ga. 1828) (a Virginia act making those convicted of gaming subject to stripes was held not to constitute a cruel and unusual punishment under state law; "The punishment of offenses by stripes is certainly odious, but cannot be said to be *unusual*." (italics in original)).

⁷⁰² *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) ("The Eighth Amendment is addressed to always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew."); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting) ("Racks and thumbscrews, well-known instruments for inflicting pain, were not in use because they were regarded as cruel punishments."); *Furman v. Georgia*, 408 U.S. 238, 330 (1972) (Marshall, J., concurring) ("[T]here are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them—e.g., use of the rack, the thumbscrew, or other mont. Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it."); *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) (describing "the rack and thumbscrew" as "historic punishments that were cruel and unusual"); *Twining v. State of New Jersey*, 211 U.S. 78, 125 (1908) (Harlan, J.,

temporal,⁷⁰³ whipping,⁷⁰⁴ the hitching post,⁷⁰⁵ branding⁷⁰⁶ and ear cropping.⁷⁰⁷ In other instances, lower courts have ruled—often as a matter of constitutional law—that corporal punishments, including ones previously allowed by law, can no longer be employed.⁷⁰⁸

By contrast, the Court has upheld the constitutionality of sentences imposing fines, imprisonment, and hard labor.⁷⁰⁹ For example, in *Lockyer v. Andrade*,⁷¹⁰ the Court upheld a California decision affirming two consecutive terms of 25 years to life in prison for a “third strike” conviction involving the theft of nine videotapes worth \$84.70 from a Kmart store.⁷¹¹ In that regard, it is important to remember that the Thirteenth Amendment, which prohibits slavery and involuntary servitude, excluded “duly

dissenting) (describing “the thumbscrew” and “the rack” as “cruel or unusual punishments”); *see also* *Ingraham v. Wright*, 430 U.S. 651, 691 (1977) (White, J., dissenting) (describing the use of “a thumbscrew” as an act of “torture”).

⁷⁰³ *Weems v. United States*, 217 U.S. 349, 382 (1910) (“even if the minimum penalty of *cadena temporal* had been imposed, it would have been repugnant to the Bill of Rights”). The punishment of *cadena temporal* was a Filipino practice requiring inmates—who would be confined for years at a time—to “always carry a chain at the ankle, hanging from the wrists” and be “employed at hard and painful labor.” *Id.* at 363–64. Under the law in question, “prison bars and chains” would be removed only after twelve years. *Id.* at 366. Although the Court in *Weems* was interpreting the Philippine Bill of Rights, which prohibited the infliction of cruel and unusual punishment, the Court emphasized that the provision “was taken from the Constitution of the United States, and must have the same meaning.” *Id.* at 367.

⁷⁰⁴ *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.).

⁷⁰⁵ *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (“We agree with the Court of Appeals that the attachment of Hope to the hitching post under the circumstances alleged in this case violated the Eighth Amendment.”).

⁷⁰⁶ *Furman*, 408 U.S. at 283 n.28 (Brennan, J., concurring) (“No one, of course, now contends that the reference in the Fifth Amendment to ‘jeopardy of ... limb’ provides perpetual constitutional sanction for such corporal punishments as branding and earcropping, which were common punishments when the Bill of Rights was adopted.”).

⁷⁰⁷ *Id.*

⁷⁰⁸ *James v. Commonwealth*, 1825 WL 1899 (Pa. 1825) (“We all agree in this, that this customary ancient punishment for ducking scolds, was never adopted, and therefore, is not the common law of Pennsylvania.”); *State v. Cawood*, 2 Stew. 360, 1830 WL 516 *3 (Ala. 1830) (“It cannot be, as insisted by the counsel for the plaintiffs in error, that a conspiracy is not an offense known to our laws; because the villanous judgment which was awarded to it by the common law, would not be tolerated by our constitution, as being, if not cruel, at least unusual.”; “This doctrine in the case of a common scold, underwent a very able discussion in the Supreme Court of Pennsylvania a few years ago, in which Judge Duncan delivered a very learned opinion, deciding, that though the ducking stool could no longer be used, fine and imprisonment might be substituted.”).

⁷⁰⁹ *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866).

⁷¹⁰ 538 U.S. 63 (2003).

⁷¹¹ *Id.* at 66, 70; *see also Id.* at 77 (“The gross disproportionality principle reserves a constitutional violation for only the extraordinary case. In applying this principle for § 2254(d)(1) purposes, it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade’s sentence of two consecutive terms of 25 years to life in prison.”).

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convicted” convicts from its provisions when sentences are imposed “as a punishment for crime.”⁷¹² Fines, imprisonment and prison labor have long been considered traditional criminal-law sanctions.⁷¹³ While a criminal justice system can certainly employ more than one “usual” punishment at the same time, the question the U.S. Supreme Court must confront as regards executions is this: have executions, in practice, become too “unusual” to be constitutional any longer?

Under the Eighth Amendment, the Supreme Court—using proportionality principles—has already struck down “excessive” fines as unconstitutional.⁷¹⁴ A leading case is *United States v. Bajakajian*,⁷¹⁵ where a defendant pleaded guilty to failing to report exported currency after he was charged with trying to board an international flight while carrying \$347,144. A federal district court in California determined that the entire amount was subject to forfeiture under the applicable federal statute, but that a full forfeiture would be grossly disproportional to the offense and would violate the Excessive Fines Clause. The district court judge thus ordered that defendant forfeit only \$15,000, a decision the government appealed. After the Ninth Circuit affirmed, the U.S. Supreme Court did too, holding in its 5-4 opinion that the forfeiture of the entire amount of money would violate the Eighth Amendment’s Excessive Fines Clause.⁷¹⁶

Writing for the Court, Justice Clarence Thomas held that a forfeiture is a “fine” and that “full forfeiture of respondent’s currency would be grossly disproportional to the gravity of his offense.”⁷¹⁷ In coming to that conclusion, Justice Thomas focused on the text and history of the Eighth Amendment. After noting that the Court “has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause,” Justice

⁷¹² U.S. CONST., amend. XIII.

⁷¹³ *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (“[b]ail, fines, and punishment traditionally have been associated with the criminal process”); *Weems v. United States*, 217 U.S. 349, 350 (1910) (“we perceive nothing excessive, or cruel, or unusual in a fine of \$50 and imprisonment at hard labor in the house of correction for three months”) (citing *Pervear v. Massachusetts*, 72 U.S. 475 (1866)).

⁷¹⁴ *Hudson v. United States*, 522 U.S. 93, 103 (1997) (“The Eighth Amendment protects against excessive civil fines, including forfeitures.”); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (“A civil forfeiture may violate the Eighth Amendment’s proscription against excessive fines.”). Compare *United States v. Ursery*, 518 U.S. 267, 287 (1996) (forfeitures “are subject to review for excessiveness under the Eighth Amendment”) and *United States v. Bajakajian*, 524 U.S. 321, 331 n.6 (1998) (“a modern statutory forfeiture is a ‘fine’ for Eighth Amendment purposes if it constitutes punishment even in part”) with *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (holding that the Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties); see also *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001) (“[t]he Due Process Clause of its own force also prohibits the States from imposing ‘grossly excessive’ punishments on tortfeasors”) (citations omitted).

⁷¹⁵ 524 U.S. 321 (1998).

⁷¹⁶ *Id.* at 324-26.

⁷¹⁷ *Id.* at 324, 334.

Thomas explained that a “fine” is “a payment to a sovereign as punishment for some offense”⁷¹⁸ and that “excessive” means “surpassing the usual, the proper, or a normal measure of proportion.”⁷¹⁹ “The text and history of the Excessive Fines Clause,” Thomas wrote, “demonstrate the centrality of proportionality to the excessiveness inquiry,” though Thomas emphasized that “they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be ‘excessive.’”⁷²⁰

Justice Thomas—in focusing on proportionality in that context—concluded that neither the text nor the history of the Eighth Amendment answered the constitutional question of “just how proportional to a criminal offense a fine must be.”⁷²¹ “[T]he text of the Excessive Fines Clause does not answer it,” “[n]or does its history,” Thomas ruled.⁷²² “The Clause,” Thomas noted, “was little discussed in the First Congress and the debates over the ratification of the Bill of Rights.”⁷²³ After noting that the Excessive Fines Clause “was taken verbatim from the English Bill of Rights of 1689,” Thomas emphasized that none of the English sources suggest “how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive.”⁷²⁴

“The touchstone of the constitutional inquiry under the Excessive Fines Clause,” Thomas opined in *Bajakajian*, “is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”⁷²⁵ Finding the text and history of the Eighth Amendment unhelpful, Justice Thomas concluded, “We must therefore rely on other considerations in deriving a constitution-

⁷¹⁸ *Id.* at 327-28 (citing *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

⁷¹⁹ *Id.* at 335 (citing 1 N. Webster, *American Dictionary of the English Language* (1828) (defining excessive as “beyond the common measure or proportion”) & S. Johnson, *A Dictionary of the English Language* 680 (4th ed. 1773 (defining excessive as “[b]eyond the common proportion”))).

⁷²⁰ *Id.* at 335.

⁷²¹ *Id.*

⁷²² *Id.*

⁷²³ *Id.*

⁷²⁴ *Id.* at 335-36 (citing *Earl of Devonshire’s Case*, 11 State Tr. 1367, 1372 (H.L.1689) & *Magna Charta*, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.)). The Earl of Devonshire was fined £30,000 by the Court of King’s Bench during the reign of James II, a sum that was found to be “excessive and exorbitant,” “against *Magna Charta*, the common Right of the Subject, and the Law of the Land,” and “a great Violation of the Privileges of the Peers of *England*.” 1 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS, FROM THE RESTORATION IN 1660, TO THE PRESENT TIME 362-64 (1742) (italics in original).

⁷²⁵ *Id.* at 334 (citing *Austin v. United States*, 509 U.S. 602, 622-23 (1993) & *Alexander v. United States*, 509 U.S. 544, 559 (1993)). The question of whether a fine is constitutionally excessive, Justice Thomas wrote, was entitled to “de novo” review, without any deference to the district court’s determination of excessiveness. *Id.* at 336 n.10.

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al excessiveness standard.”⁷²⁶ He found two such considerations “particularly relevant.”⁷²⁷ “The first, which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause,” Thomas wrote, “is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature.”⁷²⁸ “The second,” Thomas added, “is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.”⁷²⁹ Finding both principles “counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense,” the majority in *Bajakajian* adopted the standard of “gross disproportionality,” the standard also articulated in the Court’s Cruel and Unusual Punishments Clause precedents.⁷³⁰

In applying the “gross disproportionality” standard, words that do not appear in the Constitution itself, the Court in *Bajakajian* found that a forfeiture of \$357,144 would violate the Excessive Fines Clause.⁷³¹ Justice Thomas emphasized that the crime “was solely a reporting offense”; that the offense was “unrelated to any other illegal activities”; that the money “was the proceeds of legal activity and was to be used to repay a lawful debt”; that “it was perfectly legal” for the defendant to “possess the \$357,144 in cash and to remove it from the United States”; and that the defendant “is not a money launderer, a drug trafficker, or a tax evader.”⁷³² Justice Thomas also specifically rejected the contention that “the proportionality of full forfeiture is demonstrated by the fact that the First Congress enacted statutes requiring full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods’ value.”⁷³³ Thomas pointed out that the type of forfeiture imposed by these early customs statutes was civil or remedial, not criminal, in nature.⁷³⁴

In *Bajakajian*, Justice Kennedy’s dissent expressed outrage, finding that the Constitution “does not forbid forfeiture of all of the smuggled or unreported cash.”⁷³⁵ “For the first time in its history,” the dissent began,

⁷²⁶ *Id.* at 336.

⁷²⁷ *Id.*

⁷²⁸ *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983) (“Reviewing courts ... should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes”) & *Gore v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment, ... these are peculiarly questions of legislative policy”)).

⁷²⁹ *Id.*

⁷³⁰ *Id.* Justice Thomas noted that the “gross disproportionality” standard had been developed by the Court in its Cruel and Unusual Punishments Clause precedents. *Id.*

⁷³¹ *Id.* at 337; *see also id.* at 337 n.11 (“The only question before this Court is whether the full forfeiture of respondent’s \$357,144 ... is constitutional under the Excessive Fines Clause. We hold that it is not.”).

⁷³² *Id.* at 337-38 & n.13.

⁷³³ *Id.* at 340.

⁷³⁴ *Id.* at 340-43.

⁷³⁵ *Id.* at 354 (Kennedy, J., dissenting).

“the Court strikes down a fine as excessive under the Eighth Amendment.”⁷³⁶ As Justice Kennedy wrote: “The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court’s test, its decision portends serious disruption of a vast range of statutory fines.”⁷³⁷ The dissent agreed with the gross disproportionality test, but took issue with the Court’s application of it. “This test would be a proper way to apply the Clause,” Kennedy wrote, “if only the majority were faithful in applying it.”⁷³⁸ “The majority’s assessment of the crime accords no deference, let alone substantial deference, to the judgment of Congress,” Kennedy emphasized.⁷³⁹

Apart from the Excessive Fines Clause arena, judges have already concluded that certain *modes* of execution—among them, burning at the stake,⁷⁴⁰ crucifixion,⁷⁴¹ and breaking on the wheel⁷⁴²—would be excessive and thus unconstitutional.⁷⁴³ As Justice William Douglas, for example, wrote in his concurrence in *Robinson v. California*: “The historic punishments that were cruel and unusual included ‘burning at the stake, crucifixion, breaking on the wheel,’ quartering, the rack and the thumbscrew, and in some circumstances even solitary confinement.”⁷⁴⁴

In 1857, the Supreme Court of Ohio—after noting that, under English law, drawing and quartering, being dragged to the place of execution, or being disemboweled or burned alive, were sometimes “[s]uperadded”—also opined as follows: “These cruel devices for purposes of torture in inflicting the punishment of death for what was deemed the more atrocious crimes, as well as the ignominious inventions, as the punishment for minor offenses, by mutilation or dismemberment, such as the cutting off the hand or the ears, or fixing a lasting stigma by slitting the nostrils, or branding

⁷³⁶ *Id.* at 344.

⁷³⁷ *Id.*

⁷³⁸ *Id.* at 348.

⁷³⁹ *Id.*

⁷⁴⁰ *In re Kemmler*, 136 U.S. 435, 446-47 (1890) (describing burning at the stake as “cruel and unusual”); *Twining v. State of New Jersey*, 211 U.S. 78, 125 (1908) (Harlan, J., dissenting) (describing “burning at the stake” as a “cruel or unusual” punishment); *accord Furman*, 408 U.S. at 385 (Burger, C.J., dissenting) (writing that capital punishment “is not a punishment such as burning at the stake that everyone would ineffectually find to be repugnant to all civilized standards”).

⁷⁴¹ *In re Kemmler*, 136 U.S. at 446-47 (describing crucifixion as “cruel and unusual”).

⁷⁴² *Id.* (describing breaking on the wheel as “cruel and unusual”).

⁷⁴³ In a dissent in one case, Justice John Paul Stevens—joined by Justice Blackmun—noted that “[t]o that list we might have added the garrotte, a device for execution by strangulation developed—and abandoned—centuries ago in Spain.” *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 658 n.10 (1992) (Stevens, J., dissenting).

⁷⁴⁴ *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) (citations omitted).

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the hand or cheek, or by the use of the pillory, the stocks, or the ducking stool, etc., have been wholly discarded in this country, as relics of barbarism, inconsistent with the humane and enlightened spirit of the age.”⁷⁴⁵

In contrast, the U.S. Supreme Court has upheld, or declined to hear legal challenges to, the following methods of execution: hanging⁷⁴⁶ and firing squads,⁷⁴⁷ electrocution⁷⁴⁸ and lethal gas,⁷⁴⁹ and lethal injection.⁷⁵⁰ In *Baze v. Rees*⁷⁵¹—the 2008 case upholding Kentucky’s lethal injection protocol—the Supreme Court first explained that “[a] total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States.”⁷⁵² The Court’s opinion, written by Chief Justice John Roberts, and joined by Justices Kennedy and Alito, then opined: “Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”⁷⁵³ “Through-

⁷⁴⁵ *Robbins v. State*, 1857 WL 73 *20 (Ohio 1857).

⁷⁴⁶ *Campbell v. Wood*, 511 U.S. 1119 (1994) (denying a petition for writ of certiorari). By the middle of the nineteenth century, hanging was the “nearly universal form of execution” in the United States. *Baze v. Rees*, 553 U.S. 35, 41 (2008).

⁷⁴⁷ *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1879).

⁷⁴⁸ *In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). In 1888, New York became the first state to authorize electrocution as a method of execution. *Glass v. Louisiana*, 471 U.S. 1080, 1082 & n.4 (1985) (Brennan, J., dissenting from denial of cert.). Electrocution remained a predominant mode of execution for nearly a century. *Baze*, 553 U.S. at 42. *Compare* *Bryan v. Moore*, 528 U.S. 1133 (2000) (mem.) (dismissing a challenge to Florida’s electric chair as moot after the Florida legislature adopted lethal injection as an alternative means of execution).

⁷⁴⁹ *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 653 (1992) (refusing to consider on the merits a claim that execution by lethal gas is cruel and unusual in violation of the Eighth Amendment). The Supreme Court also refused to hear a challenge to the constitutionality of lethal gas in an earlier case. *Gray v. Lucas*, 463 U.S. 1237, 1239-40 (1983) (Burger, C.J., concurring in denial of cert.) (rejecting an Eighth Amendment challenge to lethal gas because the petitioner had not shown that “the pain and terror resulting from death by cyanide gas is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment right”) (quoting *Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir. 1983)).

⁷⁵⁰ *Baze v. Rees*, 553 U.S. 35 (2008).

⁷⁵¹ 553 U.S. 35 (2008).

⁷⁵² *Baze*, 553 U.S. at 42.

⁷⁵³ *Id.* at 47. The constitutionality of certain methods of execution has been attacked in the past, with at least some judges inclined to find particular methods of execution unconstitutional. *Gomez v. United States Dist. Court for the Northern Dist. of Cal.*, 503 U.S. 653, 654, 656-57 (1992) (Stevens, J., dissenting) (arguing that lethal gas is unconstitutional because of “the availability of more humane and less violent methods of execution”); *Glass v. Louisiana*, 471 U.S. 1080, 1093 (1985) (Brennan, J., dissenting from denial of cert.) (arguing that electrocution is unconstitutional); *Campbell v. Wood*, 114 S. Ct. 2125, 2126 (1994) (Blackmun, J., dissenting) (“The public condemnation of hanging is overwhelming. Not only have 46 of the 48 States that once regularly imposed hanging

out our history,” Chief Justice Roberts wrote, “whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge.”⁷⁵⁴

On the other hand, the U.S. Supreme Court has also squarely held that prisoners must be *protected* from harm, even *prospective* harm. For example, in *Nelson v. Campbell*,⁷⁵⁵ the Supreme Court held that a federal civil rights statute, 42 U.S.C. § 1983, was an appropriate vehicle for a prisoner to challenge Alabama’s proposed use of a “cut-down” procedure to access his compromised veins during a lethal injection procedure.⁷⁵⁶ In that case, the petitioner, David Nelson, alleged three days before his scheduled execution that the use of the “cut-down” procedure would violate the Eighth Amendment.⁷⁵⁷ Petitioner had been informed by the warden that prison personnel would cut a 0.5-inch incision into petitioner’s arm and catheterize a vein 24 hours before the scheduled execution.⁷⁵⁸ Writing for the Court and allowing the section 1983 claim to proceed, Justice Sandra Day O’Connor concluded that “the gravamen of petitioner’s entire claim is that use of the cut-down would be *gratuitous*.”⁷⁵⁹ “Merely labeling something as part of an execution procedure,” O’Connor emphasized, “is insufficient to insulate it from a § 1983 attack.”⁷⁶⁰

abandoned the practice, but many state legislatures rejected the practice because it was perceived as inhumane and barbaric, precisely the concern that lies at the core of the Eighth Amendment.”); *Campbell v. Wood*, 18 F.3d 662, 715 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting) (arguing that hanging violates the Eighth Amendment because it involves risks of pain and mutilation not presented by lethal injection).

⁷⁵⁴ *Baze*, 553 U.S. at 62. “Our society,” Roberts added, however, “has nonetheless steadily moved to more humane methods of carrying out capital punishment.” “The firing squad, hanging, the electric chair, and the gas chamber,” he wrote, “have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection.” *Id.* From a constitutional perspective, Chief Justice Roberts explained his position as follows: “The broad framework of the Eighth Amendment has accommodated this progress toward more humane methods of execution, and our approval of a particular method in the past has not precluded legislatures from taking the steps they deem appropriate, in light of new developments, to ensure humane capital punishment.” *Id.* “The fact that society has moved to progressively more humane methods of executions,” Roberts emphasized, “does not suggest that capital punishment itself no longer serves valid purposes; we would not have supposed that the case for capital punishment was stronger when it was imposed predominantly by hanging or electrocution.” *Id.* at 62 n.7.

⁷⁵⁵ 541 U.S. 637 (2004).

⁷⁵⁶ *Id.* at 639.

⁷⁵⁷ *Id.*

⁷⁵⁸ *Id.* at 641.

⁷⁵⁹ *Id.* at 645 (italics in original). As Justice O’Connor noted: “petitioner has been careful throughout these proceedings, in his complaint and at oral argument, to assert that the cut-down, as well as the warden’s refusal to provide reliable information regarding the cut-down protocol, are *wholly unnecessary* to gaining venous access.” *Id.* at 645-46 (italics in original).

⁷⁶⁰ *Id.* at 645.

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Indeed, in *Farmer v. Brennan*,⁷⁶¹ the Supreme Court ruled that a prison official may be held liable for “deliberate indifference” to a prisoner’s Eighth Amendment right to protection against violence while in custody if the official “knows that [the] inmate face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”⁷⁶² “The Amendment,” the Court ruled, “also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates.”⁷⁶³ In yet another case, dealing with a prisoner’s exposure to second-hand smoke, the Court also opined that a prisoner’s Eighth Amendment claim could be based upon “future harm” to health.⁷⁶⁴

IV. THE TRANSFORMATION OF AMERICAN LAW

A. The Fourteenth Amendment’s Ratification

The U.S. Bill of Rights originally applied only to the federal government.⁷⁶⁵ In the landmark case of *Barron v. Baltimore*,⁷⁶⁶ the Supreme Court—in an opinion written by Chief Justice John Marshall—held that “[t]hese amendments contain no expression indicating an intention to apply them to the state governments.”⁷⁶⁷ The Fifth Amendment, he wrote in that case, “must be understood as restraining the power of the general government, not as applicable to the states.”⁷⁶⁸ As Marshall wrote: “The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.”⁷⁶⁹

⁷⁶¹ 511 U.S. 825 (1994).

⁷⁶² *Id.* at 828, 834, 847; *accord* *Ortiz v. Jordan*, 131 S. Ct. 884, 892-93 (2011) (citing that language).

⁷⁶³ *Farmer*, 511 U.S. at 832.

⁷⁶⁴ *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (emphasis added) (citation omitted); *see also id.* (“It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”); *Washington v. Medical Staff T.C.S.O.*, No. A-06-CA-130-SS, 2006 WL 2052848 *5 (W.D. Tex., July 21, 2006) (“The Eighth Amendment embraces the treatment of medical conditions which may cause future health problems.”).

⁷⁶⁵ *Barker v. People*, 3 Cow 686 (N.Y. Sup. Ct. 1824) (“The provision in the constitution of the United States, that cruel and unusual punishments shall not be inflicted, is a restriction [sic] upon the government of the United States only; and not upon the government of any state.”).

⁷⁶⁶ 32 U.S. 243 (1833).

⁷⁶⁷ *Id.* at 250.

⁷⁶⁸ *Id.* at 247.

⁷⁶⁹ *Id.*; *see also* *Fox v. Ohio*, 46 U.S. 410, 434 (1847) (“The prohibition alluded to as contained in the amendments to the constitution ... were not designed as limits upon the

The Fourteenth Amendment, however, made the Eighth Amendment and other individual rights applicable to the states.⁷⁷⁰ The Fourteenth Amendment, ratified in 1868, begins: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”⁷⁷¹ Coming on the heels of the Thirteenth Amendment, which abolished slavery,⁷⁷² the Fourteenth Amendment gave American citizens—including all newly emancipated citizens—additional legal rights. As the remainder of Section 1 of the Fourteenth Amendment reads: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁷⁷³

The Fourteenth Amendment’s ratification thus changed the nature of the U.S. Constitution in profound ways.⁷⁷⁴ First, the Fourteenth Amendment changed the federal-state power structure. States—and not just the federal government—were now explicitly prohibited from taking certain actions, and the federal courts themselves became more powerful instruments of justice. Second, the Fourteenth Amendment—as determined in a series of subsequent cases—applied various provisions of the U.S. Bill of Rights to the states through the Supreme Court’s “selective incorporation” doctrine.⁷⁷⁵ This legal development gave federal judges the power to protect the rights of American citizens from abusive state power—even power traditionally exercised by Southern states to repress minorities.⁷⁷⁶ Finally, along with replicating the Fifth Amendment’s “due process of law” provision, the Fourteenth Amendment went further, realizing the Declaration of

State governments in reference to their own citizens. They are exclusively restrictions upon federal power ...”).

⁷⁷⁰ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001) (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States.”).

⁷⁷¹ U.S. CONST., amend. XIV, § 1.

⁷⁷² U.S. CONST., amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁷⁷³ U.S. CONST., amend. XIV, § 1.

⁷⁷⁴ U.S. CONST., amend. XIV (ratified July 9, 1868).

⁷⁷⁵ *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3034 (2010).

⁷⁷⁶ Akhil Reed Amar, *America’s Lived Constitution*, 20 *YALE L.J.* 1734, 1779 (2011) (“Reconstruction Republicans used Section 1 of that Amendment to take special aim at the abusive practices of state governments of the Deep South, a region that had lagged behind national norms of liberty and equality. Even if a particular state legislature consistently authorized a given punishment, that consistency hardly made the practice “usual” when judged by the national baseline envisioned by the Fourteenth Amendment.”).

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Independence's emphasis on equality by putting in place the new guarantee to "equal protection of the laws."⁷⁷⁷

Unfortunately, it took considerable time before the U.S. Supreme Court actually recognized the Fourteenth Amendment's legal significance. Indeed, after the Fourteenth Amendment's ratification, the Supreme Court reaffirmed its *Barron v. Baltimore* holding for many decades.⁷⁷⁸ In almost open defiance of the Fourteenth Amendment's plain language, the Court—in case after case—simply stuck to its prior ruling in *Barron*.⁷⁷⁹ This happened in spite of the fact that the Fourteenth Amendment's advocates plainly intended to make the U.S. Bill of Rights—including the Eighth Amendment—applicable to the states.⁷⁸⁰ Indeed, legislators pushing for the adoption of the Fourteenth Amendment explicitly said so during the debates while it was being considered.⁷⁸¹

Not until the early 1960s—over ninety years after the Fourteenth Amendment's ratification—was the Eighth Amendment finally held applicable to the states.⁷⁸² In *Robinson v. California*,⁷⁸³ the 1962 case that did it,

⁷⁷⁷ U.S. CONST., amend. XIV (ratified July 9, 1868).

⁷⁷⁸ In 1866, the Supreme Court considered the question of whether fines and penalties imposed under a Massachusetts law were "excessive, cruel, and unusual." *Pervear v. Commonwealth*, 72 U.S. 475, 479 (1866). Adhering to its holding in *Barron v. Baltimore*, the Court in *Pervear* held that the Eighth Amendment "does not apply to State but to National legislation." *Id.* at 479-80. In affirming the judgment of the Massachusetts court, the Court in *Pervear* also emphasized in dicta: "[I]t appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this." *Id.* at 480. A "NOTE" to the *Pervear* case also notes that "[t]he same order was made in four other cases, presenting, as the Chief Justice said, 'substantially the same facts and governed by the same principles.'" *Id.* (citations omitted).

⁷⁷⁹ *Twitchell v. Commonwealth of Pennsylvania*, 74 U.S. 321, 322, 325-26 (1868) (citing *Barron v. Baltimore* with approval and rejecting the habeas corpus petition of a man convicted of murder and sentenced to be hanged in spite of his argument based on the Fifth and Sixth Amendments); *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The first amendment to the Constitution ... like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.") (citing *Barron*); see also *Eilenbecker v. District Court of Plymouth County*, 134 U.S. 31, 34 (1890) ("[T]he first eight articles of the amendments to the constitution have reference to powers exercised by the government of the United States, and not to those of the states. The limitation, therefore, of articles 5, 6, and 8 of those amendments, being intended exclusively to apply to the powers exercised by the government of the United States, whether by congress or by the judiciary, and not as limitations upon the powers of the states, can have no application to the present case ... ") (citations omitted).

⁷⁸⁰ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 204-205.

⁷⁸¹ *Id.* Senator Jacob Howard of Michigan also explained in 1866 that the Fourteenth Amendment "prohibits the hanging of a black man for a crime for which the white man is not to be hanged." *Id.* at 206.

⁷⁸² *Graham v. Florida*, 130 S. Ct. 2011, 2018 (2010) (citing *Robinson v. California*, 370 U.S. 660 (1962) for the proposition that the Eighth Amendment was made applicable to the states by the Due Process Clause of the Fourteenth Amendment).

the Supreme Court held that punishing someone for being addicted to narcotics is a cruel and unusual punishment.⁷⁸⁴ In spite of the Fourteenth Amendment's recognition of citizens' "privileges or immunities," the right to be free from "cruel and unusual punishments" was not grounded—as might have been expected—in the Fourteenth Amendment's Privileges or Immunities Clause. Instead, as it had done with other individual rights in the Bill of Rights, the Supreme Court used the Fourteenth Amendment's Due Process Clause to make the Eighth Amendment applicable to the states. Since 1962, the Supreme Court has routinely reaffirmed that the Fourteenth Amendment's Due Process Clause made the Eighth Amendment applicable to the states.⁷⁸⁵

B. Due Process and Equal Protection

The Fifth Amendment's Due Process Clause unequivocally prohibits the federal government from depriving an individual "of life, liberty, or property, without due process of law."⁷⁸⁶ States are similarly restricted by the Fourteenth Amendment, which provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."⁷⁸⁷ Initially, the U.S. Supreme Court looked to what procedures were required by the English common law to define the contours of due process.⁷⁸⁸ For example, in *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁷⁸⁹ the Supreme Court analyzed the types of procedures the framers of the Fifth Amendment would have considered "the law of the land."⁷⁹⁰ That "frozen-in-history" approach, however, soon gave way to a non-historical methodology, with the Court asking instead—as two scholars put it—"whether a given procedure was essential to *modern*—as opposed to 17th century— notions of fairness."⁷⁹¹

⁷⁸³ 370 U.S. 660 (1962).

⁷⁸⁴ *Id.* at 666-68.

⁷⁸⁵ *E.g.*, *Graham*, 130 S. Ct. at 2018; *Baze*, 553 U.S. at 47.

⁷⁸⁶ U.S. CONST., amend. V. The Fifth Amendment also states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* The right to be free from bodily harm has long been noted in the American legal system, and dates back to the time of the Founding Fathers. See ZEPHANIAH SWIFT, A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 179 (1795);

Not only is a man protected against loss of limb, but the body and the limbs, are protected against all menaces, assaults, beating, and wounding. Such acts are a breach of the peace, and punishable by fine. The person injured, has an action of trespass for assault and battery, against the wrong-doer, to recover damages for the injury he has sustained. This security of our body and limbs, from all corporal injuries, is an inestimable right.

⁷⁸⁷ U.S. CONST., amend. XIV, § 1.

⁷⁸⁸ John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 550 (1994).

⁷⁸⁹ 59 U.S. (18 How.) 272 (1855).

⁷⁹⁰ *Id.* at 276.

⁷⁹¹ Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 468-69 (1986); see also *Adamson v.*

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The U.S. Supreme Court, in fact, has repeatedly emphasized that “due process is flexible and calls for such procedural protections as the particular situation warrants.”⁷⁹² As Justice Felix Frankfurter once explained, due process is, “perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.”⁷⁹³ Thus, it has been concluded that even “ancient” procedural rules “must satisfy contemporary notions of due process.”⁷⁹⁴ In *Mathews v. Eldridge*,⁷⁹⁵ the Court—in setting forth its flexible balancing-of-interests approach—articulated the following three areas of importance for a court to consider in determining what process is due:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁷⁹⁶

The private interest at stake in the death penalty debate—the right of an inmate to remain alive—is of utmost importance.⁷⁹⁷ Indeed, the right to “life” has, since America’s very inception, been considered a basic right, or—to use the exact wording of the Declaration of Independence—an “unalienable” right.⁷⁹⁸ The Supreme Court, in a number of cases, has confirmed that principle, characterizing the “right to life” as “fundamental.”⁷⁹⁹

California, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring) (asking whether procedures are necessary for the “protection of ultimate decency in a civilized society”).

⁷⁹² *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey*); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 15 n.15 (1978) (same); *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (same); *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196-97 (2001) (same); *see also Connecticut v. Doe*, 501 U.S. 1, 10 (1991) (“Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”).

⁷⁹³ *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

⁷⁹⁴ *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 630 (1990) (Brennan, J., concurring).

⁷⁹⁵ 424 U.S. 319 (1976).

⁷⁹⁶ *Id.* at 335; *see also Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (“we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures”).

⁷⁹⁷ *Berry v. City of Muskogee*, 900 F.2d 1489, 1493-97 (10th Cir. 1990) (holding that a prisoner’s Eighth Amendment rights were violated when he was murdered while in custody); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (holding that “wanton or obdurate disregard of or deliberate indifference to the prisoner’s right to life as a condition of confinement is a substantive constitutional deprivation whether it falls under the due process clause or the Eighth Amendment”).

⁷⁹⁸ *Butts v. People of State of Ill.*, 333 U.S. 640, 651 (1948); *see also Elizabeth R. Jungman, Beyond All Doubt*, 91 GEO. L.J. 1065, 1077 (2003) (“Capital cases necessarily implicate a defendant’s fundamental right to life.”). “The self-evident truths and the unalienable rights” set forth in the Declaration of Independence, Justice Thurgood Marshall once remarked, “were intended, however, to apply only to white men.” *Regents*

The risk of wrongful convictions and executions is, in the twenty-first century, well documented,⁸⁰⁰ making the possibility of “erroneous deprivation” of life—to borrow the words of *Mathews*—a real one. While deterring crime is a legitimate government function, there is no persuasive evidence that executions deter crime more effectively than life-without-parole sentences,⁸⁰¹ making death sentences unnecessary. The Founding Fathers—living in an era when American penitentiaries were not yet a universal reality—themselves often expressed the view that any punishment beyond that which was necessary was “tyrannical.”⁸⁰² The first U.S. penitentiary, Philadelphia’s Walnut Street Prison, was not even opened until 1790, and it took several decades before America’s penitentiary system was built out on a state-by-state basis. Pennsylvania itself authorized two new penitentiaries—the Western Penitentiary in 1818 and the Eastern Penitentiary in

of *University of California v. Bakke*, 438 U.S. 265, 388 (1978) (opinion of Marshall, J.); *accord Bell v. State of Maryland*, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring) (the “ideal” of the Declaration “was not fully achieved with the adoption of our Constitution because of the hard and tragic reality of Negro slavery”).

⁷⁹⁹ *Ford v. Wainwright*, 477 U.S. 399, 409 (1986); *see also Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (referring to the “fundamental human rights of life and liberty”); *Woods v. Nierstheimer*, 328 U.S. 211, 216 (1946) (referring to the “fundamental rights to life and liberty guaranteed by the United States Constitution”); *Callan v. Wilson*, 127 U.S. 540, 550 (1888) (referring to “the fundamental rights of life, liberty, and property”); *Powell v. Commonwealth of Pennsylvania*, 127 U.S. 678, 685 (1888) (same); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (referring to “the fundamental rights to life, liberty, and the pursuit of happiness”); *Hurtado v. People of State of California*, 110 U.S. 516, 539 (1884) (Harlan, J., dissenting) (“The phrase ‘due process of law’ is not new in the constitutional history of this country or of England. It antedates the establishment of our institutions. Those who had been driven from the mother country by oppression and persecution brought with them, as their inheritance, which no government could rightfully impair or destroy, certain guaranties of the rights of life, liberty, and property which had long been deemed fundamental in Anglo-Saxon institutions.”); *Slaughter-House Cases*, 83 U.S. 36, 116 (1872) (Bradley, J., dissenting) (describing the right to “life” as one of the “fundamental rights which can only be taken away by due process of law”); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943) (“One’s right to life, liberty and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”); *Lucas v. Forty-Fourth Colorado General Assembly*, 377 U.S. 713, 736-37 (1964) (“A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be.”).

⁸⁰⁰ *The Innocence List*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Aug. 29, 2013) (listing 142 cases where defendants had their convictions overturned, with a subsequent acquittal at re-trial or where charges were dropped, or where defendants were given a pardon by a governor based on new evidence of innocence).

⁸⁰¹ NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *DETERRENCE AND THE DEATH PENALTY* (Apr. 2012) (finding that deterrence studies are flawed and do not factor in the effects of noncapital punishments).

⁸⁰² BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 50 (discussing the copying of Beccaria’s maxim to that effect by John Adams).

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1821—after the Walnut Street Prison proved inadequate to the state’s needs.⁸⁰³

Although the Declaration of Independence mentions the concept of equality, the Equal Protection Clause, which now unequivocally reaches state actors,⁸⁰⁴ was not added to the Constitution until the adoption of the Fourteenth Amendment in 1868. That provision specifically commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”⁸⁰⁵ Unlike the Thirteenth Amendment, which exempted those convicted of crimes from its protection, the Fourteenth Amendment protects every person, even inmates, without exception. In the non-capital context, that Fourteenth Amendment’s unequivocal language has already been used to strike down discriminatory policies at schools on the basis of race⁸⁰⁶ and gender.⁸⁰⁷ The Supreme Court so held based on the Fourteenth Amendment’s plain language—and “even though those who drafted the Amendment evidently thought that separate was not unequal.”⁸⁰⁸ In short, the Equal Protection Clause, like the Due Process Clause, has been read in a contemporary fashion based upon its plain and unequivocal language—and not in accord with the antiquated personal views and prejudices of its drafters.⁸⁰⁹

The Supreme Court’s equal protection jurisprudence has, significantly, regularly concerned itself “with governmental classifications that ‘affect

⁸⁰³ Meskill, *supra* note 140, at 853-54; L. A. Tulin, *Book Review*, 37 YALE L. J. 1168, 1168-69 (1928) (reviewing HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA* (1927)).

⁸⁰⁴ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009). It is well settled that the Equal Protection Clause applies to administrative as well as legislative acts. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 597 (2008).

⁸⁰⁵ U.S. CONST., amend. XIV (ratified July 9, 1868); *see also* *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (“the Equal Protection Clause ‘protect[s] persons, not groups’”) (quoting *Adarand*, 515 U.S. at 227) (emphasis in original).

⁸⁰⁶ *Brown v. Bd of Educ. of Topeka*, 347 U.S. 483 (1954) (prohibiting segregated schools).

⁸⁰⁷ *United States v. Virginia*, 518 U.S. 515, 534 (1996) (male-only admissions policy at Virginia Military Institute violated the Equal Protection Clause); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (female-only admission policy at a traditionally single-sex public college violated the Equal Protection Clause).

⁸⁰⁸ *Van Orden v. Perry*, 545 U.S. 677, 732 (2005) (Stevens, J., dissenting).

⁸⁰⁹ *See* Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2337-42 (1995) (“[e]qual protection had not been identified with social integration when the Fourteenth Amendment was drafted in 1866, nor when it was ratified in 1868, nor when *Plessy* [v. Ferguson, 163 U.S. 537] was decided in 1896”). The Equal Protection Clause has also been used to invalidate discriminatory practices in jury selection. *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994) (discrimination in jury selection on the basis of gender violates the Equal Protection Clause); *Georgia v. McCollum*, 505 U.S. 42, 44 (1992) (racial discrimination in jury selection offends the Equal Protection Clause).

some groups of citizens differently than others.”⁸¹⁰ In some circumstances, an equal protection claim can be sustained “even if the plaintiff has not alleged class-based discrimination,” but instead claims to have been “irrationally singled out as a so-called ‘class of one.’”⁸¹¹ In *Village of Willowbrook v. Olech*,⁸¹² the Court specifically held that a property owner stated a valid claim under the Equal Protection Clause because she had been “intentionally treated differently from others similarly situated” and because there was “no rational basis for the difference in treatment.”⁸¹³ Although the word “unusual” in the Eighth Amendment invites the Court to gauge what is currently being done throughout the country to assess a punishment’s constitutionality, the Court also, because of the Fourteenth Amendment, needs to be sure not to allow arbitrary or unequal applications of the law that violate the Equal Protection Clause.

The Equal Protection Clause—as the Supreme Court itself has held—is concerned with arbitrary and discriminatory governmental conduct. “The purpose of the equal protection clause of the Fourteenth Amendment,” the Court has emphasized, “is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”⁸¹⁴ As the Court ruled as long ago as 1887 in *Hayes v. Missouri*,⁸¹⁵ the Fourteenth Amendment “requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.”⁸¹⁶ Thus, “when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a ‘rational basis for the difference in treatment.’”⁸¹⁷

⁸¹⁰ *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 601 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)); *see also* *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (“‘Equal Protection’ . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) (“the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes”).

⁸¹¹ *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 601 (2008) (citing *Village of Willowbrook v. Olech*).

⁸¹² 528 U.S. 562 (2000).

⁸¹³ *Id.* at 564. In that case, a municipality had attempted to condition the connection to the municipal water supply on the granting of a 33-foot easement instead of the norm—a 15-foot easement—required of other property owners.

⁸¹⁴ *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)); *accord Olech*, 528 U.S. at 564 (quoting the same language).

⁸¹⁵ 120 U.S. 68 (1887).

⁸¹⁶ *Id.* at 71-72.

⁸¹⁷ *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 602 (2008). In *Engquist*, the Supreme Court pointed out that “[t]here are some forms of state action” involving “discretionary

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Indeed, the prohibition against “cruel and unusual punishments” has long been associated with preventing arbitrary abuses at criminals’ sentencing proceedings.⁸¹⁸ In *Batson v. Kentucky*,⁸¹⁹ the Supreme Court held that

decisionmaking” where “allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.” *Id.* at 603. In that case, the Court used the example of a traffic officer handing out speeding tickets to some people but not others. *Id.* at 603-4. The Court emphasized: “[A]n allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action.” *Id.* at 604. Of course, death sentences and executions—the most severe punishments ever conceived by lawmakers—are a far cry from parking tickets.

⁸¹⁸ See, e.g., 1 FRANCIS HARGRAVE, ED., *A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANORS* xi (4th ed. 1776) (italics in original):

As to smaller Crimes and Misdemeanors, they are differenc’d with such a variety of extenuating or aggravating Circumstances, that the Law has not, nor indeed could affix to each a certain and determinate Penalty; this is left to the Discretion and Prudence of the Judge, who may punish it either with Fine or Imprisonment, Pillory or Whipping, as he shall think the nature of the Crime deserves; but tho’ he be intrusted with so great Power, yet he is not at liberty to do as he lists, and inflict what arbitrary Punishments he pleases; due regard is to be had to the Quality and Degree, to the Estate and Circumstances of the Offender, and to the greatness or smallness of the Offense; that Fine, which would be mere Trifle to one Man, may be the utter Ruin and Undoing of another; and those Marks of Ignominy and Disgrace, which would be shocking and grievous to a Person of a liberal Education, would be slighted and despised by one of the vulgar sort. A Judge therefore who use this discretionary Power to gratify a private Revenge, or the Rage of a Party, by inflicting indefinite and perpetual Imprisonment, excessive and exorbitant Fines, unusual and cruel Punishments, is equally guilty of perverting Justice and acting against Law, as he, who in a Case, where the Law has ascertained the Penalty, wilfully and knowingly varies from it... [W]here a Court has a Power of setting Fines, that must be understood of setting *reasonable* Fines; an *excessive Fine*, says Lord Coke, is *against Law*, and so it is declared to be by the *Act for declaring the Rights and Liberties of the Subject*, &c. The same Statute declares the illegality of unusual and cruel Punishments.

It was the non-observance of these Rules, which occasioned the dissolution of the *Star Chamber* ... when once its Authority was abus’d to wreak the Malice of particular Persons, and prostituted to the base Ends of a Court-Faction, when no Limits were observed in the Exercise of its Jurisdiction, nor Humanity in its Sentences, when the Judges thereof, however dignified by their Posts, became a Disgrace to human Nature by their barbarous and cruel butcherings, punishing pretended Libels not only with perpetual Imprisonments, but with brandings in the Face and mutilation of Members, when the Case was thus (as it appears to have been from some Instances in this Collection) it was then high time to tear it up by the Roots, as a Grievance no longer to be borne with. A Judge therefore ought to be strictly careful that he conform to the Rules of Law not only as to the nature of the Punishment, but likewise as to the degrees thereof.

It is indeed no easy matter to settle the precise Limits, how far a Court of Justice may go; every Case must depend upon its own particular Circumstances. But *some* Fines and *some* Punishments are so monstrously extravagant, that no body can doubt their being so;

the unlawful exclusion of jurors based on race required reversal because it “violates a defendant’s right to equal protection,” “unconstitutionally discriminate[s] against the excluded juror,” and “undermine[s] public confidence in the fairness of our system of justice.”⁸²⁰ The Supreme Court, in other instances, has also invalidated capital sentences based on racial bias and the dictates of the Equal Protection Clause.⁸²¹ In one case involving the exclusion through peremptory strikes of 10 of the 11 African Americans eligible to serve on the jury,⁸²² the Court held that “[d]efendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury.”⁸²³ “[T]he statistical evidence alone,” the Court held, “raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors.”⁸²⁴

The Supreme Court has emphasized that “death is different.”⁸²⁵ Yet, when it comes to the death penalty’s actual infliction, the Court—raising the specter of a slippery slope—has shunned reliance on statistical studies⁸²⁶ showing that racial discrimination is prevalent in capital charging and sentencing.⁸²⁷ In *McCleskey v. Kemp*,⁸²⁸ the Court instead held that the Equal Protection Clause—while aimed at eliminating racial discrimination⁸²⁹—only prohibits intentional discrimination that can be proven through means other than statistics.⁸³⁰ In effect, unlike what it does in jury selection cases,

such were the Fines of Sir *Samuel Barnardiston* and Mr. *Hampden*, such were the repeated Pilloryings and barbarous Whippings of *Oates*, *Dangerfield*, and *Johnson*.

⁸¹⁹ 476 U.S. 79 (1986).

⁸²⁰ *Id.* at 86-87.

⁸²¹ *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (noting that statistical evidence could support a finding of discrimination in jury selection); *Miller-El v. Dretke*, 545 U.S. 231, 240-41, 266 (2005) (considering statistical evidence in case dealing with improper exclusion of black jurors); see also *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) (noting that the Supreme Court “has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district”).

⁸²² *Cockrell*, 537 U.S. at 326, 331.

⁸²³ *Dretke*, 545 U.S. at 237.

⁸²⁴ *Cockrell*, 537 U.S. at 342.

⁸²⁵ *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) (“[T]here is no doubt that ‘[d]eath is different.’”) (citation omitted).

⁸²⁶ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁸²⁷ *E.g.*, U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (Feb. 1990) (reporting on studies showing “pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty”).

⁸²⁸ 481 U.S. 279 (1987).

⁸²⁹ *Bartlett v. Strickland*, 556 U.S. 1 (2009) (“[T]he ‘moral imperative of racial neutrality is the driving force of the Equal Protection Clause,’ and racial classifications are permitted only ‘as a last resort.’”) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518-19 (1989) (Kennedy, J., concurring in part)).

⁸³⁰ *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Ginsburg, J., dissenting) (“The Equal Protection Clause, this Court has held, prohibits only intentional discrimination; it does

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when it comes to death sentences themselves, an American death row inmate is required by the Court to prove that an individual prosecutor exhibited racial animus in that inmate's *particular case*—a tough row to hoe, to be sure.⁸³¹

C. The Effect on What Is Considered “Cruel and Unusual”

One effect of the Fourteenth Amendment's ratification—a byproduct of its adoption—was to expand the Eighth Amendment's scope. When the Eighth Amendment was ratified in 1791, it only constrained the actions of the federal government⁸³²—then a small institution with only a few legislators and a few employees.⁸³³ Although many states had similar protections against “cruel and unusual,” “cruel or unusual,” or simply “cruel” punishments,⁸³⁴ in the pre-Fourteenth Amendment era—rampant with racial prejudice and slavery⁸³⁵—African Americans were often excluded from legal protection of such constitutional rights altogether.⁸³⁶ To have a constitutional protection that ensured “equal protection of the laws” was thus a remarkable achievement.

After the ratification of the Fourteenth Amendment, aimed at stamping out invidious racial discrimination, once lawful state actions became

not have a disparate-impact component.”) (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) & *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

⁸³¹ Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 COLUM. HUM. RTS. L. REV. 395, 421 (1993).

⁸³² *United States v. Henning*, 4 Cranch C.C. 645, 26 F. Cas. 267, 271 (C.C.D.C. 1836) (“If congress have a right to pass laws prohibiting those acts to be done in the district, they have a right to affix penalties and punishment to the violation of those laws; and they are not limited in the degree of punishment, if it be not ‘cruel and unusual’ within the meaning of the 8th article of the amendments of the constitution.”).

⁸³³ KRISHNA K. TUMMALA, ED., *COMPARATIVE BUREAUCRATIC SYSTEMS* 83 (2003) (“In 1791 the federal government employed roughly 4,500 individuals.”).

⁸³⁴ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 176-81.

⁸³⁵ See generally WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* (1999).

⁸³⁶ In *Aldridge v. Commonwealth*, 2 Va. Cas. 47, 1824 WL 1072 (Va. Gen. 1824), the General Court of Virginia held that the state's “cruel and unusual punishments” clause did not even apply to “a free man of color.” *Id.* at *1, 3. As the Virginia court ruled: “Notwithstanding the general terms used in the Bill of Rights, it is undeniable that it never was contemplated, or considered, to extend to the whole population of the State. Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it?” *Id.* at *3; see also *Id.* (“[N]obody has ever questioned the power of the Legislature, to deny to free blacks and mulattoes, one of the first privileges of a citizen; that of voting at elections, although they might in every particular, except color, be in precisely the same condition as those qualified to vote. The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population.”).

unlawful. The Thirteenth Amendment had abolished slavery, but in response, Southern states enacted “Black Codes”—laws attempting to limit the rights of former slaves.⁸³⁷ With the Fourteenth Amendment’s “equal protection” language, though, such laws were destined to fall. Now that former slaves were citizens and were to be afforded equal protection, the idea expressed at one time that racial minorities were not entitled to be protected from “cruel” or “unusual” punishments under the Eighth Amendment could no longer withstand judicial scrutiny. While a practice such as whipping might be customary or usual in a given state, the federal courts would ultimately be able to review the matter—and put a stop to it.⁸³⁸ In the modern era, the racial bias present in the death penalty’s administration can no more be ignored than other forms of discrimination, especially given the fundamental nature of the right to life.

In fact, in interpreting the Constitution, the U.S. Supreme Court must decide for itself whether executions, with all their arbitrariness and racial bias, have become “cruel and unusual.” Just as the Court has been called upon in the past to decide what is an “infamous” crime or punishment, it can judge for itself perfectly well whether executions are “cruel” and “unusual” at this juncture and thus unconstitutional. Early American legal commentators themselves spoke of the “cruel and unusual punishments” prohibition as reflecting “the improved spirit of the age”⁸³⁹ and “the spirit of our humane general constitution.”⁸⁴⁰

The case of *Ex parte Wilson*,⁸⁴¹ decided by the Supreme Court in 1885, is instructive. In that case, the Court found that “if the crime of which the petitioner was accused was an infamous crime, within the meaning of the fifth amendment of the constitution, no court of the United States had jurisdiction to try or punish him, except upon presentment or

⁸³⁷ Sean M. Heneghan, *Employment Discrimination Faced by the Immigrant Worker: A Lesson from the United States and South Africa*, 35 *FORDHAM INT’L L.J.* 1780, 1787 (2012).

⁸³⁸ *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.).

⁸³⁹ JAMES BAYARD, *A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 154 (2d ed. 1840) (“The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion.”).

⁸⁴⁰ BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 186 (1832):

Under the [Eighth] amendment the infliction of cruel and unusual punishments, is also prohibited. The various barbarous and cruel punishments inflicted under the laws of some other countries, and which profess not to be behind the most enlightened nations on earth in civilization and refinement, furnish sufficient reasons for this express prohibition. Breaking on the wheel, flaying alive, rendering assunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution.

⁸⁴¹ 114 U.S. 417 (1885).

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indictment by a grand jury.”⁸⁴² Just as the Court can decide what constitutes an “infamous” crime, it can decide with little difficulty what qualifies as a “cruel and unusual” punishment.

In deciding whether the petitioner’s crime was “infamous” or not, the Supreme Court in *Ex parte Wilson* first noted that “the scope and effect” of the Fifth Amendment provision at issue, “as of many other provisions of the constitution, are best ascertained by bearing in mind what the law was before.”⁸⁴³ But after noting that the Fifth Amendment’s purpose was “to limit the powers of the legislature, as well as of the prosecuting officers, of the United States,”⁸⁴⁴ the Supreme Court framed the question as “whether imprisonment at hard labor for a term of years is an infamous punishment.”⁸⁴⁵ “What punishments shall be considered as infamous,” the Court held in language reminiscent of the “evolving standards” approach, “may be affected by the changes of public opinion from one age to another.”⁸⁴⁶

Ultimately, the Court in *Ex parte Wilson* ruled: “In former times, being put in the stocks was not considered as necessarily infamous. And by the first judiciary act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the district courts to cases ‘where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.’”⁸⁴⁷ “But at the present day,” the Court emphasized, “either stocks or whipping might be thought an infamous punishment.”⁸⁴⁸ In other words, the Supreme Court opined—as it would later with its “evolving standards of decency” test—that a punishment might be classed one way in one generation and a different way in another.⁸⁴⁹ The lesson: the fact that

⁸⁴² *Id.* at 422. The Fifth Amendment provides in part: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.” U.S. CONST., amend. V.

⁸⁴³ *Ex parte Wilson*, 114 U.S. at 422.

⁸⁴⁴ *Id.* at 426.

⁸⁴⁵ *Id.* “Infamous punishments cannot be limited to those punishments which are cruel or unusual,” the Supreme Court ruled, “because ... ‘cruel and unusual punishments’ are wholly forbidden, and cannot therefore be lawfully inflicted even in cases of convictions upon indictments duly presented by a grand jury.” *Id.* at 426-27.

⁸⁴⁶ *Id.* at 427. The Court noted that “Mr. Dane,” a legal commentator, “while treating it as doubtful whether confinement in the stocks or in the house of correction is infamous, says, ‘punishments, clearly infamous, are death, gallows, pillory, branding, whipping, confinement to hard labor, and cropping.’” (citation omitted).

⁸⁴⁷ *Id.* at 427-28 (quoting Act of Sept. 24, 1789, ch. 20, § 9).

⁸⁴⁸ *Id.* at 428.

⁸⁴⁹ In *Ex parte Wilson*, the Supreme Court—anxious to leave flexibility for future decisionmaking—ultimately held as follows: “Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the fifth amendment.” *Id.* at 429.

executions were deemed constitutional at one time does not make them constitutional for all time.

V. TOWARD A PRINCIPLED EIGHTH AMENDMENT

A. *The Punishment Continuum*

When viewed on a continuum, as the Founding Fathers so often viewed them, punishments range from *de minimis* all the way to death itself.⁸⁵⁰ In 1777, Thomas Jefferson methodically divided crimes into three categories: (1) capital offenses or—in his words—“Crimes whose punishment. Extends to *Life*”; (2) “Crimes whose punishment goes to *Limb*,” such as castration for rapists; and (3) “Crimes punishable by *Labor &c.*”⁸⁵¹ Cesare Beccaria had suggested a “scale of punishments,” writing that “a scale of misdeeds can be identified, at the top of which are those that are immediately destructive to society and at the bottom those that cause the least possible injustice to its individual members.”⁸⁵² “If geometry were applicable to the infinite and obscure combinations of human actions,” Beccaria concluded, “there would be a corresponding scale of punishments, descending from the most severe to the mildest.”⁸⁵³

Most punishments the Eighth Amendment is concerned with are meted out at criminals’ sentencing proceedings. But other post-sentencing actions (i.e., those that occur within the confines of prisons) can also constitute Eighth Amendment violations. Thus, in *Estelle v. Gamble*,⁸⁵⁴ the Supreme Court first applied the Cruel and Unusual Punishments Clause to deprivations that were not specifically part of a prisoner’s sentence.⁸⁵⁵ Not all actions of guards or uses of force, of course, lead to Eighth Amendment violations. As the Supreme Court quite appropriately clarified: “*de minimis* uses of physical force” do not violate the Eighth Amendment’s prohibition of “cruel and unusual punishments” unless the force used is “repugnant to the conscience of mankind.”⁸⁵⁶

⁸⁵⁰ E.g., John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 957-58 (2011) (“Thomas Jefferson narrowly failed in his attempt to get Virginia to enact his “Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital,” which set forth a scale of crimes and punishments in the manner suggested by Beccaria and Blackstone.”).

⁸⁵¹ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 144.

⁸⁵² AARON THOMAS, ED., CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 18 (Aaron Thomas & Jeremy Parzen, trans. 2008).

⁸⁵³ *Id.*; see also *id.* at 50 (referring to “a scale of punishments”). Citing Beccaria, Blackstone similarly spoke of “a corresponding scale of punishments, descending from the greatest to the least.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 18 (19th ed. 1836).

⁸⁵⁴ 429 U.S. 97 (1976).

⁸⁵⁵ *Hudson v. McMillian*, 503 U.S. 1, 10 (1992).

⁸⁵⁶ *McMillian*, 503 U.S. at 9-10; *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1178 (2010); compare *Hudson*, 503 U.S. at 18 (Thomas, J., dissenting) (“The Court today ... broadly asserts that *any* ‘unnecessary and wanton’ use of physical force against a prisoner

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In other words, the protection provided to inmates by the Eighth Amendment's Cruel and Unusual Punishments Clause has limits. "An inmate who complains of a 'push or shove' that causes no discernible injury," the Court has emphasized, "almost certainly fails to state a valid excessive force claim."⁸⁵⁷ As the Court has ruled, prison officials are free to discipline prisoners, so long as the disciplinary rules serve a rational and legitimate purpose⁸⁵⁸ and prisoners are not disciplined in an "arbitrary" manner.⁸⁵⁹ In order to prevail on an excessive force claim, the inmate must prove "not only that the assault occurred but also that it was carried out 'maliciously and sadistically' rather than as part of 'a good-faith effort to maintain or restore discipline.'"⁸⁶⁰ In the death penalty context, the issue becomes whether executions serve any rational or legitimate purpose now that maximum-security prisons and life-without-parole sentences are so widely available.

automatically amounts to cruel and unusual punishment, whenever more than de minimis force is involved.").

⁸⁵⁷ *Wilkins*, 130 S. Ct. at 1178.

⁸⁵⁸ *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("the challenged regulations bear a rational relation to legitimate penological interests"); *id.* ("In *Turner* we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a "valid, rational connection" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are 'ready alternatives' to the regulation.") (citing *Turner*, 482 U.S. at 89-91); *Overton*, 539 U.S. at 133 ("Turning to the restrictions on visitation by children, we conclude that the regulations bear a rational relation to MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. The regulations promote internal security, perhaps the most legitimate of penological goals"); *id.* ("MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes."); *id.* at 134 ("Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.").

⁸⁵⁹ *Overton*, 539 U.S. at 136 ("Respondents also claim that the restriction on visitation for inmates with two substance-abuse violations is a cruel and unusual condition of confinement in violation of the Eighth Amendment. The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances of this case, fall below the standards mandated by the Eighth Amendment."); *id.* at 137 ("This is not a dramatic departure from accepted standards for conditions of confinement. Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur."). In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Supreme Court noted in dicta: "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." *Id.* at 137.

⁸⁶⁰ *Wilkins*, 130 S. Ct. at 1178.

The social movement to substitute incarceration in place of death sentences—a movement that is still ongoing—has been taking place in America for centuries. It began in the Founding Fathers’ time, when the cornerstones of state penitentiaries were laid, with the torch then being passed to succeeding generations. In 1922, Justice Louis Brandeis—joined by Chief Justice William Howard Taft and Justice Oliver Wendell Holmes—noted the development in the law. In a dissenting opinion, they pointed out that “[c]onfinement in a penitentiary is the modern substitute for the death penalty and for the other forms of corporal punishment which, at the time of the adoption of the Fifth Amendment, were still administered in America for most of the crimes deemed serious.”⁸⁶¹ As Justice Brandeis reminded his audience of New York’s pre-Fifth Amendment laws: “The punishment, other than death, then prescribed for serious crimes were mutilation, cutting off the ears or nailing them to the pillory, branding, whipping, the pillory, the stocks and the ducking stool.”⁸⁶²

B. The Abandonment of Corporal Punishments

Corporal punishments were once prevalent in the English⁸⁶³ and American legal systems.⁸⁶⁴ In eighteenth-century America, corporal punishments could thus be described as common—or usual—punishments.⁸⁶⁵

⁸⁶¹ *United States v. Moreland*, 258 U.S. 433, 448 (1922) (Brandeis, J., dissenting).

⁸⁶² *Id.* at 448 n.14.

⁸⁶³ See *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000) (“Subject to the limitations that the punishment not ‘touch life or limb,’ that it be proportionate to the offense, and, by the 17th century, that it not be ‘cruel or unusual,’ judges most commonly imposed discretionary ‘sentences’ of fines or whippings upon misdemeanants. Actual sentences of imprisonment for such offenses, however, were rare at common law until the late 18th century, for ‘the idea of prison as a punishment would have seemed an absurd expense.’”) (quoting J. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 584 (3d ed.1990); JOHN BAKER, CRIMINAL COURTS AND PROCEDURE AT COMMON LAW 1550-1800, in *Crime in England 1550-1800*, p. 43 (J. Cockburn ed.1977)).

⁸⁶⁴ *Watkins v. United States*, 354 U.S. 178, 189-90 & n.12 (1957) (noting that Floyd, a Catholic, was ordered “to stand two hours in the pillory, and to be branded in the forehead with the letter K” and “to be whipped at the cart’s tail,” among other punishments, for “uttering a few contemptible expressions”); *Ex parte Lange*, 85 U.S. 163, 168 (1873) (“A criminal may be sentenced to a disgraceful punishment, as whipping, or, as in the old English law, to have his ears cut off, or to be branded in the hand or forehead.”); *Murphy v. Daytona Beach Humane Soc., Inc.*, 176 So.2d 922, 924 (Fla. App. 1965) (noting that, until its abolition, the English star chamber exercised the power of cutting off ears and branding the foreheads and slitting the noses of libelers); *State v. Chandler*, 2 Harr. 553, 1837 WL 154 *10 (Del. Gen. Sess. 1837) (noting that English law punished blasphemy “by setting the offender in the pillory for the space of two hours, branding in the forehead with the letter B, and public whipping on the bare back with thirty-nine lashes, well laid on”).

⁸⁶⁵ See James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A “Not Exactly,” Equal Protection Analysis*, 37 HARV. J. ON. LEGIS. 105, 149 (2000) (“Corporal punishments once dominated the penal body. Whippings were a common punishment in colonial times. Other common punishments included branding; severing of

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The whipping of slaves was a standard disciplinary practice, and many offenses—both civilian and military—were punished with lashes,⁸⁶⁶ often in a brutal or severe manner.⁸⁶⁷ The first criminal-law statute passed by the First Congress, for example, prescribed 39 lashes for falsifying federal records, larceny, and receiving stolen goods and one hour in the pillory for perjury.⁸⁶⁸ “An Act to establish the Judicial Courts of the United States”—another law passed by the First Congress—gave the federal courts exclusive jurisdiction over “all crimes and offences that shall be cognizable under the authority of the United States” where, among other things, “no other punishment than whipping, not exceeding thirty stripes . . . is to be inflicted.”⁸⁶⁹ Corporal punishments were purposely designed to inflict pain and to shame and humiliate offenders.⁸⁷⁰

But over time, as societal attitudes changed, corporal punishments withered away.⁸⁷¹ Ear cropping, hand and forehead branding, and flogging had been punishments in colonial times and in America’s early years, as judicial opinions from the time make clear.⁸⁷² In *State v. Henderson*,⁸⁷³ the

ears and noses; and hanging.”); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 348-49, 353 (1982) (recounting that eighteenth-century punishments including whipping and public shaming).

⁸⁶⁶ Act of Mar. 2, 1799, ch. 43, § 15, 1 Stat. 736-737 (up to 40 lashes, as well as up to 10-years imprisonment, could be imposed for first mail-robbery conviction; up to 30 lashes or imprisonment not exceeding two years, or both, was the punishment for attempted robbery of the mails); see also *Duncan v. State of Louisiana*, 391 U.S. 145, 191-92 (1968) (Harlan, J., dissenting) (“Nor had the Colonies a cleaner slate, although practices varied greatly from place to place with conditions. In Massachusetts, crimes punishable by whipping (up to 10 strokes), the stocks (up to three hours), the ducking stool, and fines and imprisonment were triable to magistrates . . . New York was somewhat harsher. For example, ‘anyone adjudged by two magistrates to be an idle, disorderly or vagrant person might be transported whence he came, and on reappearance be whipped from constable to constable with thirty-one lashes by each.’”); *United States v. Barnett*, 376 U.S. 681, 711-12, 749-50 (1964) (describing various seventeenth- and eighteenth-century laws that imposed ear cropping, hours in the stocks, the pillory, or lashes as forms of punishment).

⁸⁶⁷ E.g., MARVIN L. MICHAEL KAY & LORIN LEE CARY, *SLAVERY IN NORTH CAROLINA, 1748-1775*, at 82 (1999).

⁸⁶⁸ *Furman v. Georgia*, 408 U.S. 238, 262 n.6 (1972) (Brennan, J., concurring) (citing Act of Apr. 30, 1790, §§ 15-18, 1 Stat. 115-16).

⁸⁶⁹ An Act to establish the Judicial Courts of the United States, 1 Stat. 73 (1789) (cited in *United States v. Comstock*, 130 S. Ct. 1949, 1969 nn.3-4 (2010) (Alito, J., concurring)).

⁸⁷⁰ See *Smith v. Doe*, 538 U.S. 84, 98 (2003) (“Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public.”).

⁸⁷¹ See Rita K. Lomio, *Working against the Past: The Function of American History of Race Relations and Capital Punishment in Supreme Court Opinions*, 9 J. L. SOCIETY 163, 165 n.8 (2008) (“Certain practices such as branding, pillorying, and ear-cropping have fallen out of use and law even without Eighth Amendment invocation.”).

⁸⁷² GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 175 (1960) (noting that ear cropping and whipping were punishments imposed by colonial magistrates); TERENCE D. MIETHE & HONG LU, *PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE* 35 (2005) (“The early American

Supreme Court of North Carolina faced this issue: “whether one convicted of manslaughter may be sentenced to be burned in the hand.”⁸⁷⁴ The court, citing English statutes, gave its answer as follows: “we are all of the opinion, that he may.”⁸⁷⁵ Colonial New Jersey likewise punished burglary by branding the offender’s hand for a first offense, and the offender’s forehead for subsequent offenses.⁸⁷⁶ In an earlier era, a murderer escaping the gallows might be branded with an “M” and a thief not punished capitally might be branded with a “T.”⁸⁷⁷ “A common form of mutilation or maiming was the detachment of an ear,” a judge on the U.S. Court of Appeals for the Third Circuit once explained, noting that “[t]he effect of branding, mutilation, or maiming was often to cast the offender out of society once and for all.”⁸⁷⁸

But as noted, such punishments fell out of use over time.⁸⁷⁹ For example, flogging fell into disuse at both the federal and state levels over the

colonists also burned particular letters on offenders’ hands and forehead.”); Abner Mikva, *What Justice Brennan Gave Us to Keep*, 32 LOY. L.A. L. REV. 655, 661 (1999) (“Ear-cropping, which involved clipping off a piece of the ear, was a common punishment in the colonial days for people who stole or did other terrible things.”); Erwin Chemerinsky, *Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201, 214 (2004) (“ear cropping and flogging were also in existence in 1787”); Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 OHIO N.U. L. REV. 517, 520 (2000) (“Flogging and ear cropping were just two forms of mutilation and torture that were commonly available in 1789”); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1031 (1978) (“Whipping and ear-cropping were thought perfectly proper, neither torturous nor excessive, when the Bill of Rights was born.”); J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823-1835*, 32 N.C. CENT. L. REV. 27, 41 (2009) (listing “ear cropping” as a punishment in the Cherokee Nation in a section about criminal procedure in the 1820s and 1830s); *State v. Webb*, 680 A.2d 147, 228 n.6 (1996) (Berdon, J., dissenting) (noting that a judge of the Connecticut Superior Court in 1773 ordered that a burglar be “branded on his forehead” with a capital letter “B” with “a hot iron” and “have one of his Ears Nailed to a post and Cut off” and also be “Whipt on his Naked body fifteen Stripes”); *compare State v. Frink*, 1 Bay 168, 1791 WL 210 *1 (S.C. Com. Pl. Gen. Sess. 1791) (a man convicted of manslaughter “was brought up to receive sentence of burning in the hand, which had been usually inflicted instanter in open Court,” but as the jury had recommended him as a fit object for mercy, punishment was delayed pending a review by the governor in Charleston); *State v. Grisham*, 2 N.C. 12, 1792 WL 50 *1 (N.C. Super. L. & Eq. 1792) (noting that the judge “gave judgment that the prisoner should be branded in the hand; which was accordingly done in presence of the court”).

⁸⁷³ 2 Dev. & Bat. 543, 1837 WL 498 (N.C. 1837).

⁸⁷⁴ *Id.* at *1.

⁸⁷⁵ *Id.*

⁸⁷⁶ *E. B. v. Verniero*, 119 F.3d 1077, 1116 (1997) (Becker, J., concurring in part and dissenting in part).

⁸⁷⁷ *Id.*

⁸⁷⁸ *Id.*

⁸⁷⁹ MICHAEL NEWTON, *THE ENCYCLOPEDIA OF KIDNAPPINGS* 51 (2002) (noting that Delaware’s governor remitted the ear-cropping portion of a man’s sentence following his

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course of several decades.⁸⁸⁰ To encourage enlistment, Congress first abolished flogging in the army in 1812,⁸⁸¹ but then reinstated the punishment in 1833 in an attempt to prevent desertions.⁸⁸² A few years later, in 1839, Congress abolished flogging for all federal crimes,⁸⁸³ then outlawed flogging in the navy in 1850⁸⁸⁴ and again in the army in 1861.⁸⁸⁵ At the state level, flogging also came to be seen as unacceptable. For example, in 1847, New York's legislature abolished flogging in that state's prisons.⁸⁸⁶ For purposes of understanding the Eighth Amendment and judicial readings of it, such history is informative.

In fact, the Cruel and Unusual Punishments Clause has long been read to bar corporal punishments and abuse or mistreatment of inmates. The federal courts, cognizant that inmates are government wards, have repeatedly held that the Eighth Amendment requires that inmates be fed, clothed, and treated for illness. "To incarcerate," the U.S. Supreme Court has itself emphasized, "society takes from prisoners the means to provide for their own needs."⁸⁸⁷ As a result, prisoners are "dependent on the State for food, clothing, and necessary medical care."⁸⁸⁸ "Just as a prisoner may starve if

conviction in 1822); *State v. Cannon*, 190 A.2d 514, 157 (Del. 1963) (noting the abolition of branding and cropping of ears). For a discussion of ear cropping under Massachusetts law, see JANE KAMENSKY, *GOVERNING THE TONGUE: THE POLITICS OF SPEECH IN EARLY NEW ENGLAND* 251 n.132 (1997).

⁸⁸⁰ E.g., Brian Hauck, Cara Hendrickson & Zena Yoslov, *Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEGIS. 479, 481 n.16 (1999) ("In 1805, the Massachusetts legislature abolished whipping, branding, the stocks, and the pillory."); W. J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 829 (1987) ("In 1829 the Tennessee General Assembly, in accordance with a national reform movement, abolished traditional methods for the punishment of crimes. Imprisonment replaced whipping, branding, and stocks.").

⁸⁸¹ ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS, & INDIAN ALLIES* 348 (2011); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481, 483 n.13 (1999).

⁸⁸² Spak & Tomes, *supra* note 881, at 483 n.13.

⁸⁸³ DAVID FELLMAN, *THE DEFENDANT'S RIGHTS TODAY* 396 (1976) (citing Act of Feb. 28, 1839, 5 Stat. 322 ch. 36, § 5).

⁸⁸⁴ MYRA C. GLENN, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA* 9 n.* (1984) (citing Act of Sept. 28, 1850); KENNETH J. HAGAN, *IN PEACE AND WAR: INTERPRETATIONS OF AMERICAN NAVAL HISTORY* 70 (2008). Traditions died hard, however. See W. JEFFREY BOLSTER, *BLACK JACKS: AFRICAN AMERICAN SEAMEN IN THE AGE OF SAIL* 180 (1997) (noting that a seaman in 1853 overheard a captain telling another captain that "he sailed under the old law, & he should trust himself and that he should flog as much as ever").

⁸⁸⁵ CLAYTON R. NEWELL & CHARLES R. SHRADER, *OF DUTY WELL AND FAITHFULLY DONE: A HISTORY OF THE REGULAR ARMY IN THE CIVIL WAR* 46 (2011).

⁸⁸⁶ W. DAVID LEWIS, *FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848*, at 251 (1965).

⁸⁸⁷ *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

⁸⁸⁸ *Id.*

not fed,” the Supreme Court noted in *Brown v. Plata*,⁸⁸⁹ “he or she may suffer or die if not provided adequate medical care.”⁸⁹⁰ “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,” the Court ruled as late as 2011.⁸⁹¹ “If a government fails to fulfill this obligation,” the Court held, “the courts have a responsibility to remedy the resulting Eighth Amendment violation.”⁸⁹²

As a result, the Eighth Amendment is often used in civil rights cases to remedy the failure of prison officials to meet prisoners’ basic health needs. In a recent case dealing with overcrowding in California’s prisons, the Supreme Court took note of the large number of prisoners being housed in squalid, sardine-like conditions.⁸⁹³ The overcrowding—and lack of sufficient staff and medical and mental health services within the prisons⁸⁹⁴—had led to rampant disease⁸⁹⁵ and preventable deaths,⁸⁹⁶ including a num-

⁸⁸⁹ 131 S. Ct. 1910 (2011).

⁸⁹⁰ *Id.* at 1928.

⁸⁹¹ *Id.*

⁸⁹² *Id.*

⁸⁹³ *Id.* at 1923 (“For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. Needless suffering and death have been the well-documented result.”); *id.* at 1923 (“The degree of overcrowding in California’s prisons is exceptional. California’s prisons are designed to house a population just under 80,000, but at the time of the three-judge court’s decision the population was almost double that. The State’s prisons had operated at around 200% of design capacity for at least 11 years. Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet.”) (citations omitted).

⁸⁹⁴ *Id.* at 1932 (“The record documents the severe impact of burgeoning demand on the provision of care. At the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists.”); *id.* at 1933 (“Delays are no less severe in the context of physical care. Prisons have backlogs of up to 700 prisoners waiting to see a doctor. A review of referrals for urgent specialty care at one prison revealed that only 105 of 316 pending referrals had a scheduled appointment, and only 2 had an appointment scheduled to occur within 14 days. Urgent specialty referrals at one prison had been pending for six months to a year.”) (citations omitted); *id.* at 1934 (“The effects of overcrowding are particularly acute in the prisons’ reception centers, intake areas that process 140,000 new or returning prisoners every year. Crowding in these areas runs as high as 300% of design capacity. Living conditions are ‘toxic,’ and a lack of treatment space impedes efforts to identify inmate medical or mental health needs and provide even rudimentary care.”) (citations omitted).

⁸⁹⁵ *Id.* at 1933 (“Crowding also creates unsafe and unsanitary living conditions that hamper effective delivery of medical and mental health care. A medical expert described living quarters in converted gymnasiums or dayrooms, where large numbers of prisoners may share just a few toilets and showers, as “‘breeding grounds for disease.’”); *id.* at 1933-34 (“Cramped conditions promote unrest and violence, making it difficult for prison officials to monitor and control the prison population. On any given day, prisoners in the

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ber of suicides.⁸⁹⁷ Such conditions, not surprisingly, eventually draw the attention of lawyers and the courts.

general prison population may become ill ... and overcrowding may prevent immediate medical attention necessary to avoid suffering, death, or spread of disease. After one prisoner was assaulted in a crowded gymnasium, prison staff did not even learn of the injury until the prisoner had been dead for several hours.”); *id.* at 1934 n.7 (“Correctional officials at trial described several outbreaks of disease. One officer testified that antibiotic-resistant staph infections spread widely among the prison population and described prisoners ‘bleeding, oozing with pus that is soaking through their clothes when they come in to get the wound covered and treated.’ Another witness testified that inmates with influenza were sent back from the infirmary due to a lack of beds and that the disease quickly spread to ‘more than half’ the 340 prisoners in the housing unit, with the result that the unit was placed on lockdown for a week.”) (citations omitted).

⁸⁹⁶ *Id.* at 1925 n.4 (“In 2007, the last year for which the three-judge court had available statistics, an analysis of deaths in California’s prisons found 68 preventable or possibly preventable deaths. This was essentially unchanged from 2006, when an analysis found 66 preventable or possibly preventable deaths. These statistics mean that, during 2006 and 2007, a preventable or possibly preventable death occurred once every five to six days.”) (citations omitted).

⁸⁹⁷ *Id.* at 1924-25 (“Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had “‘no place to put him.’” Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California’s prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved ‘some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable.’”) (citations omitted); *id.* at 1925 (“Prisoners suffering from physical illness also receive severely deficient care. California’s prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population. A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12-by 20-foot cage for up to five hours awaiting treatment. The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with “‘constant and extreme” chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a ‘failure of MDs to work up for cancer in a young man with 17 months of testicular pain.’”) (citations omitted); *id.* at 1925-26 (“Many more prisoners, suffering from severe but not life-threatening conditions, experience prolonged illness and unnecessary pain.”); *id.* at 1933 (“This shortfall of resources relative to demand contributes to significant delays in treatment. Mentally ill prisoners are housed in administrative segregation while awaiting transfer to scarce mental health treatment beds for appropriate care. One correctional officer indicated that he had kept mentally ill prisoners in segregation for ‘6 months or more.’ App. 594. Other prisoners awaiting care are held in tiny, phone-booth sized cages. The record documents instances of prisoners committing suicide while awaiting treatment.”); *id.* at 1934 (“Living in crowded, unsafe, and unsanitary conditions can cause prisoners with latent mental illnesses to worsen and

In that particular case, *Brown v. Plata*,⁸⁹⁸ the Court noted that “[c]ourts 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.”⁸⁹⁹ Still, the Court held that “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.”⁹⁰⁰ As the Court stated: “The State’s desire to avoid a population limit, justified as according respect to state authority, creates a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong.”⁹⁰¹

Although prisoners lose the right to their freedom by virtue of their criminality,⁹⁰² the Supreme Court reiterated in *Brown* that “the law and the Constitution demand recognition of certain other rights.”⁹⁰³ As the Court put it: “Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”⁹⁰⁴ In its 2011 decision, the Court found that the need to remedy unconstitutional conditions in California’s prisons was so urgent because “[p]risoners in the general population will become sick . . . with routine frequency; and overcrowding may prevent the timely diagnosis and care necessary to provide effective treatment and to prevent further spread of disease.”⁹⁰⁵ “Even prisoners with no present physical or mental illness may become afflicted,” the Court noted, adding: “all prisoners in California are at risk so long as the State continues to provide inadequate care.”⁹⁰⁶

develop overt symptoms. Crowding may also impede efforts to improve delivery of care. Two prisoners committed suicide by hanging after being placed in cells that had been identified as requiring a simple fix to remove attachment points that could support a noose. The repair was not made because doing so would involve removing prisoners from the cells, and there was no place to put them.”).

⁸⁹⁸ 131 S. Ct. 1910, 1928 (2011).

⁸⁹⁹ *Id.*

⁹⁰⁰ *Id.* at 1928-29.

⁹⁰¹ *Id.* at 1941.

⁹⁰² *Id.* at 1928 (“As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty.”).

⁹⁰³ *Id.*

⁹⁰⁴ *Id.*

⁹⁰⁵ *Id.* at 1940.

⁹⁰⁶ *Id.* As the Supreme Court wrote: “Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness. Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth Amendment, but in no sense are they remote bystanders in California’s medical care system. They are that system’s next potential victims.” *Id.*

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The concept of “human dignity”—also referred to as the “dignity of man”—has long been a touchstone of the Court’s Eighth Amendment jurisprudence.⁹⁰⁷ Thus, it is well established that “state prisoners are entitled to reasonably adequate food”⁹⁰⁸—one thing needed for basic survival. “A prison’s failure to provide sustenance for inmates,” the Supreme Court has determined, “may actually produce physical ‘torture or a lingering death.’”⁹⁰⁹ An Eighth Amendment violation will therefore be found—even in the death penalty-prone Fifth Circuit—where a denial of food constitutes a denial of the “minimal civilized measure of life’s necessities.”⁹¹⁰ “Because depriving a prisoner of adequate food is a form of corporal punishment,” the Fifth Circuit specifically ruled in 1991, “the [E]ighth [A]mendment imposes limits on prison officials’ power to so deprive a prisoner.”⁹¹¹ Death-row inmates traditionally get a last meal, but executions—by their very nature—deprive inmates of *all* rights whatsoever. If new evidence of innocence—or a constitutional violation that occurred at trial—comes to light later, nothing can be done; it is too late.

Just as non-lethal corporal punishments are considered unconstitutional, so too should executions be treated as such. Indeed, the concepts of cruelty and unusualness—linked together as they are in the Eighth Amendment—both point to that conclusion. On the cruelty front, this is especially so given that lethal punishments are more severe than non-lethal ones. How can it be less cruel, for instance, to take someone’s life than it is to cut off that person’s ear? Given how arbitrary, discriminatory and error-ridden America’s death penalty has proven to be, the Fourteenth Amendment guarantees to due process and equal protection only reinforce the conclusion that executions are unconstitutional. Not only is it cruel to inject another human being with lethal chemicals, but when such a punishment is carried out so sporadically and arbitrarily that it resembles a state-run lottery, the punishment of death must be considered unusual in the extreme.

⁹⁰⁷ *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting that language from *Trop*).

⁹⁰⁸ *Cooper v. Sheriff, Lubbock Cnty.*, 929 F.2d 1078, 1084 (5th Cir. 1991); *see also* *Marquez v. Woody*, No. 10-40378, 2011 WL 3911080 *4 (5th Cir., Sept. 6, 2011) (“It is clearly established that ‘state prisoners are entitled to reasonably adequate food.’”).

⁹⁰⁹ *Brown*, 131 S. Ct. at 1928 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) & *In re Kemmler*, 136 U.S. 436, 447 (1890)).

⁹¹⁰ *Talib v. Gilley*, 138 F.3d 211, 214 n.3 (5th Cir. 1998); *accord* *Marquez v. Woody*, No. 10-40378, 2011 WL 3911080 *4 (5th Cir., Sept. 6, 2011) (“Accepting Marquez’s competent summary judgment evidence as true, as we must at this stage, Lemaster’s actions clearly violated the Eighth Amendment because she refused to provide Marquez with a soft food despite the fact that a doctor prescribed him such a diet. It would be difficult to argue that Marquez did not need to eat soft food when it is apparent that Marquez has no teeth and when Marquez presented a prescription for a soft food diet to Lemaster which indicated that such a diet was medically necessary.”).

⁹¹¹ *Cooper v. Sheriff, Lubbock Cnty.*, 929 F.2d 1078, 1083 (5th Cir. 1991).

Significantly, the U.S. Supreme Court has already held that the punishment of denationalization may not be imposed on a prisoner as it deprives a person of the “right to have rights.”⁹¹² Ironically, the death penalty does just that. It deprives the convicted inmate of the Eighth Amendment right to food, shelter and basic medical care, and it deprives the inmate of the “right of access to the courts.”⁹¹³ Once executed, an inmate can no longer assert any rights at all. An execution, for example, deprives the inmate of the right to prove his or her innocence—and to be adjudged not guilty—should new, exculpatory evidence be brought to light after the inmate’s execution.⁹¹⁴ Indeed, executions deprive inmates of every single right inmates typically have. In so doing, executions fly in the face of existing and long-settled Eighth Amendment precedents aimed at *safeguarding* inmates from harm.

The question that the U.S. Supreme Court needs to squarely confront is whether this contradiction in the law makes any sense? Stated differently, should the Supreme Court rule that the death penalty must go the way of the stocks, the pillory, and the whipping post⁹¹⁵ and be ruled “cruel and unusual,” just as corporal punishments in prisons are already a relic of the past?⁹¹⁶ In early America, the *lex talionis* principle—an eye for an eye, a tooth for a tooth—was still in vogue, with Jefferson himself once proposing that offenders who maimed be maimed themselves.⁹¹⁷ Yet, Jefferson candidly acknowledged that this approach to crime and punishment would fall out of favor, telling his mentor George Wythe: “The ‘Lex talionis’ will be

⁹¹² *Trop v. Dulles*, 356 U.S. 86, 101-2 (1958) (plurality opinion). *But see* *People v. Potter*, 4 N.Y. Leg. Obs. 177, 1 Edm. Sel. Cas. 235 (N.Y. Sup. Ct. 1846) (“[T]he governor may grant a pardon on a condition which does not subject the prisoner to an unusual or cruel punishment. Banishment is neither. It is sanctioned by authority, and has been inflicted, in this form, from the foundation of our government.”); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (“Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.”) (citing *Turner v. Williams*, 194 U.S. 279, 290 (1904); *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Mahler v. Eby*, 264 U.S. 32 (1924)).

⁹¹³ *Furman v. Georgia*, 408 U.S. 238, 290 (Brennan, J., concurring).

⁹¹⁴ In Texas, questions have already been raised as to whether that state recently convicted and executed an innocent man based on faulty evidence. *See* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009.

⁹¹⁵ *E.g.*, *Hadix v. Caruso*, 461 F. Supp.2d 574, 591–92 (W.D. Mich. 2006) (noting that Congress abolished the pillory in 1839); *Ex parte Wilson*, 114 U.S. 417, 427 (1885) (same); Daniel E. Hall, *When Caning Meets the Eighth Amendment: Whipping Offenders in the United States*, 4 WIDENER J. PUB. L. 403, 421 n.103 (1995) (“The Act of February 28, 1839, abolished whipping and standing in the stocks.”) (citing Act of Feb. 28, 1839, ch. 36, § 5, 25 Stat. 321, 322 (1839)).

⁹¹⁶ The death penalty’s constitutionality was debated in the 1970s. *See, e.g.*, Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970). However, American society has changed a lot since then, as has our understanding of mental illness and human rights issues generally.

⁹¹⁷ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 142.

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revolting to the humanized feelings of modern times.” “An eye for an eye, and a hand for a hand,” Jefferson wrote, “will exhibit spectacles in execution, whose moral effect would be questionable.”⁹¹⁸ With the exception of executions, which continue to sporadically occur, Jefferson’s prediction came true. The American judicial system no longer tolerates the lopping off of offenders’ limbs or the maiming of inmates, just as no judge today would order that, as a punishment for rape, a rapist be raped. Why then should a killer be killed?

If the meaning of *cruel* is carefully considered, executions—the intentional killing of human beings—must thus be found to fall within that rubric. That executions are inherently cruel must also, in some fashion, be taken into account when judges determine if executions are *unusual*. That is because it would be highly unusual for any civilized society to inflict a cruel and unnecessary punishment, especially in a more or less random fashion. The American people are living at a time when there is a greater awareness of human rights principles than ever. Although the Constitution requires a punishment be both cruel *and* unusual to be unconstitutional, the cruelty of a punishment must surely be found to contribute to its unusualness. Conversely, the rarity and sheer unusualness of executions mutually reinforces the notion that they are cruel. It is inherently cruel and inhumane, after all, to arbitrarily or discriminatory inflict the punishment of death.

C. To Kill or Not to Kill?

The Supreme Court’s Eighth Amendment jurisprudence is in a state of chaos and confusion. Instead of construing the actual phrase “cruel and unusual punishments” in the Eighth Amendment, the Court has adopted a nice-sounding legal standard—the “evolving standards of decency” test—to evaluate Eighth Amendment claims. In doing so, the Court has lost its way by failing to focus on what the Constitution states in no uncertain terms: that “cruel and unusual punishments” are unconstitutional. While early American jurists grappled with what “cruel” and “unusual” meant in particular factual contexts such as the ducking of scolds, today’s Justices grapple not with the meaning and proper interpretation of the *words* “cruel” and “unusual,” but with somehow trying to divine the “evolving standards of decency of a maturing society.” Instead of just focusing on whether executions are “cruel” and have become “unusual,” as the Constitution requires, the Court tries to gauge trends, the consistency of the direction of the change, or if a “national consensus” has been reached. In the twenty-first century, a return to first principles—interpret *the text*, not decades-old judicial gloss *imposed on it*—seems to be in order.

*Turnipseed v. State*⁹¹⁹—an 1844 case decided before slavery was abolished through Abraham Lincoln’s Thirteenth Amendment—illustrates how

⁹¹⁸ *Id.* at 141.

⁹¹⁹ 6 Ala. 664, 1844 WL 301 (Ala. 1844).

American judges, though operating in a completely different time, once focused on the *words* of a legal provision to decide upon its meaning. In that case, a person was indicted by an Alabama grand jury for inflicting “on a negro woman named Rachel, a slave,” a “cruel and unusual punishment.”⁹²⁰ The accused contested the indictment but was tried by a jury and found guilty of the crime, with the punishment being the assessment of a fifty dollar fine.⁹²¹ The Alabama law under which the accused was indicted provided: “No cruel or unusual punishment shall be inflicted on any slave, and any master, or other person having charge of a slave, who shall be guilty of inflicting such punishment, or authorizing, or permitting the same, shall be subject to indictment therefor, and on conviction thereof, be punished by a fine not less than fifty, and not exceeding one thousand dollars; and in addition thereto, be required to give security for his good behavior for the space of twelve months.”⁹²²

When the jury’s verdict was appealed, the convicted defendant argued that “[t]he indictment is double in charging the infliction of punishment both *cruel* and *unusual*”⁹²³ and that “[t]he indictment is too general: it should have stated what and how the punishment was inflicted.”⁹²⁴ As to the first objection, the Alabama Supreme Court acknowledged that “[i]t is certainly a *general* rule, that the defendant cannot be charged, in one count of an indictment, with two distinct offenses.”⁹²⁵ In rejecting the “objection of duplicity,” the Alabama court held, however, that the law did not require two separate indictments and that the indictment in question “is not bad for duplicity.”⁹²⁶ The court first emphasized: “True, the statute makes two offences, or rather does not require that the punishment inflicted upon a slave shall be both *cruel* and *unusual* to subject the offender to its sanctions: it is enough if the proof show it to be either the one or the other. To punish cruelly is one, and unusually is another breach of criminal law.”⁹²⁷ “The statute, it is apprehended,” the court then held, “does not use the epithets as synonymous, nor in contrast with each other; but it was merely intended to make the enactment sufficiently broad to embrace a high offence against good morals, no matter under what circumstances committed.”⁹²⁸

In so holding, the Alabama Supreme Court—in that unsavory factual context—focused on the concept of cruelty and unusualness separately. As

⁹²⁰ *Id.* at *1.

⁹²¹ *Id.*

⁹²² *Id.* (citing Clay’s Dig. 431).

⁹²³ *Id.* The defendant—described as “[t]he plaintiff in error” on appeal—contended on appeal that “[t]o punish cruelly is one offense, and unusually is another; and they should have been so charged.” *Id.*

⁹²⁴ *Id.*

⁹²⁵ *Id.*

⁹²⁶ *Id.* at *2.

⁹²⁷ *Id.* at *1.

⁹²⁸ *Id.*

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the 1844 ruling stated: “*Cruel*, as indicating the infliction of pain of either mind or body, is a word of most extensive application; yet every cruel punishment is not, perhaps, unusual; nor, perhaps, can it be assumed that every uncommon infliction is cruel.”⁹²⁹ “But be this as it may,” the court then held, “there may be punishment that is both cruel and unusual; thus, if a slave should be punished, even without bodily torture, in a manner offensive to modesty, decency and the recognized proprieties of social life, the offender would be chargeable in the broad terms employed in the indictment.”⁹³⁰ “An offence, committed under such circumstances,” the court concluded, “might be charged according to its true character, without subjecting the indictment to the imputation of duplicity; and upon conviction, the accused would be liable to but one penalty.”⁹³¹

As to the defendant’s second objection—that the indictment was too vaguely worded—the Alabama Supreme Court agreed.⁹³² “In the present case,” the court began, “the statute merely denounces the cruel and unusual punishment of a slave as a public offence, and prescribes the punishment.”⁹³³ “It does not,” it said of the statute, “declare with particularity what are its elements; and consequently, in framing the indictment the statute affords but little aid.”⁹³⁴ Under the circumstances, the Alabama Supreme Court held that “the general terms in which the charge is made against the defendant, is not sufficient; but it should be alleged what punishment was inflicted and how, that the court might judge whether the accused should have been put upon his trial; that he may know what he is to defend against, and the jury know how to apply the evidence.”⁹³⁵ “This brings us to the conclusion,” the court wrote, “that the indictment is defective, because of the generality of the terms in which the defendant is charged.”⁹³⁶ The court—beholden to the Deep South’s peculiar institution of slavery—thus reversed the conviction, finding that the “defect” in the indictment warranted that result.⁹³⁷

In this day and age, state-sanctioned killing—the ultimate penal sanction—must be considered unconstitutional. Executions are cruel, and they have become unusual. The U.S. Supreme Court has already held, in fact, that “the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”⁹³⁸ Not only do executions carry with them the risk of serious *physical* pain and

⁹²⁹ *Id.* (italics in original).

⁹³⁰ *Id.*

⁹³¹ *Id.*

⁹³² *Id.* at *3.

⁹³³ *Id.*

⁹³⁴ *Id.*

⁹³⁵ *Id.*

⁹³⁶ *Id.*

⁹³⁷ *Id.*

⁹³⁸ *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

suffering,⁹³⁹ but the *psychological* injury associated with death sentences—which amounts to a threat of possible execution—must be taken into consideration in gauging their cruelty.⁹⁴⁰ The overall harm, equivalent to cruel and inhumane treatment or torturous conduct,⁹⁴¹ must no longer be countenanced by American law despite prior court rulings to the contrary.⁹⁴² A judicial death sentence places the inmate at risk for the future deprivation of life—something far more credible and serious than, say, idle threats or verbal abuse of inmates by prison officials which normally does not result

⁹³⁹ Karin Buhmann, *Damned If You Do, Damned If You Don't? The Lundbeck Case of Pentobarbital, the Guiding Principles on Business and Human Rights, and Competing Human Rights Responsibilities*, 40 J.L. MED. & ETHICS 206, 208 (2012).

⁹⁴⁰ Compare *Newman v. Alabama*, 466 F. Supp. 628, 635 (D. Ala. 1979) (“The cumulative effect of these deficiencies and abuses is a threat to life and limb that violates the Eighth Amendment.”); *Crawford v. Wisconsin Dep’t of Corr.*, No. 09-C-0616G *7 (E.D. Wis., Sept. 30, 2011) (“Threats and harassment may constitute cruel and unusual punishment.”) (citing *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000)); *French v. Owens*, 777 F.2d 1250, 1257 (7th Cir. 1985) (where prison conditions included prison rapes, assaults, and one prisoner being doused with lighter fluid and attempted to be set aflame, the court held that “[t]he constitution cannot countenance such widespread abuses”) with *Pabon v. Lemaster*, Civil Action No. 07-805, 2008 WL 1830500 *3 (W.D. Pa. 2008) (“To the extent that Plaintiff claims these verbal threats, abuse and harassment constituted cruel and unusual punishments, Defendants are entitled to dismissal of the claims because such verbal threats and abuse do not constitute a sufficiently objective deprivation under the Eighth Amendment.”) (citations omitted); *Williams v. Fleming*, Civil Action No. 7:07CV00199, 2007 WL 2693644 *3 n.5 (Sept. 13, 2007) (“To the extent that Williams alleges that the threat of force feeding was cruel and unusual punishment, in violation of the Eighth Amendment, his claim fails because he does not allege any physical or mental injury.”); *Walton v. Terry*, 38 Fed. Appx. 363, 364-65 (9th Cir. 2002) (“verbal threats do not constitute cruel and unusual punishment”); *Grant v. Fernandez*, No. C 96-1788, 1997 WL 118257 *2 (N.D. Cal., Mar. 5, 1997) (“allegations of harassment and threats generally fail to state a cognizable claim under § 1983”).

⁹⁴¹ See, e.g., *State v. Fielder*, No. W2009-CCA-R3-CD, 2011 WL 3689134 *13 (Tenn. Crim. App. 2011) (“Among the facts found by the trial court to constitute exceptional cruelty to the victim was the manner of use of the Skil saw to threaten amputation of the victim’s hand and cutting his face, and the threats to the lives of the victim’s family. This mental torture was clearly beyond the elements of the offenses.”); *id.* (“The proof showed that Defendant immobilized the victim’s hand while the Skil saw was operated in the threatening manner it was used. Furthermore, the proof supports the inference that Defendant allowed the victim to be frightened by serious threats to his life and the lives of his family.”).

⁹⁴² See *Lucas v. State*, 841 So.2d 380, 389 (Fla. 2003) (twenty-five years on death row does not constitute cruel and unusual punishment); *Foster v. State*, 810 So.2d 910, 916 (twenty-three years on death row does not constitute cruel and unusual punishment); *Knight v. State*, 746 So.2d 423, 437 (Fla. 1998) (more than two decades on death row does not constitute cruel and unusual punishment); *United States v. Walker*, 66 M.J. 721, 756 (N.M. Ct. Crim. App. 2008) (“no American court appears to have found that a lengthy confinement followed by execution constitutes cruel and unusual punishment under the Eighth Amendment”).

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in an Eighth Amendment violation.⁹⁴³ Just as American physicians have concluded that participation in executions violates their solemn ethical oaths,⁹⁴⁴ so too should American lawyers and judges decide that executions are not compatible with their profession—or the practice of law.

By extinguishing the inmate's life, executions inflict the most harm that one can possibly do to an inmate. In its *existing* Eighth Amendment case law, however, the Supreme Court has already firmly rejected the notion that "significant injury"—let alone death—is even a "threshold" requirement for stating an excessive force claim.⁹⁴⁵ "What is necessary to establish an 'unnecessary and wanton infliction of pain,'" the Court has ruled, "varies according to the nature of the alleged constitutional violation."⁹⁴⁶ When prison officials fail to attend to an inmate's serious medical needs, the appropriate inquiry is whether officials exhibited "deliberate indifference."⁹⁴⁷ "This standard is appropriate," the Court states, "because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns."⁹⁴⁸ "Because society does not expect that prisoners will have unqualified access to health care," the Court held in *Hudson v. McMillian*,⁹⁴⁹ "deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'"⁹⁵⁰

Because death sentences inflict severe mental anguish and torment on par with other acts of psychological cruelty, they should be declared unconstitutional. Judicial precedents, in fact, already recognize Eighth Amendment claims based on psychological⁹⁵¹ or emotional distress,⁹⁵² in-

⁹⁴³ *Hahn v. Bauer*, No. 09-2220, 2010 WL 396228 *10 (D. Minn. Jan. 27, 2010) (citing cases).

⁹⁴⁴ Travis Cade Armstrong, "Veneer of Medical Respectability": *How Physician Participation in Lethal Injections Perpetuates the Illusion of a Humane Execution*, 51 S. TEX. L. REV. 469, 484-85 (2009); Emily Pokora, *Should State Codes of Medical Ethics Prohibit Physician Participation in State-Ordered Executions?*, 37 W. ST. U. L. REV. 1, 2 (2009).

⁹⁴⁵ *Wilkins v. Gaddy*, 130 U.S. 1175, 1178 (2010).

⁹⁴⁶ *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). "What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends upon the claim at issue, for two reasons." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). First, "[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should ... be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley*, 475 U.S. at 320. Second, "the Eighth Amendment's prohibition of cruel and unusual punishments 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,' and so admits of few absolute limitations." *Hudson*, 503 U.S. at 8 (citations omitted).

⁹⁴⁷ *Hudson*, 503 U.S. at 5-6 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

⁹⁴⁸ *Hudson*, 503 U.S. at 6 (citing *Whitley*, 475 U.S. at 320).

⁹⁴⁹ 503 U.S. 1 (1992).

⁹⁵⁰ *Id.* at 9.

⁹⁵¹ *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003) (allegation of strip search of male prisoner in front of female prison guards sufficed to state an Eighth Amendment

humane or undignified punishments,⁹⁵³ or—in some cases—threatening conduct.⁹⁵⁴ And the suffering of death-row inmates, many of whom attempt suicide or abandon their appeals and choose to die,⁹⁵⁵ is only exacerbated by the many years or decades they spend on death row in relative isolation. In this regard, the failure of the Supreme Court to take up the question of whether it is “cruel and unusual” punishment to execute inmates who have spent in some cases more than 25 years on death row is inexplicable.⁹⁵⁶ In a dissent in *Sollesbee v. Balkcom*,⁹⁵⁷ a case decided more than sixty years ago, Justice Felix Frankfurter himself noted that the “onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”⁹⁵⁸

claim if the search was “conducted in a harassing manner intended to humiliate and inflict psychological pain”; “physical injury need not result for the punishment to state a cause of action, for the wanton infliction of psychological pain is also prohibited”; *Jordan v. Gardner*, 986 F.2d 1521, 1522–31 (9th Cir. 1993) (en banc) (severe “psychological” pain and trauma can violate the Eighth Amendment); *Northington v. Jackson*, 973 F.2d 1518, 1522–25 (10th Cir. 1992) (placing a revolver to a prisoner’s head without justification and threatening to kill the inmate create an actionable Eighth Amendment claim based on “psychological injury”); *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (“It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment.”); *Madrid v. Gomez*, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) (“[I]f the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.”).

⁹⁵² *Chandler v. Baird*, 926 F.2d 1057, 1066 (11th Cir. 1991) (inmate’s statement that “I’m sure I was depressed from it” was sufficient, when coupled with allegations of harsh conditions of administrative confinement, to state a claim for violation of the Eighth Amendment standards for prison conditions); *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993) (“[I]n order to withstand summary judgment on an Eighth Amendment challenge to prison conditions a plaintiff must produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions.”).

⁹⁵³ *Estelle*, 429 U.S. at 102 (“Our more recent cases ... have held that the [Eighth] Amendment proscribes more than physically barbarous punishments. The Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency ...’”) (citations omitted) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

⁹⁵⁴ *Burton v. Livingston*, 791 F.2d 97 (8th Cir. 1986) (where complaint alleged that a guard pointed a lethal weapon at the prisoner, cocked it, and threatened him with instant death accompanied by racial epithets, the court held that “a prisoner retains at least the right to be free from the terror of instant and unexpected death at the whim of his allegedly bigoted custodians”).

⁹⁵⁵ John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939 (2005).

⁹⁵⁶ See *Thompson v. McNeil*, 129 S. Ct. 1299 (2009); *Johnson v. Bredesen*, 130 S. Ct. 541 (2009); *Lackey v. Texas*, 514 U.S. 1045 (1995).

⁹⁵⁷ 339 U.S. 9 (1950) (Frankfurter, J., dissenting).

⁹⁵⁸ *Id.* at 14.

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The Supreme Court's "deliberate indifference" standard actually already applies to Eighth Amendment claims about conditions of confinement.⁹⁵⁹ To make out a conditions-of-confinement claim, the Court has determined, extreme deprivations are required because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society."⁹⁶⁰ As the Supreme Court held in *Wilson v. Seiter*,⁹⁶¹ "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation."⁹⁶² Because the death penalty, however, deprives an inmate of his or her life, it, if anything, must certainly be considered an extreme—and therefore unconstitutional—deprivation. And because death sentences—the terrifying prerequisite to the execution of inmates—also appear deliberately indifferent to the physical and mental health of inmates, they, too, should be considered unlawful.

The law makes crystal clear that, in a prison setting, prison officials can protect themselves. At the same time, though, they must not cross the line into the *gratuitous* infliction of inmate suffering. Officials confronted with a prison disturbance, the Supreme Court has held, "must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force."⁹⁶³ In *Whitley v. Albers*,⁹⁶⁴ the Court specifically ruled that the "deliberate indifference" standard is inappropriate where force is used to quell a prison disturbance.⁹⁶⁵ In dealing with prison riots or unrest, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"⁹⁶⁶

The *Whitley* standard was extended to all excessive force claims in *Hudson v. McMillian*.⁹⁶⁷ Under *Whitley*, the Court ruled in *Hudson*, "the extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation, 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness

⁹⁵⁹ *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Hudson*, 503 U.S. at 8.

⁹⁶⁰ *Hudson*, 503 U.S. at 9 (quoting *Rhodes*, 452 U.S. at 347).

⁹⁶¹ 501 U.S. 294 (1991).

⁹⁶² *Id.* at 298 (quoting *Rhodes*, 452 U.S. at 347).

⁹⁶³ *Hudson*, 503 U.S. at 6 (citing *Whitley*).

⁹⁶⁴ 475 U.S. 312 (1986).

⁹⁶⁵ *Id.* at 320-21.

⁹⁶⁶ *Hudson*, 503 U.S. at 6-7 (citations omitted). The "core judicial inquiry," the Court re-emphasized in *Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010), is "not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Id.* at 1178.

⁹⁶⁷ 503 U.S. 1, 7 (1992).

that it occur.”⁹⁶⁸ “In determining whether the use of force was wanton and unnecessary,” the Court added, “it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to temper the severity of a forceful response.’”⁹⁶⁹ The utter lack of necessity for executions within prisons make them unconstitutional as there is no need to kill an incarcerated inmate, particularly one tied down to a prison gurney.

Executions, because they are unnecessary, are nothing more than acts of sadistic vengeance. “When prison officials maliciously and sadistically use force to cause harm,” the Court has ruled in another context, “contemporary standards of decency always are violated.”⁹⁷⁰ “Otherwise,” the Court has determined, “the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.”⁹⁷¹ Under the Court’s precedents, even injuries far less significant than death are already expressly prohibited. As Justice Harry Blackmun wrote in 1992 in his concurrence in *Hudson*, explaining the ruling’s significance: “The Court today appropriately puts to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with ‘significant injury,’ e.g., injury that requires medical attention or leaves permanent marks.”⁹⁷²

At executions, of course, the level of injury is off the charts: the inmate’s death. And the intent to harm the inmate is clear: the state, through its judicial process and using execution protocols to carry out its will, methodically plans the inmate’s death, often for years or decades in advance. Bizarrely, the Supreme Court has held that executions pass constitutional muster even though injuries characterized as “minor”—as the Fifth Circuit described the prisoner’s in *Hudson*—can be Eighth Amendment violations.⁹⁷³ Though the Supreme Court acknowledged in *Hudson* that not every “malevolent touch by a prison guard gives rise to a federal cause of action,”⁹⁷⁴ it expressly excluded only *de minimis* uses of force from the Eighth Amendment’s scope.⁹⁷⁵ As the Court ruled: “The Eighth Amendment’s prohibition of ‘cruel and unusual’ punishments necessarily excludes

⁹⁶⁸ *Hudson*, 503 U.S. at 9 (quoting *Whitley*, 475 U.S. at 321).

⁹⁶⁹ *Id.* (quoting *Whitley*, 475 U.S. at 321).

⁹⁷⁰ *Id.* at 9. “This is true,” the Court emphasized, “whether or not significant injury is evident.” *Id.*

⁹⁷¹ *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1178 (2010).

⁹⁷² *Hudson*, 503 U.S. at 13-14 (Blackmun, J., concurring).

⁹⁷³ *Id.* at 10 (citation omitted).

⁹⁷⁴ *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (“Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates a prisoner’s constitutional rights.”)).

⁹⁷⁵ “An inmate who complains of a ‘push or shove’ that causes not discernible injury almost certainly fails to state a valid excessive force claim,” the Supreme Court emphasized in *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1178 (2010).

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from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’”⁹⁷⁶

A comparison of the injuries suffered by the inmate in *Hudson*—and found to be actionable—should be contrasted with those inflicted at executions. “The blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate,” the Court concluded in *Hudson*, “are not *de minimis* for Eighth Amendment purposes.”⁹⁷⁷ Thus, the Court in *Hudson* refused to dismiss the prisoner’s section 1983 claim alleging the use of excessive force.⁹⁷⁸ “Injury and force,” the Court also emphasized in its per curiam opinion in *Wilkins v. Gaddy*,⁹⁷⁹ “are only imperfectly correlated, and it is the latter that ultimately counts.”⁹⁸⁰ As the Court wrote in that 2010 decision: “An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.”⁹⁸¹ Executions, by contrast, inflict death itself.

VI. Conclusion

The history of the death penalty is one of successive restrictions on its use. The death penalty was once inflicted for a whole host of offenses. England’s “Bloody Code” made more than 200 crimes punishable by death, and laws in the American colonies were modeled on English practice.⁹⁸² In the late eighteenth century, however, many of America’s founders and framers read and were inspired by the writings of an Italian philosopher, Cesare Beccaria. In the 1760s, Beccaria wrote *On Crimes and Punishments*, a book in which he called for proportion between crimes and pun-

⁹⁷⁶ *Hudson*, 503 U.S. at 10 (citations omitted).

⁹⁷⁷ *Id.*

⁹⁷⁸ *Id.*

⁹⁷⁹ 130 S. Ct. 1175 (2010).

⁹⁸⁰ *Id.* at 1178.

⁹⁸¹ *Id.* at 1178-79. In *Wilkins*, the inmate alleged that he was “punched, kicked, kneed, choked, and body slammed ‘maliciously and sadistically’ and ‘[w]ithout any provocation.’” *Id.* at 1179. The District Court in that case dismissed the inmate’s action *sua sponte* because the purported assault—which allegedly left the inmate with “a bruised heel, pack pain, and other injuries requiring medical treatment”—involved “*de minimis* force.” *Id.* After the U.S. Court of Appeals for the Fourth Circuit summarily affirmed the district court’s ruling, *id.* at 1177, the U.S. Supreme Court reversed. *Id.* at 1176. In reserving judgment on the inmate’s specific allegations, the Court in *Wilkins* held as follows: “In holding that the District Court erred in dismissing Wilkins’ complaint based on the supposedly *de minimis* nature of his injuries, we express no view on the underlying merits of his excessive force claim. In order to prevail, Wilkins will ultimately have to prove not only that the assault actually occurred but also that it was carried out “maliciously and sadistically” rather than as part of “a good-faith effort to maintain or restore discipline.” *Id.* at 1180.

⁹⁸² Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 223 (2001).

ishments and opposed both torture and capital punishment. That treatise influenced Europeans such as Sir William Blackstone and Jeremy Bentham, as well as leading American revolutionaries, including John Adams, Dr. Benjamin Rush, and Thomas Jefferson.⁹⁸³

Today, executions are seen in other parts of the world—including in England, America's mother country—as human rights violations. Europe has treaties in place that already forbid the use of executions,⁹⁸⁴ and the unmistakable trend worldwide is toward abolition.⁹⁸⁵ Some countries even refuse to extradite offenders to the United States unless assurances are given that the death penalty will not be sought.⁹⁸⁶ And here in the United States, the number of executions and death sentences has declined markedly. The number of U.S. executions fell from 98 in 1999 to 43 in 2012, and the number of American death sentences fell from more than 300 per year in 1995 and 1996 to 78 in 2011.⁹⁸⁷ In truth, executions are rarely and arbitrarily imposed—and often in a racially discriminatory manner.

The death penalty has a long, sordid history, dating back to the very beginnings of recorded history.⁹⁸⁸ In the United States, executions were once used to quell slave rebellions, and their use has long been associated with racial prejudice.⁹⁸⁹ Executions are now heavily concentrated in the South, the same region where slavery was once so stubbornly entrenched and where racially motivated extra-judicial lynchings were prevalent.⁹⁹⁰ In fact, multiple studies show that the odds of receiving a death sentence increase dramatically for African Americans who kill whites. This disturbing state of affairs runs counter to basic precepts of U.S. law, including equal protection of the laws, though—to date—the U.S. Supreme Court has insisted on more than statistical proof to demonstrate racial bias in capital cases.⁹⁹¹

⁹⁸³ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 48-49, 70-71.

⁹⁸⁴ Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, opened for signature Apr. 28, 1983, E.T.S. No. 114 (entered into force Mar. 1, 1985); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, opened for signature May 3, 2002, E.T.S. No. 187 (entered into force July 1, 2003).

⁹⁸⁵ *Figures on the Death Penalty*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/death-penalty/numbers> (last visited Feb. 18, 2013).

⁹⁸⁶ Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 U.C. DAVIS J. INT'L L. & POL'Y 273, 311 (2010).

⁹⁸⁷ *Facts about the Death Penalty*, *supra* note 48.

⁹⁸⁸ GARY P. GERSHMAN, DEATH PENALTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 16 (2005).

⁹⁸⁹ DOUGLAS R. EGERTON, GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802, at 111-12, 187 (1993).

⁹⁹⁰ PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2007).

⁹⁹¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

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Although the Founding Fathers did not abolish all death penalty laws, they actively explored alternatives to executions.⁹⁹² Indeed, it was during their time—as well as that of succeeding generations—that America’s penitentiary system, on a state-by-state basis, began to be built and then progressively developed.⁹⁹³ The Walnut Street Prison in Philadelphia opened only a year before the ratification of the U.S. Bill of Rights,⁹⁹⁴ though other states were soon to follow Pennsylvania’s example.⁹⁹⁵ New York passed legislation in 1796 providing for the construction of the Newgate state prison in Greenwich Village⁹⁹⁶; New Jersey completed its state penitentiary in 1797; and penitentiaries in Virginia and Kentucky opened in 1800, the same year Massachusetts appropriated money for one.⁹⁹⁷ The Maryland Penitentiary was opened in 1811,⁹⁹⁸ and construction of other state penitentiaries began in that decade and the ones that followed.⁹⁹⁹ In Adam Hirsch’s *The Rise of the Penitentiary*, the author states that “[t]he penitentiary had its heyday in the United States in the 1830s” as “[f]acilities proliferated.”¹⁰⁰⁰

Today, state and federal penitentiaries around the country—built with concrete and iron—are readily available to house violent offenders, making executions anachronistic and obsolete. In fact, in America, life-without-parole sentences—now available as a sentencing option in all death penalty states—have already largely displaced executions as society’s preferred method of punishment.¹⁰⁰¹ There are now more than 41,000 offenders in the U.S. serving life-without-parole sentences.¹⁰⁰² In comparison, as of January 1, 2013, there were 3,125 death row inmates in the United States, with even fewer executions—1,343 to be exact—having occurred in the United States since 1976.¹⁰⁰³ When those numbers are thoughtfully consid-

⁹⁹² BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 66-161.

⁹⁹³ ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* (1992).

⁹⁹⁴ Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 496 (2009).

⁹⁹⁵ *Id.* at 470.

⁹⁹⁶ Leonard G. Levenson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination*, 18 HARV. C.R.-C.L. L. REV. 409, 415 (1983).

⁹⁹⁷ James M. Binnall, *Respecting Beasts: The Dehumanizing Quality of the Modern Prison and an Unusual Model for Penal Reform*, 17 J.L. & POL’Y 161, 171 n.68 (2008) (citation omitted).

⁹⁹⁸ Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 990 (2003).

⁹⁹⁹ Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO STATE J. CRIM. L. 53, 62-63 (2011).

¹⁰⁰⁰ HIRSCH, *supra* note 993, at 112 (1992).

¹⁰⁰¹ Marilyn Peterson Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 MARQ. L. REV. 1, 5-6 & n.10 (2012).

¹⁰⁰² Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 223 (2012).

¹⁰⁰³ *Facts about the Death Penalty*, *supra* note 48.

ered, the inescapable conclusion is that life-without-parole sentences have become the typical—or usual—choice of juries, while death sentences and executions are now unusual, less preferred, and no longer the norm.

At the Jefferson Memorial in Washington, D.C., a series of quotes are inscribed under the dome. On one panel, Jefferson's familiar and immortal words from the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."¹⁰⁰⁴ But another panel contains a lesser-known quotation, an excerpt from a letter Thomas Jefferson wrote in 1816.¹⁰⁰⁵ That excerpt reads: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind."¹⁰⁰⁶ As Jefferson's letter read: "As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors."¹⁰⁰⁷ Jefferson's words, written as part of the American Enlightenment, serve as a valuable reminder that the right to life is to be protected—and that equality and human progress are important American values.

The genius of the U.S. Constitution's Cruel and Unusual Punishments Clause is that it allows each generation of American judges, in their own time, to evaluate anew what punishments are "cruel and unusual." Every generation must decide for itself what societal practices will be allowed, and in that respect, Jefferson's words should be taken to heart. While crime is about what the offender does, punishment is about how society behaves and reacts. The absence of cruel and unusual punishments in a society is a sign of progress that also furthers human dignity, that long-standing Eighth Amendment touchstone. Indeed, the Constitutional Court of the Republic of South Africa ruled back in 1995—more than fifteen years ago—that the death penalty violated principles of human dignity and was thus unconstitutional in that society.¹⁰⁰⁸

In America, the time has finally come for the U.S. Supreme Court to put an end to capital punishment once and for all. The death penalty—whether seen as a product of the Dark Ages or a step-child of the peculiar institutions of slavery or apartheid—must be seen as a vestige of a bygone

¹⁰⁰⁴ Declaration of Independence (July 4, 1776).

¹⁰⁰⁵ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816).

¹⁰⁰⁶ *Quotations on the Jefferson Memorial*, THOMAS JEFFERSON'S MONTICELLO, <http://www.monticello.org/site/jefferson/quotations-jefferson-memorial> (last visited Feb. 16, 2013).

¹⁰⁰⁷ Letter from Thomas Jefferson, *supra* note 1005.

¹⁰⁰⁸ *S. v. Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391.

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era. Because it has no place in a civilized society, be it in Africa or America, it should go the way of the stocks, the pillory, and the whipping post. Just as American society no longer tolerates ear cropping or hand-branding, it should no longer tolerate executions. Penitentiaries and life-without-possibility-of-parole sentences are more than sufficient to protect the public from violent offenders while allowing us to maintain our own respect for human dignity and human rights.