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The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual

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ABSTRACT

The Eighth Amendment of the U.S. Constitution, like the English Bill of Rights before it, safeguards against the infliction of "cruel and unusual punishments." To better understand the meaning of that provision, this Article explores the concept of "unusual punishments" and its opposite, "usual punishments." In particular, this Article traces the use of the "usual" and "unusual" punishments terminology in Anglo-American sources to shed new light on the Eighth Amendment's Cruel and Unusual Punishments Clause. The Article surveys historical references to "usual" and "unusual" punishments in early English and American texts, then analyzes the development of American constitutional law as it relates to the dividing line between "usual" and "unusual" punishments. The Article concludes that customary punishments were often described as "usual punishments," but that it was understood—and has long been understood by the U.S. Supreme Court itself—that punishments might become "unusual" over time. The Article further concludes that the protection against the infliction of "cruel and unusual punishments" arose out of a desire to protect against torture and the arbitrary infliction of punishments, including ones that were either out of step with societal values or that had become at odds with societal norms. In light of the decline in death sentences and executions, the Fourteenth Amendment's post-Civil War guarantee of "due process" and "equal protection of the laws," and the Eighth Amendment's long-standing prohibition against torture, this Article concludes that America's death penalty, which has always been cruel, has now become a highly arbitrary and unusual punishment. The Article concludes that life sentences are now the "usual" punishment for the most serious crimes, and that the death penalty is now "unusual" and that its use is incompatible with the text and guarantees of the U.S. Constitution. Not only are executions now extremely rare, especially in comparison to life sentences, but the death penalty is administered in an arbitrary, error-prone, discriminatory, and torturous manner.

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I. INTRODUCTION

The English Bill of Rights of 1689 included a prohibition on the infliction of "cruel and unusual punishments."[1] That provision was a byproduct of the Glorious Revolution of 1688, a revolution that overthrew King James II of England, a Catholic, and installed Dutch stadtholder William III of Orange-Nassau and his wife, Mary II, as England's new king and queen.[2] On February 13, 1689, William and Mary, while seated on armchairs "under a Canopy in the Banqueting-House," listened as a clerk read a declaration recounting how King James II had abrogated the throne and violated the rights of the English people.[3] To vindicate "their Ancient Rights and Liberties," the "Lords Spiritual and Temporal, and Commons"—those who had joined forces with William of Orange to put parliamentary limits on monarchical power—publicly declared their rights, the tenth of which read: "That Excessive Bail ought not to be required, nor Excessive Fines imposed, nor cruel and unusual Punishments inflicted."[4]

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[1] Roper v. Simmons, 543 U.S. 551, 577 (2005); Harmelin v. Michigan, 501 U.S. 957, 966 (1991). That protection has been described as a "fundamental principle of the Government of England" intended "to establish mercy, even to convicted offenders." JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 385 (1789); *see also id.* at 385–86 (citing Article 10 of the English Bill of Rights and noting "Torture has, from the earliest times," been "unknown in England"):

> 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.
>
> Nay, so 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 æra of the Revolution, that "no cruel and unusual punishments should be used."

[2] *See generally* STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION (2009).

[3] ABEL BOYER, THE HISTORY OF KING WILLIAM THE THIRD 354–56 (1702). That declaration recited that "Excessive Bail hath been requir'd of Persons committed in Criminal Cases," that "Excessive Fines have been impos'd," and that "Illegal and Cruel Punishments inflicted." *Id.* at 355.

[4] *Id.*; *see also* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 575 (2010):

> There is no clear evidence as to what Parliament intended to probibit by the language of Article 10. The preamble of the English Bill of Rights denounces King James II's subversion of English laws and liberties by, among other things, suspending laws without Parliament's consent, prosecuting prelates for petitioning the King, and prosecuting individuals for ecclesiastical offenses. The document also charges that "excessive fines have been imposed; and illegal and cruel punishments inflicted." Historically, scholars have disagreed whether the document prohibited cruel methods of punishment or cruel and illegal punishments, but they seem to agree that, whatever the meaning of the document, it was enacted "to prevent a recurrence of recent events" in England.

Like the British, Americans opposed "cruel and unusual punishments," though that concept was left undefined in American constitutions. Prior to the Revolutionary War (1775–1783), American colonists, as British subjects living in the Age of the Enlightenment, felt grossly abused and oppressed by George III.[5] After unsuccessfully seeking fair and equitable treatment in comparison to those in the British Isles, the colonists rebelled, declared their independence, promulgated bills of rights and constitutions containing important legal protections, and became American citizens.[6] In light of that history and the fervent desire of the colonists to safeguard their individual rights, privileges, and liberties, it is hardly surprising that the long-standing English prohibition against "cruel and unusual punishments" was widely copied—sometimes verbatim—in American declarations of rights and in constitutions in the newly forged republic, the United States of America.[7]

The legal protection against "cruel and unusual punishments," a prohibition early Americans eagerly embraced, first found its way into American law through an

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[5] BARBARA BARDES, MACK SHELLEY & STEFFEN SCHMIDT, AMERICAN GOVERNMENT AND POLITICS TODAY: THE ESSENTIALS 31 (2008) ("The conflict between Britain and the American colonies, which ultimately led to the Revolutionary War, began in the 1760s when the British government decided to raise revenues by imposing taxes on the American colonies."); *compare* 1 ALBERT H. PUTNEY, INTRODUCTION TO THE STUDY OF LAW: LEGAL HISTORY 210 (1908):

> The Revolutionary War, in its broadest significance, was not so much between America and England, as one in which the radical forces in both countries were arrayed against the conservative elements in each. William Pitt openly rejoiced that America had resisted, while Fox, in his speeches in the House of Commons habitually referred to Washington's forces as "our army," and even adopted the famous blue and buff of the continental army as the colors of the Whig party. With the mass of the English people the war was so unpopular that the troops for the war mainly had to be hired in Germany. On the other hand, probably at least one-third of the whole population of the colonies were Tories in their sympathies, and this third included the majority (the great majority outside of Massachusetts) of the wealthy and educated classes.

[6] The Declaration of Independence, referring to "a long train of abuses and usurpations," "absolute Despotism," and "repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States," asserted that it was the "right" and "duty" of the people "to throw off such Government." THE DECLARATION OF INDEPENDENCE (U.S. 1776). Among the indictments of George III in the Declaration of Independence: "He 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." *Id.*

[7] JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 155 (2012); *see also* Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1518 (2012):

> Six states, or 46 percent of the total number of states, comprising 56 percent of the total U.S. population in 1787, had constitutional bans on cruel and/or unusual punishments. These states were Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia. Cruel and/or unusual punishment clauses were far more popular in the South . . . .

identically-worded provision of the Virginia Declaration of Rights.[8] That declaration of rights was drafted in 1776 by George Mason, a plantation owner, before the issuance of the American Declaration of Independence.[9] The safeguards against cruelty and "unusual punishments" also found a home in other bills of rights or state constitutions, ones that variously prohibited "cruel and unusual," "cruel or unusual," or simply "cruel" punishments.[10] "[I]n the late eighteenth century," Yale Law School professor Akhil Amar has written, "every schoolboy in America knew that the English Bill of Rights' 1689 ban on excessive bail, excessive fines, and cruel and unusual punishments—a ban repeated virtually verbatim in the Eighth Amendment—arose as a response to the gross misbehavior of the infamous Judge Jeffreys."[11]

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[8] LOUIS J. PALMER, JR., THE DEATH PENALTY: AN AMERICAN CITIZEN'S GUIDE TO UNDERSTANDING FEDERAL AND STATE LAWS 12 (1998):

> A Virginia delegate named George Mason was responsible for taking the tenth clause of the English Bill of Rights and placing it into Virginia's Declaration of Rights. Mason was also a strong advocate at the Constitutional Convention for placing the tenth clause into the Constitution as the Eighth Amendment. His foresight eventually paid off, and in 1791 the tenth clause, with slight modifications, became the Constitution's Eighth Amendment.

[9] VA. BILL OF RIGHTS: A DECLARATION OF RIGHTS, § IX (June 12, 1776). In America itself, the notion of "usual" punishments—the flip side of "unusual" punishments—can be found in non-legal contexts, too. THE REMEMBRANCER; OR, IMPARTIAL REPOSITORY OF PUBLIC EVENTS, PART III, FOR THE YEAR 1776, at 53 (1777) (showing an entry pertaining to August 21, 1776, in Philadelphia, notes that George Morgan "prevented the usual punishments of the prisoners upon their entry").

[10] BESSLER, *supra* note 7, at 178–80. The history of the English prohibition against "cruel and unusual punishments" suggests that seventeenth-century Englishmen may have seen no distinction between "cruel and unusual" or "cruel or unusual" punishments. As one academic has written:

> The history of the English Bill of Rights reinforces the conclusion that the phrases "cruel *and* unusual" and "cruel *or* unusual" were understood to capture the same meaning. Just months after the House of Lords approved the Bill's prohibition against "cruel *and* unusual punishments," a group of Lords filed a dissenting statement in the case of Titus Oates. The dissenting Lords concluded that the punishments imposed in Oates's cases violated the Bill of Rights, which they described as providing that neither "cruel *nor* unusual punishments [be] inflicted." Their mistake suggests that they understood prohibitions of "cruel and unusual" and "cruel or unusual" punishments as equivalents. This history has particular salience because the Cruel and Unusual Punishment Clause was taken virtually verbatim from the English Bill of Rights and because the English Bill of Rights is thought to have been principally a reaction to the punishments in Oates's case.

Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 503–04 (2005); *see also* Michael David Warren Jr., *Constitutional Law*, 56 WAYNE L. REV. 991, 1002–03 (2010) (noting that whereas the U.S. Constitution prohibits "cruel and unusual" punishments, the Michigan Constitution prohibits "cruel or unusual" punishments).

[11] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 87 (1998). Chief Justice George Jeffreys of the Kings Bench had, after the 1685 trial, presided over a sentencing of a cleric, Titus Oates (1649–1705), who committed perjury. Oates had fabricated a supposed Catholic conspiracy, a "Popish Plot," to kill King Charles II, with Lord Chief Justice Jeffreys lamenting that death was not a permissible punishment for perjury. As a result of his conduct, which led to the execution of more than a dozen innocent men, Oates was sentenced to be defrocked, to pay a fine of two thousand marks (the

The wording of American prohibitions against "cruel" or "unusual" punishments, or both, was not uniform.[12] For example, the Northwest Ordinance of 1787, governing newly acquired Western lands and famously barring slavery, included an express prohibition against "cruel *or* unusual punishments."[13] But in the U.S. Constitution's Eighth Amendment, adopted by Congress in 1789[14] and ratified in 1791,[15] the legal bar was expressed as one against "cruel *and* unusual punishments."[16] When James Madison—"the Father of the U.S. Constitution"[17]—drafted the U.S. Bill of Rights, he, like George Mason and many others, found the prohibition against "cruel and unusual punishments" to be a worthy one.[18] His chosen language—now set forth in the Constitution's Eighth Amendment—jettisoned the hortatory word "ought" in the English and Virginia provisions and replaced it with a "shall not" directive, making the bar on the infliction of "cruel and unusual punishments" an absolute prohibition.[19] In the decades and centuries to come, it would, naturally, fall to American judges to decide precisely what such prohibitions actually meant.

The concept of "cruel and unusual punishments" has been the subject of much litigation,[20] endless legal scholarship,[21] and tremendous public controversy.[22] In the

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equivalent of $10,000), to be whipped from Aldgate to Newgate (a distance of more than a mile) and, two days later, from Newgate to Tyburn (an additional two miles). Oates was then to be imprisoned for life and pilloried four times per year. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 236–37 (2001); Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 91–94, 94 n.156 (2012); *see also* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 970 (2011) [hereinafter *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*] ("Parliament condemned the punishment inflicted on Titus Oates as "contrary to Law and ancient Practice.").

[12] BESSLER, *supra* note 7, at 178–80.

[13] *Id.* at 119 (emphasis added); *see also* 2 WILLIAM WINTERBOTHAM, AN HISTORICAL, GEOGRAPHICAL, COMMERCIAL, AND PHILOSOPHICAL VIEW OF THE AMERICAN UNITED STATES, AND OF THE EUROPEAN SETTLEMENTS IN AMERICA AND THE WEST-INDIES 490 (1795) (reprinting the NORTHWEST ORDINANCE (U.S. 1787), which provides in Article II, that "no cruel or unusual punishment shall be inflicted"). The act providing for the government of the Missouri territory also included a prohibition against "cruel or unusual punishment." An Act Providing for the Government of the Territory of Missouri, 12th Cong., 1st Sess., § 14 (June 4, 1812), *reprinted in* 4 LAWS OF THE UNITED STATES OF AMERICA, FROM THE 4TH OF MARCH, 1789, TO THE 4TH OF MARCH, 1815, at 442–43 (1816).

[14] CHRISTINE BARBOUR & GERALD C. WRIGHT, KEEPING THE REPUBLIC: POWER AND CITIZENSHIP IN AMERICAN POLITICS 139 (6th ed. 2014) ("The first ten amendments to the Constitution, known as the Bill of Rights, were passed by Congress on September 25, 1789.").

[15] The Eighth Amendment was ratified on December 15, 1791. RICHARD S. CONLEY, HISTORICAL DICTIONARY OF THE U.S. CONSTITUTION 73 (2016).

[16] U.S. CONST. amend. VIII (emphasis added).

[17] 1 STEVEN HARMON WILSON, ED., THE U.S. JUSTICE SYSTEM: AN ENCYCLOPEDIA 568 (2012).

[18] JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002, at 156 (2d ed. 2003) ("Both the Virginia and the North Carolina ratifying conventions called for amendments against cruel and unusual punishments, and James Madison linked this guarantee to the provisions against excessive bail and fines when he presented his proposal for a bill of rights before Congress.").

[19] BESSLER, *supra* note 7, at 155.

[20] *See generally* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (2011); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (2016); *see also* KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS

academic world, a University of Florida law professor, John Stinneford, has written about what he describes as the original meaning of both "cruel"[23] and "unusual."[24] He contends that the framers used the term "cruel" to denote "unjustly harsh"[25] and that they used the term "unusual" to mean punishments "contrary to long usage."[26] "In the seventeenth and eighteenth centuries," Stinneford observes in laying out his interpretative arguments, "the term 'unusual' had many of the meanings we currently associate with the term: 'rare,' 'uncommon,' 'out of the ordinary." "The word," he asserts, "also had a more specific meaning, however, as a legal term of art: 'contrary to long usage' or 'immemorial usage.'" As Stinneford, looking to history for guidance in constitutional interpretation, contends: "A review of seventeenth- and eighteenth-century legal and political history shows that this last meaning is the only one that may plausibly be attributed to the term 'unusual' in the Eighth Amendment's Cruel and Unusual Punishments Clause."[27]

In sharp contrast, Akhil Amar, in his article, "America's Lived Constitution," has written about the Eighth Amendment through a much different interpretive lens. "In ordinary language," he writes, "the word 'unusual' focuses not merely on laws on the books but also on the law as actually applied."[28] Emphasizing that "the meaning of the

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200 (2009) ("In the ferment of the 1960s, the death penalty produced intense debate. Proposals to abolish or restrict capital punishment competed with calls to expand its use.").

[21] *Compare* David A. J. Richards, *Constitutional Interpretation, History, and the Death Penalty*, *in* HUGO ADAM BEDAU, ED., THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 214 (1997) ("The argument of Raoul Berger's book, *Death Penalties: The Supreme Court's Obstacle Course,* may be easily summarized: the persons who drafted and approved the eighth and fourteenth amendments to the United States Constitution did not intend the former to limit, let alone invalidate, the use of the death penalty by the federal or state governments." (citing RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982)), *with* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970) (an influential article arguing that the death penalty is unconstitutional); *see also* Jacob Lemon-Strauss, *The States are Right: Arguing for the Continued Use of State Legislators in Forming a National Consensus for the Evolving Standards of Decency*, 47 AM. CRIM. L. REV. 1319, 1319 (2010) ("The Eighth Amendment has spawned a great torrent of scholarship and jurisprudence.").

[22] *E.g.*, BILLY WAYNE SINCLAIR & JODIE SINCLAIR, CAPITAL PUNISHMENT: AN INDICTMENT BY A DEATH-ROW SURVIVOR 131 (2011) (noting in Chapter 10: "In June 2008, the U.S. Supreme Court struck down the death penalty for child rape in *Kennedy v. Louisiana*. The decision caught the attention of then presidential candidates John McCain and Barack Obama, who went on record as disagreeing with it.").

[23] John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441 (2016) [hereinafter *The Original Meaning of "Cruel"*].

[24] John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) [hereinafter *The Original Meaning of "Unusual"*].

[25] *The Original Meaning of "Cruel"*, *supra* note 23, at 445.

[26] *The Original Meaning of "Unusual"*, *supra* note 24, at 1745; *see also* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 536 (2014); *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, *supra* note 11, at 901; *compare* William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 5 AM. U. L. REV. 1355, 1373 (2005) (discussing the meaning of "unusual" and noting that the U.S. Supreme Court, in *In re Kemmler*, 136 U.S. 436 (1890), "was confronted with the question of whether New York's use of the electric chair, an innovation at the time, was constitutional," and determined that the state's use of the electric chair was constitutional).

[27] *The Original Meaning of "Unusual"*, *supra* note 24, at 1767–68.

[28] Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1780 n.114 (2011). As Amar writes of the implications of a living constitutionalism approach, using a low-level offense as an example:

Bill of Rights shifted when its words and principles were refracted through the prism of the Fourteenth Amendment," Amar has reflected on the U.S. Supreme Court's decades-old penchant for counting jurisdictions that either permit or prohibit a particular punishment to assess its constitutionality. "Suppose that the policies of, say, Wyoming and California differ dramatically on a rights-related issue," Amar writes, posing a hypothetical before raising these important questions as regards interpreting the Constitution's Eighth Amendment: "Should the norms and practices of Wyoming's half-million inhabitants be given the same weight, Senate-style, as those of California's thirty-six million residents? Or should a proper tally reflect the population differential, House-style?" "This issue," Amar explains, "has pointedly arisen in cases pondering whether a given form of criminal punishment practiced in some states but not others violated the Eighth Amendment, which prohibits 'cruel and unusual punishment.'"[29]

The Justices of the U.S. Supreme Court have, themselves, interpreted the Eighth Amendment's Cruel and Unusual Punishments Clause in widely divergent ways.[30] While a majority of Justices have long eschewed an eighteenth-century-centric view of that

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> Laws exist allowing jaywalkers to be jailed; but being jailed for jaywalking in America is surely "unusual." (Whether it is also "cruel" is another question.) Examining law as actually applied properly brings constitutional institutions other than the legislature into the frame of Eighth Amendment analysis. Criminal laws are often written in overbroad ways precisely because it is understood, and in some respects constitutionally required, that such laws will be softened in practice by merciful discretion exercised by prosecutors, grand juries, criminal trial juries, trial judges, governors, and parole boards. Each of these institutions represents the public, too, and helps define what modern America really does believe and practice when it comes to punishment.

[29] *Id.* at 1778. The Supreme Court frequently tallies states that either permit or prohibit a given punishment. *See* Kennedy v. Louisiana, 554 U.S. 407, 426 (2008):

> The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty. As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.

Notably, since *Kennedy v. Louisiana*, additional states have abolished the death penalty altogether. LARRY J. SIEGEL & JOHN L. WORRALL, INTRODUCTION TO CRIMINAL JUSTICE 448 (16th ed. 2018) (noting that Connecticut abolished the death penalty in 2012 and that Maryland abolished the death penalty in 2013).

[30] Many U.S. Supreme Court decisions in the Eighth Amendment arena have been decided by five-to-four votes. *See, e.g.*, E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 134 (2009) ("Since 1980 the Supreme Court has decided six cases in which the duration of a prison sentence was attacked on Eighth Amendment grounds. All six cases were 5-4 decisions in form or substance . . . .").

clause,[31] in a dissent, Justice Antonin Scalia—the prominent originalist voice—once wrote: "The Eighth Amendment is addressed to always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew."[32] And when it comes to what punishments are "unusual," the Justices have articulated differing views, too. While Justice Potter Stewart emphasized in 1972 that "death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . ,"[33] Justice William O. Douglas concluded that same year that "the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[34] Justice Scalia, on the other hand, relying on popular dictionary definitions, defined "unusual" in *Harmelin v. Michigan*[35] to mean "such as [does not] occu[r] in ordinary practice" and "[s]uch as is [not] in common use."[36]

Since 1958, the Eighth Amendment has been interpreted in accordance with the "evolving standards of decency that mark the progress of a maturing society."[37] As the Court observed in its 1958 decision in *Trop v. Dulles*, where it established that now decades-old legal standard: "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."[38] In describing its prior holding in *Weems v. United States*, a 1910 decision invalidating a severe corporal punishment, the Court in *Trop*—which essentially, without extended discussion, adopted a layperson's understanding of *unusual*[39]—emphasized: "This Court has had little occasion to give precise content to the

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[31] *Compare* MARY WELEK ATWELL, EVOLVING STANDARDS OF DECENCY: POPULAR CULTURE AND CAPITAL PUNISHMENT 25 (2004) (noting that the U.S. Supreme Court has interpreted the Eighth Amendment in accordance with the "evolving standards of decency that mark the progress of a maturing society," with the Court concluding that the Eighth Amendment "is not static"), *with* RUDOLPH J. GERBER & JOHN M. JOHNSON, THE TOP TEN DEATH PENALTY MYTHS: THE POLITICS OF CRIME CONTROL 90 (2007) (discussing Justice Scalia's views of the Eighth Amendment prohibition against "cruel and unusual punishments," with Justice Scalia having expressed the view that because the death penalty "was clearly permitted when the Eighth Amendment was adopted," "it is clearly permitted today").

[32] Atkins v. Virginia, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting).

[33] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., dissenting).

[34] *Id.* at 242 (Douglas, J., concurring).

[35] 501 U.S. 957 (1991).

[36] *Id.* at 976 (quoting WEBSTER'S AMERICAN DICTIONARY (1828), and WEBSTER'S SECOND INTERNATIONAL DICTIONARY 2807 (1954)).

[37] Trop v. Dulles, 356 U.S. 86, 101 (1958). Several of the U.S. Supreme Court's decisions applying the "evolving standards of decency" test have been in the death penalty arena. *E.g.*, 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).

[38] *Trop*, 356 U.S. at 103.

[39] *Id.* at 100 n.32 (citations omitted):

> Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. 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. 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.' If the word 'unusual' is to have any meaning apart from the word 'cruel,'

Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character."[40]

Whereas the Court in *Trop*, in rejecting a rigid, purely historical interpretation of the Eighth Amendment, struck down the punishment of expatriation or denationalization for desertion, the Court in *Weems*[41] declared unconstitutional a draconian practice in the Philippines known as *cadena temporal*.[42] Notably, the Supreme Court in *Trop*—self-aware of the lack of logic in striking down a *non-lethal* punishment when capital punishment laws were still in place—felt the need to mention the death penalty even as it invalidated a punishment that would have rendered an American soldier stateless. "At the outset," the Court stressed, "let us put to one side the death penalty as an index of the constitutional limit on punishment."[43] As the Court, in its plurality opinion,[44] then observed: "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."[45] Those words were penned sixty years ago, decades before the United States, in

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> however, the meaning should be the ordinary one, signifying something different from that which is generally done.

[40] *Id.* at 100 (citing Weems v. United States, 217 U.S. 349 (1910)). In *Weems*, the Supreme Court observed: "What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous,—torture and the like." 217 U.S. at 368.

[41] Denationalization as a punishment was characterized as unusual by the Supreme Court in *Trop*. *Trop*, 356 U.S. at 100 n.32.

[42] BESSLER, *supra* note 7, at 196–97; *see also Weems*, 217 U.S. at 378 (noting that the Cruel and Unusual Punishments Clause is "progressive" in nature and "may acquire meaning as public opinion becomes enlightened by a humane justice"). Even before *Weems*, the U.S. Supreme Court—in a different context—noted that public opinion could shape punishment practices. *See Ex parte* Wilson, 114 U.S. 417, 427–28 (1885):

> What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. 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 . . . . But at the present day either stocks or whipping might be thought an infamous punishment.

[43] *Trop*, 356 U.S. at 99.

[44] The plurality opinion in *Trop* was authored by Chief Justice Earl Warren and joined by Justices Black, Douglas, and Whittaker. *Id.* at 87.

[45] *Id.* at 99 (emphasis added). Through the years, the U.S. Supreme Court has distinguished the *dictionary* definition of "cruel" from the concept of cruelty in its *constitutional* sense. BESSLER, *supra* note 7, at 210, 295–96, 331–32. The death penalty today, of course, is no longer "widely accepted." The majority of the world's nations no longer actively make use of executions, and Americans themselves—per public opinion polls—are very divided (as has now long been the case) about the propriety of the punishment. SCOTT VOLLUM, ROLANDO V. DEL CARMEN, DURANT FRANTZEN, CLAUDIA SAN MIGUEL & KELLY CHEESEMAN, THE DEATH PENALTY: CONSTITUTIONAL ISSUES, COMMENTARIES, AND CASE BRIEFS 304 (3d ed. 2015) ("The increasing availability of sentences of life without parole (LWOP) has added another dimension to public opinion about the death penalty. Recent data reveal that when given the alternative of LWOP,

1994, ratified the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[46] and decades before the Constitutional Court of South Africa, in 1995, declared the death penalty to be unconstitutional under that country's post-apartheid constitution.[47]

In applying its "evolving standards of decency" test since *Trop*, the U.S. Supreme Court has used "objective" criteria to assess a punishment's constitutionality[48] while reserving its right—as the final arbiter of the Constitution's meaning[49]—to make an independent judgment.[50] "The beginning point," the Court ruled in *Roper v. Simmons*,[51] "is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question."[52] "We must then determine, in the exercise of our independent judgment," Justice Anthony Kennedy wrote for the Court in that case, one dealing with the legality of executing juvenile offenders, "whether the death penalty is a disproportionate punishment for juveniles."[53] In addition to gauging whether a "national consensus" exists against a specific punishment (or against a specific

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support for the death penalty drops below 50%."); NATHANIEL PERSILY, JACK CITRIN & PATRICK J. EGAN, EDS., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 109 (2008) ("In the last hundred years, Americans have directly expressed their views on capital punishment through referendums and public opinion polls. Progressive Era referendums in Ohio, Oregon, and Arizona reveal electorates closely divided on the abolition of the death penalty, with Oregon voters going so far as to affirm the death penalty in 1912, reject it in 1914 by a very narrow margin, and then vote for its restoration in 1920."); 3 PETER HODGKINSON, ED., THE INTERNATIONAL LIBRARY OF ESSAYS ON CAPITAL PUNISHMENT: POLICY AND GOVERNANCE (2016) (unpaginated at Part V):

> At the end of the eighteenth century, a movement to abolish, or at least sharply limit, the death penalty emerged in the Western world. Though this abolitionist movement has ebbed and flowed during the past two centuries, it has enjoyed striking success during the past forty years as a majority of the world's nations, including virtually every Western nation except the United States, has abolished capital punishment.

[46] JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION 176–78, 183–84 (2017).

[47] LILIAN CHENWI, TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE 128 (2007).

[48] *E.g.*, Atkins v. Virginia, 536 U.S. 304, 312 (2002) (holding that "[p]roportionality review under those evolving standards" should be informed by "'objective factors to the maximum possible extent,'" and further noting, "[w]e have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures'") (citations omitted).

[49] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[50] Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 870 (2013) ("While the Court has engaged, on the one hand, in the complex analysis of objective indicia . . . , it has also insisted that reliance on indicators of public opinion does not amount to the Court abrogating its own responsibility to interpret the Constitution."); *Roper*, 543 U.S. at 575 ("[T]he task of interpreting the Eighth Amendment remains our responsibility."); *Atkins*, 536 U.S. at 312 (citing Coker v. Georgia, 433 U.S. 584, 597 (1977)) ("We also acknowledged in *Coker* that the objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'").

[51] 543 U.S. 551.

[52] *Id.* at 564.

[53] *Id.*

punishment for a specific class of offender),[54] the Court has looked to actual state practices, including past usage and jury verdicts,[55] a punishment's frequency,[56] as well as trends[57] and the consistency of the direction of the change.[58]

The U.S. Supreme Court has often wrestled with what constitutes a cruel and unusual punishment. In applying the "evolving standards" test, the Court—to date—has declared unconstitutional various punishment practices, including: (1) the execution of non-homicidal offenders,[59] those who played a less culpable role in the commission of the crime,[60] offenders under age eighteen,[61] the insane,[62] and the intellectually disabled;[63] and (2) life-without-parole sentences for juveniles, whether for homicide or non-

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[54] *E.g.*, Moore v. Texas, 137 S. Ct. 1039, 1048 (2017) ("Executing intellectually disabled individuals, we concluded in *Atkins*, serves no penological purpose, runs up against a national consensus against the practice, and creates a 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'") (citations omitted).

[55] Woodson v. North Carolina, 428 U.S. 280, 288 (1976) ("Central to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in *Gregg v. Georgia*, indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations.") (citations omitted); Thompson v. Oklahoma, 487 U.S. 815, 822 (1988) ("[W]e first review relevant legislative enactments, then refer to jury determinations."); *see also* Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 115 (2016) ("In assessing the constitutionality of the death penalty, the Supreme Court considers aggregate capital trial outcomes as 'objective indicia' of our nation's 'evolving standards of decency.'") (citations omitted).

[56] *E.g.*, *Atkins*, 536 U.S. at 316 ("[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades."); *Roper*, 543 U.S. at 564–65 (citations omitted):

> *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry*, only five States had executed offenders known to have an IQ under 70. In the present case, too, even 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 10 years, only three have done so: Oklahoma, Texas, and Virginia.

See also Tiffani Darden, *Exploring the Spectrum: How the Law May Advance a Social Movement*, 48 ARIZ. ST. L.J. 261, 272 (2016) ("When considering the 'objective indicia of consensus,' the Court looks to sentencing statutes and the frequency of their application.").

[57] *E.g.*, Emily Taft, Moore v. Texas*: Balancing Medical Advancements with Judicial Stability*, 12 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 115, 121 (2017) ("Applying the 'evolving standards of decency' test for the Eighth Amendment, the Court in both *Atkins* and *Hall* found the trends among the states probative to its decisions.") (citations omitted).

[58] *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.").

[59] *Coker*, 433 U.S. 584; *Kennedy*, 554 U.S. 407.

[60] Enmund v. Florida, 458 U.S. 782 (1982).

[61] *Roper*, 543 U.S. 551.

[62] Ford v. Wainwright, 477 U.S. 399 (1986); *see also* Panetti v. Quarterman, 551 U.S. 930, 960 (2007) ("Petitioner's submission is that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. This argument, we hold, should have been considered.").

[63] *Atkins*, 536 U.S. 304; Hall v. Florida, 134 S. Ct. 1986 (2014); *Moore*, 137 S. Ct. 1039.

homicide offenses.[64] "While the modern Court has splintered on various issues of counting methodology," Akhil Amar stresses, "'unusual' should mean what it says."[65] As he cogently argues in his *Yale Law Journal* article, using a pragmatic approach to reading the word *unusual*: "If 240 million modern Americans live in states that flatly prohibit punishment X while only sixty million live in states that vigorously practice punishment X, then X is 'unusual' in the ordinary everyday meaning of that word."[66] Taking note of the U.S. Supreme Court's death penalty jurisprudence, one that has allowed many executions to take place while simultaneously barring others, Amar has also written of how the Supreme Court has responded to data on state practice (*e.g.*, executions and the enactment of laws) in the Eighth Amendment context since the 1960s.[67]

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[64] Graham v. Florida, 560 U.S. 48, 74 (2010) ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment."); Miller v. Alabama, 567 U.S. 460, 479 (2012) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them . . . . Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.").

[65] Amar, *supra* note 28, at 1778.

[66] *Id.* As Amar writes: "Citizens, not states, should thus count equally in interpreting both the Eighth Amendment word 'unusual' and modern America's lived Constitution more generally." *Id.*; *see also id.* at 1780 ("Although Justice Scalia has argued that modern Eighth Amendment interpreters should count each state equally regardless of state population, this approach warps the Reconstruction vision."); *id.* ("Judicial interpreters should be seeking to discover and channel the collective wisdom of the American people, and on certain questions the wisest way to tap that collective wisdom is to survey all Americans and to weight each American equally."); *compare id.* at 1781 ("If the issue is whether a given punishment is genuinely unusual, presumably the punishment may sometimes be upheld even if it is a minority practice. If, say, states accounting for forty-five percent of the nation's population routinely use punishment X, it would be hard to say that X is truly unusual even though it is a minority practice in America.").

[67] *Id.* at 1783 n.118:

> In the late 1960s, actual executions dropped to zero in America. In response to this apparent national consensus, the Court in 1972 seemed to hold the death penalty categorially unconstitutional. *See* Furman v. Georgia, 408 U.S. 238 (1972). Over the next four years, both Congress and some thirty-five states representing an overwhelming majority of the American population pushed back against this ruling with a new round of death penalty statutes. In response, the Court reconsidered its position and gave its blessing to the penalty in certain situations where the underlying crime was particularly heinous and where strict procedural safeguards were in place. *See* Gregg v. Georgia, 428 U.S. 153 (1976). Since then the Court has imposed additional substantive and procedural limits on capital punishment with a close eye on evolving American practice. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (overruling, in effect, Penry v. Lynaugh, 492 U.S. 302 (1989)); Roper v. Simmons, 543 U.S. 551 (2005) (overruling Stanford v. Kentucky, 492 U.S. 361 (1989)); Kennedy v. Louisiana, 554 U.S. 407 (2008).

When the Eighth Amendment's "cruel and unusual punishments" prohibition is analyzed through a "living constitutionalist" lens, the American death penalty does not fare well. Several Enlightenment thinkers, including the Italian *philosophe* Cesare Beccaria and the American revolutionary Dr. Benjamin Rush, a signer of the Declaration of Independence, freely spoke of the death penalty's *unnecessary severity* or *cruelty* more than 200 years ago.[68] The eighteenth-century death penalty, however, could not plausibly have then been described as an "unusual" punishment because, in that century, death was the *customary* penalty for multiple felonies[69] and executions were the *mandatory* punishment for their commission.[70] In light of everything that has transpired in the last two centuries, especially since the development of discretionary punishments and the post-World War II recognition of universal human rights,[71] comparing eighteenth-century and twenty-first-century laws and practices is like comparing apples and oranges or rotary dial phones and iPhones. Many punishments that were permissible in the eighteenth century are simply no longer authorized today,[72] and the Fourteenth Amendment—put in place after all of America's founders had died—changed American constitutional law in monumental and fundamental ways.[73]

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[68] Cesare Beccaria asserted that the death penalty "is not useful because of the example of cruelty that it gives to men." BESSLER, *supra* note 7, at 35. Dr. Benjamin Rush, who opposed the death penalty for any crime, said "[t]he punishment of murder by death, is contrary to reason, and to the order and happiness of society" and that "[h]umanity" revolts "at the idea of the severity and certainty of a capital punishment." *Id.* at 53, 70; DAGOBERT D. RUNES, THE SELECTED WRITINGS OF BENJAMIN RUSH xi, 35–42 (1947) (reprinting Dr. Benjamin Rush's 1792 essay on the topic, "On Punishing Murder by Death"); *see also* BENJAMIN RUSH, ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL 63 (2d ed. 1806) ("In barbarous ages every thing partook of the complexion of the times. Civil, ecclesiastical, military, and domestic punishments were all of a cruel nature. With the progress of reason and Christianity, punishments of all kinds have become less severe.").

[69] *See, e.g.*, JACKSON J. SPIELVOGEL, WESTERN CIVILIZATION: VOLUME B: 1300–1815, at 518 (10th ed. 2018) (noting that punishments in eighteenth-century societies "were often cruel and even spectacular," that "[p]ublic executions were a basic part of traditional punishment," and that "[t]he death penalty was still commonly used for property crimes as well as for violent crimes").

[70] John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1943 (2012).

[71] The Universal Declaration of Human Rights was an important step forward for the idea that certain rights, such as the right to be free from cruelty and torture, are universal human rights. *See generally* Universal Declaration of Human Rights, G.A. Res. 217A (III) (Dec. 10, 1948).

[72] PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 91, 152, 172, 182 (1999) (noting the use of the pillory, ear cropping, and mutilation as punishment in the eighteenth century); KENNETH L. KUSMER, DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY 21 (2002) (noting the use of corporal punishments on convicted vagrants in colonial New York, including "the stockades, pillory, ear-cropping, and branding, in addition to whipping"); PAUL M. FINK, JONESBOROUGH: THE FIRST CENTURY OF TENNESSEE'S FIRST TOWN, 1776–1876, at 13 (2002) ("Lesser crimes might bring confinement in the pillory or stocks, or the whipping post, with a specified number of lashes 'well laid on.' Women as well as men felt the whip . . . .").

[73] DANIEL W. CROFTS, LINCOLN AND THE POLITICS OF SLAVERY: THE OTHER THIRTEENTH AMENDMENT AND THE STRUGGLE TO SAVE THE UNION 266 (2016) ("The Fourteenth Amendment, [Garrett] Epps writes, brought about 'by far the most sweeping and complex change ever made in the original Constitution.' Indeed, Epps contends that the 1787 Constitution 'died at Fort Sumter' and that the architects of the new 'second Constitution,' who attempted to repair the flawed work of the Founders, should be considered the 'second founders.'").

Already, *non-lethal* corporal punishments such as ear cropping, whipping, and the pillory have fallen out of favor and are no longer used in America's penal system.[74] For example, in *Jackson v. Bishop*,[75] Justice Harry Blackmun—then writing for the U.S. Court of Appeals for the Eighth Circuit—ruled that the Eighth Amendment prohibited the lashing of prisoners (once a common, or *usual*, practice) within Arkansas prisons.[76] Likewise, in *Hope v. Pelzer*,[77] the U.S. Supreme Court bluntly declared that it was an "obvious" Eighth Amendment violation to handcuff a shirtless Alabama inmate to a hitching post for seven hours, thus resulting in the inmate's dehydration and sunburning.[78] "Despite its long tradition," one scholar notes, "corporal punishment (in the form of whipping, caning, flogging, lashing, paddling, etc.) has been outlawed as method of disciplining adult prisoners and military personnel."[79] It is thus clear that once *usual* punishments can become *unusual* and, consequently, once constitutional punishments can become unconstitutional.

Such facts—and such Eighth Amendment cases—make America's continued use of capital punishment a particular enigma, with U.S. Supreme Court Justices themselves expressing considerable angst and reservations about the punishment of death.[80] In 1972,

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[74] John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297, 430–39 (2013); *compare* S. Meeson Morris, *The Obsolete Punishments of Shropshire*, *in* 8 TRANSACTIONS OF THE SHROPSHIRE ARCHÆOLOGICAL AND NATURAL HISTORY SOCIETY 92–93 (1885):

> The substitution of imprisonment, fines, and similar punishments now in vogue, for the curious contrivances formerly used, has rendered the pillory, ducking stool, and other instruments before referred to, things of the past, but the modes of correction employed by our forefathers, in what are familiarly termed "the good old days," must always prove of considerable interest, serving, as they undoubtedly do, to remind us of the comparative improvement effected in the infliction of punishments during the present age of progress and advancement. Many alterations and amendments remain to be made before perfection can be nearly attained, but anyone looking back at what our system of punishment once was cannot fail to observe the many steps in this direction that have already been taken.

[75] 404 F.2d 571 (8th Cir. 1968).

[76] *Id.* at 579:

> [W]e have no difficulty in reaching the conclusion 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; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess . . . .

[77] 536 U.S. 730 (2002).

[78] *Id.* at 738.

[79] ELIZABETH T. GERSHOFF, KELLY M. PURTELL & IGOR HOLAS, CORPORAL PUNISHMENT IN U.S. SCHOOLS: LEGAL PRECEDENTS, CURRENT PRACTICES, AND FUTURE POLICY 61 (2015).

[80] Glossip v. Gross, 135 S. Ct. 2726, 2780–81 (2015) (Sotomayor, J., dissenting):

> The State plans to execute petitioners using three drugs: midazolam, rocuronium bromide, and potassium chloride. The latter two drugs are intended to paralyze the inmate and stop his heart. But they do so in a torturous manner, causing burning, searing pain . . . . [I]t leaves

in *Furman v. Georgia*,[81] the U.S. Supreme Court struck down America's death penalty as violative of the Eighth and Fourteenth Amendments,[82] with some Justices noting then—more than forty-five years ago—the rarity and freakish nature of death sentences and executions.[83] The Supreme Court, though, reversed course four years later in 1976 in *Gregg v. Georgia*[84] and two companion cases,[85] thereby allowing executions to resume.[86] It was Justice Anthony Kennedy who, in 2008 in *Kennedy v. Louisiana*,[87] expressed this quite pointed concern about capital punishment in declaring the death penalty unconstitutional for non-homicidal child rape: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[88]

The Supreme Court's Eighth Amendment cases—as well as the shifting history of punishment practices—raises an important series of questions: At what point do punishments that were once *usual* become *unusual*? What should the criteria be for gauging whether a punishment is one or the other? And what consequences, if any, does this have for American courts evaluating the constitutionality of punishments such as the death penalty? These are particularly important questions to address given what we know now about the American death penalty's sordid and error-prone administration since its inception,[89] and also given that a majority of the world's nations have now abandoned the death penalty and have turned away from death sentences and executions.[90] The continent of Europe is now essentially a death penalty-free zone, with two protocols to the European Convention on Human Rights absolutely barring the death penalty's use in both peacetime and wartime.[91]

> petitioners exposed to what may well be the chemical equivalent of being burned at the stake.

[81] 408 U.S. 238.

[82] *See* MICHAEL S. GREEN & SCOTT L. STABLER, EDS., IDEAS AND MOVEMENTS THAT SHAPED AMERICA: FROM THE BILL OF RIGHTS TO "OCCUPY WALL STREET" 175 (2015) (Volume 1:A–E) (discussing the ruling in *Furman v. Georgia*, 408 U.S. 238 (1972)).

[83] *Furman*, 408 U.S. at 291 (Brennan, J., concurring) ("The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime."); *id.* at 309 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").

[84] 428 U.S. 153 (1976).

[85] Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

[86] The first execution after *Gregg v. Georgia*, 428 U.S. 153 (1976), was that of Gary Gilmore in 1977. MIKAL GILMORE, SHOT IN THE HEART, at xi (1994).

[87] 554 U.S. 407.

[88] *Id.* at 420.

[89] *See generally* Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194 (forthcoming Spring 2018).

[90] *Abolitionist and Retentionist Countries (as of March 2018)*, AMNESTY INT'L (Mar. 5, 2018), https://www.amnesty.org/en/documents/act50/6665/2017/en/ ("More than two-thirds of the countries in the world have now abolished the death penalty in law or practice.").

[91] Eur. Consult. Ass., *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, ETS No. 114 (Apr. 28, 1983)

To better understand what "unusual punishments" are, it may be helpful—and, in truth, actually seems rather intuitive—to try to better understand *what they are not*. With that in mind, this Article explores past usages of "unusual punishments" *and* "usual punishments." By examining and thinking about the difference between them, perhaps twenty-first century American judges will gain some insight—whether profound or not—into their own Eighth Amendment decision making. The natural, binary opposite of "unusual punishments" is "usual punishments," with a literature review revealing that, to date, while at least a few scholars have written about "unusual punishments,"[92] very little has been written about "usual punishments."[93] This Article seeks to fill that scholarly void by examining, from an historical perspective, not only "unusual punishments," but the flip side of the "unusual punishments" coin. Part II of the Article thus surveys early English and American sources referencing either "unusual" or "usual" punishments.

The Article's pragmatic goal is to assist courts in interpreting the Eighth Amendment's Cruel and Unusual Punishments Clause, which was drafted, approved, and ratified *in the eighteenth century*, as they grapple with *twenty-first century* legal challenges. After a review of historical sources in Part II, Part III examines the modern American death penalty and its administration and, in some cases, its immutable characteristics. This task is undertaken to help assess whether capital punishment is, in this day and age, an unusual or usual punishment and whether or not it should be declared unconstitutional. In Part IV, the Article specifically evaluates the constitutionality of death sentences and executions, exploring what factual and legal considerations courts should take into account in making the determination of when a traditional, or "usual," punishment should be considered to be (or should be found to have transformed into) an "unusual" one.

In that respect, this Article highlights the importance of reading the U.S. Constitution *as a whole*, much as lawyers and judges do with contracts.[94] The

(forbidding the death penalty's use in peacetime); Eur. Consult. Ass., *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*, ETS No. 187 (May 3, 2002) (extending the prohibition on the death penalty's use to wartime).

[92] *The Original Meaning of "Unusual", supra* note 24; Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. MEM. L. REV. 465 (2008); *see also* Ryan, *supra* note 4, at 569–70 ("Although the prohibition on cruel and unusual punishments has been the focus of many a scholarly article, neither the Court nor legal scholars have carefully examined how the cruelty and unusualness components of the Clause relate to each other."); *id.* at 599 ("[M]ost scholars . . . have neglected the role of unusualness in their interpretations and applications of the Eighth Amendment, suggesting that cruelty, alone, is the only relevant factor."); *id.* at 610 ("'[C]ruel and unusual' cannot be interpreted as simply 'cruel,' because by completely ignoring 'and unusual,' such an interpretation would violate a central principle of construction that every term must be given meaning."). Scholar Meghan Ryan—one of the scholars to focus on the *unusual* terminology—has observed that "[a]lthough 'cruel' and 'unusual' have historically been treated as distinct terms, they are certainly related." *Id.* at 603.

[93] The U.S. Supreme Court itself has only infrequently referred to the notion of "usual punishments." In its 1910 decision in *Weems*, the U.S. Supreme Court, in discussing its prior case of *Wilkerson v. Utah*, 99 U.S. 130 (1878), noted that death was a "usual punishment for murder." *Weems*, 217 U.S. at 369.

[94] *See, e.g.*, Peterson v. Minidoka Cty. Sch. Dist. No. 331, 118 F.3d 1351, 1359 (9th Cir. 1997) ("The usual rule of interpretation of contracts is to read provisions so that they harmonize with each other, not contradict each other. That task of construction is for the court."). Of course, interpreting a constitution—one that applies to an entire society, one composed of millions of people—is a much more complicated and

Constitution is itself a social contract or compact that has survived for many generations,[95] though its interpretation—because it governs the lives of people not yet born at its creation—naturally presents unique and much more complicated challenges than the interpretation of a run-of-the-mill commercial contract.[96] The *text* of the U.S. Constitution and its amendments—as well as the *principles* and *values* undergirding those textual provisions—should be of primary importance in deciding how modern judges should read it, and the proper interpretation of the words *cruel* and *unusual* is thus of considerable consequence. The Constitution conspicuously guarantees various individual rights, often employing broad and general language (*e.g.*, "due process", "equal protection", etc.). And many of those rights are specifically designed to protect

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weighty endeavor than interpreting a private contract between two parties. *Cf.* Walter F. Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman*, 87 YALE L.J. 1752, 1770 (1978) (reviewing RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977)) ("Because of the broad and basic political character of a constitution, it is not amenable to the rules of interpretation that apply to private contracts or to statutes. Because of the complex nature of the interlocking arrangements contained in a constitution, an interpreter must look at it as a whole, examine its structure, as Charles Black would say.").

[95] G. EDWARD DESEVE, THE PRESIDENTIAL APPOINTEE'S HANDBOOK 129 (2d ed. 2017) ("The men who wrote and signed [the U.S. Constitution] at the 1787 Constitutional Convention—lawyers, merchants, farmers—were students of the Renaissance, the Reformation, and the Enlightenment who learned about the social compact from John Locke and Jean-Jacques Rousseau and wove those principles into the American experiment."); *compare* LOUIS HENKIN, THE AGE OF RIGHTS 93 (1990):

> There is a different set of difficulties with treating the United States Constitution as our contemporary social compact. For the Constitution was born without principal ingredients of a social compact, and age has not cured and has even aggravated those defects. A direct and immediate descendant of the Articles of Confederation, "a more perfect union" of the states, the Constitution was declared to be ordained by "We the people" as had been the constitutions of the several states, but the compact implied in that preambular phrase was largely rhetorical and symbolic. The small federal superstructure which the framers projected was not, and was not expected to become, a significant government with significant relations to the people, implicating their rights. The real social compact remained the state constitution, the polity that the people had contracted for was the state polity, the government instituted to secure their rights was the state government; the United States Constitution was only a small "codicil" to state social compacts.

[96] The debate over how the U.S. Constitution should be interpreted has generated fierce debate. It was ratified in the eighteenth century and, though amended from time to time, including after the Civil War and in the Progressive Era, it governs twenty-first century citizens—people with very diverse views who were not, themselves, even born when the original Constitution or, for example, its Reconstruction Amendments, were adopted and ratified. *E.g.*, Christopher J. Peters, *What Lies Beneath: Interpretive Methodology, Constitutional Authority, and the Case of Originalism*, 2013 BYU. L. REV. 1251, 1255 (2014):

> We have managed to squeak by for more than two hundred years without a consensus approach to constitutional interpretation. Perhaps our interpretive disagreement even deserves some credit for this: no single approach dominates, so everyone's preferred approach is always in play. Still, it is profoundly strange that we agree so broadly that the Constitution is the supreme law of the land but diverge so widely on how to determine just what that law requires of us.

those accused of crimes and, in the case of the Cruel and Unusual Punishments Clause, offenders themselves.[97] In deciding Eighth Amendment disputes, twenty-first century judges must decide how to interpret the Constitution, and nothing less than the Rule of Law—and, in the case of the death penalty, life or death—is at stake.[98]

While the English "Bloody Code" and a wide assortment of draconian punishments (both lethal and non-lethal) are a part of Anglo-American history,[99] this Article specifically discusses the special relevance of the U.S. Constitution's Due Process Clauses[100] and the Fourteenth Amendment's Equal Protection Clause[101] in assessing whether a punishment is—or has become—"unusual." The Article argues that the language of those clauses should be fully taken into account as part of the Eighth Amendment analysis and calculus, and that the arbitrary, discriminatory, error-prone, and torturous nature of death sentences and executions must also be taken into consideration in evaluating whether capital punishment is "cruel and unusual." After exploring the history and specific language of the U.S. Constitution, the Article concludes that the American death penalty is arbitrarily applied, unequally and unfairly administered, and is—if fairly judged—not only incredibly "cruel," but torturous and highly "unusual."

II. "USUAL" VS. "UNUSUAL" PUNISHMENTS: AN HISTORICAL SURVEY

A. Common Usage, the Dichotomy Between "Usual" and "Unusual" Punishments, and English and American Law

The notion of "unusual punishments" dates back many centuries.[102] The notion of "usual punishments"—its converse—also appears commonly in historical sources.[103] For

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[97] *See generally* JACQUELINE R. KANOVITZ, CONSTITUTIONAL LAW FOR CRIMINAL JUSTICE (14th ed. 2015).

[98] *E.g.*, Stephen Macedo, *The Rule of Law, Justice, and the Politics of Moderation*, *in* IAN SHAPIRO, ED., THE RULE OF LAW 158 (1994) ("Many debates over the proper nature of constitutional interpretation owe something to the tensions . . . between the rule of law and equity: questions about the legitimate grounds and norms of interpretation, questions of constraint and discretion, and questions about the distribution of authority among institutions (founders, legislatures, executives, judges, etc.) and across time."); RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 145 (1993) ("The Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command.").

[99] MITCHEL P. ROTH, AN EYE FOR AN EYE: A GLOBAL HISTORY OF CRIME AND PUNISHMENT 77 (2014) ("The term 'Bloody Code' has been used to refer to the English system of criminal law that roughly corresponded with the years 1688-1815, when literally hundreds of felonies carrying the death penalty were added to the criminal statutes.").

[100] U.S. CONST. amends. V, XIV.

[101] U.S. CONST. amend. XIV.

[102] *The Original Meaning of "Unusual"*, *supra* note 24, at 1770 (noting that "[a]ctions that comported with long usage were often said to be 'usual'" and that "[a]ctions that were contrary to long usage, on the other hand, were described as 'unusual'"; "Americans in the late eighteenth and early nineteenth centuries also used the term 'unusual' to describe actions that were contrary to 'long usage'"); *see also id.* at 1772 (noting that the English jurist Edward Coke "argued that the common law consisted of customary practices that enjoyed 'long' or 'immemorial usage'"); *id.* at 1805 (discussing Patrick Henry's use of the "unusual punishments" terminology). While the word *unusual* was, naturally, employed in a wide variety of different

example, Edward Gibbon's *The History of the Decline and Fall of the Roman Empire*, published in London in 1776, makes reference to "the usual punishments of death, exile, and confiscation" being inflicted in the Roman empire.[104] Robert Bissett's *The History of the Reign of George III*, published in the United States in 1811, as well as Edward Baines' history of the French Revolution, also make reference "to the usual punishments prescribed by law."[105] An eighteenth-century Roman history observes that "[t]he usual punishments inflicted were fines, banishment, and death,"[106] while in seventeenth-century proceedings against Thomas Earl of Danby for high treason during King James II's reign, one man emphasized that for "ages" after "the conquest," "confiscation of estate and banishment were the usual punishments."[107]

The U.S. Constitution's Eighth Amendment was ratified in 1791, enshrining in American law the protection against "cruel and unusual punishments." In fact, references to "unusual punishment"—quite apart from concerns about "cruel" punishment—show

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contexts and writings in America's founding era, Samuel Johnson's famous dictionary defined "unusual" as "Not common; not frequent; rare." A DICTIONARY OF THE ENGLISH LANGUAGE 250 (1756); *see also* THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (defining "Unusual" as "Not common, not frequent, rare").

[103] 88 THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1777, at 244 (1788) ("The usual punishments are fine and imprisonment for such offences . . . ."); PIERRE-JOSEPH DUMONT, NARRATIVE OF THIRTY-FOUR YEAR SLAVERY AND TRAVELS AND AFRICA 17, 42 (J. S. Quesne comp., 1819) (referencing "threats of the usual punishments" and noting that in one locale "the most usual punishment is decapitation"); 3 GEORGE BURDER, COMP., THE WORKS OF THE REVEREND ISAAC WATTS, D.D. 358 (1810) (noting that "[a] fine of money or cattle to be paid, a cutting off from the people or congregation, scourging or beating at most with forty stripes, the loss of a limb, or the loss of life" were "some of the usual punishments of criminals appointed in the jewish law"); ISAAC WATTS, A SHORT VIEW OF THE WHOLE SCRIPTURAL HISTORY 68 (8th ed. 1767) (noting same); 2 SARAH TRIMMER, ED., SACRED HISTORY, SELECTED FROM THE SCRIPTURES; WITH ANNOTATIONS AND REFLECTIONS, PARTICULARLY CALCULATED TO FACILITATE THE STUDY OF THE HOLY SCRIPTURES IN SCHOOLS AND FAMILIES 37 (6th ed. 1810) ("The usual punishments of criminals among the Israelites were, a fine of money or cattle to be paid, or cutting off from the congregation, scourging or beating (not exceeding forty-nine stripes), the loss of a limb, or the forfeiture of life."); 23 THE LADY'S MAGAZINE OR ENTERTAINING COMPANION FOR THE FAIR SEX, APPROPRIATED SOLELY TO THEIR USE AND AMUSEMENT 275 (1792) ("The council of finances at Brussels have published an ordinance, prohibiting the vending to or furnishing the French with provisions, ammunition, &c. under pain of the usual punishments."); 8 THE ECLECTIC REVIEW 36 (1812) (noting, in a discussion of GEORGE COOK, A HISTORY OF THE REFORMATION IN SCOTLAND (1811), that two people "were condemned to the usual punishments").

[104] 1 EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 357 (1776). Many during the Enlightenment began to question the propriety of capital punishment, then the usual punishment for various offenses. *See* CHARLES COOTE, THE HISTORY OF EUROPE: FROM THE PEACE OF PARIS, IN 1763, TO THE TREATY CONCLUDED AT AMIENS IN 1802, at 283–84 (1817) ("Condorcet said, 'Death is the usual punishment of conspirators; but, as such a sentence is repugnant to my principles, I never will concur in it.'").

[105] 4 ROBERT BISSETT, THE HISTORY OF THE REIGN OF GEORGE III, at 233 (1811); EDWARD BAINES, HISTORY OF THE WARS OF THE FRENCH REVOLUTION 156 (1817).

[106] 2 CHARLES ROLLIN, THE ROMAN HISTORY FROM THE FOUNDATION OF ROME TO THE BATTLE OF ACTIUM: THAT IS, TO THE END OF THE COMMONWEALTH 406 (1739).

[107] 11 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, WITH NOTES AND OTHER ILLUSTRATIONS 755 (1816).

up in America's founding period in the debate over the Constitution itself.[108] For example, in asserting that the Constitution left states no control of their own militias, William Grayson, an Anti-Federalist lawyer from Prince William County, Virginia, worried specifically about the infliction of "unusual punishments."[109] George Mason—the principal drafter of the Virginia Declaration of Rights—also expressed concern about "punishments of an unusual nature" in discussing the militia.[110] In that debate, no less a figure than Patrick Henry—fearful of the proposed U.S. treaty power, and of "Give me liberty or give me death!" fame—expressed a specific apprehension about the infliction of "unusual punishments."[111]

History, of course, is informative but not determinative of how modern-day judges should assess a punishment's legitimacy. A review of sources published before and shortly after the adoption of the U.S. Bill of Rights—a time of revolutions and much social and political upheaval—shows the historical context for the Eighth Amendment's origins.[112] In such sources, one finds multiple references to "usual punishments"[113] and

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[108] *See* BESSLER, *supra* note 7, at 299–306 (discussing references to "unusual punishments" in America's founding period).

[109] *Id.* at 299.

[110] *Id.* at 299–300.

[111] *Id.* at 301; *see also* 2 THE WORKS OF JOHN SHEFFIELD, EARL OF MULGRAVE, MARQUIS OF NORMANBY, AND DUKE OF BUCKINGHAM 151–52 (2d ed. 1729):

> *John Kerby* a mercer and *John Algore* a grocer of the city of *London*, in the time of *Richard* II, had kill'd *John Imperial*, a publick Minister from the State of *Genoa;* and the Parliament happening to be sitting, pass'd an Act 3 *Richard* II. that they should be attainted of High Treason in the *King's Bench*; and they were executed accordingly. It was said, that all Judges after this were oblig'd to hold for Treason the killing any foreign Minister in the same manner, notwithstanding it is none of those crimes recited in the Act of 25 *Edward* III . . . .
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> . . . [I]f a Parliament upon an extraordinary occasion, as that of the *Genoa* Embassador, shall in their great prudence inflict any unusual punishment; by what colour of reason should that be construed, as if they would have all the ordinary Judges hereafter do the same thing, without tarrying for their judgment?
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> One Parliament's proceeding is the best sort of precedent for another: But that it should be an example for inferiour Courts, is a preposterous and dangerous, as if a Schoolmaster should imitate a General, and instead of whipping a scholar, should put him to death by a general council of school-boys.

[112] The Eighth Amendment's language was approved and ratified in close proximity to the promulgation of the French Declaration of the Rights of Man and of the Citizen (1789), a declaration that Thomas Jefferson assisted the Marquis de Lafayette—a Revolutionary War hero—in drafting. WINSTON P. NAGAN, JOHN A.C. CARTNER & ROBERT J. MUNRO, HUMAN RIGHTS AND DYNAMIC HUMANISM 121 (2017) ("Jefferson collaborated with the Marquis de Lafayette in the first draft of the French Declaration of the Rights of Man and of the Citizen. This Declaration adopted by the French National Assembly on August 26, 1789, was a descendant of the American Declaration of Independence."); DAVID EDWIN HARRELL, JR., EDWIN S. GAUSTAD, JOHN B. BOLES, SALLY FOREMAN GRIFFITH, RANDALL M. MILLER & RANDALL B. WOODS, UNTO A GOOD LAND: A HISTORY OF THE AMERICAN PEOPLE, VOLUME 1: TO 1900, at 218 (2005) ("On September 25, 1789, the Senate approved the twelve amendments that the House had agreed to the day before. By December 15, 1791, three-fourths of the states . . . had ratified the ten amendments that, collectively, are known as the American Bill of Rights."). Whereas the Eighth Amendment bars "cruel and unusual punishments," Article 8 of the French Declaration protects against penalties that are not

their opposite, "unusual punishments."[114] Thus, in the eighteenth and nineteenth centuries—prior to the abolition of slavery—one finds multiple references to the "usual punishment" inflicted upon slaves.[115] In one source, on Roman history, there is a reference to what was described as "the usual punishment inflicted on such slaves as attempted to run away from their masters": the marking of slaves on their foreheads "with

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"strictement et évidemment nécessaires," that is, "strictly and obviously necessary." WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 26 (1996).

[113] 2 MATTHEW POOLE, ED., ANNOTATIONS UPON THE HOLY BIBLE: WHEREIN THE SACRED TEXT IS INSERTED, AND VARIOUS READINGS ANNEX'D, TOGETHER WITH THE PARALLEL SCRIPTURES (3d ed. 1696) (noting, in Chapter XVI, that "tis' an usual punishment of Lyars, that they are not believed when they speak the truth"); SAMUEL CHANDLER, THE HISTORY OF PERSECUTION, IN FOUR PARTS 261 (1736) ("But the most usual Punishment of all, is their wearing Crosses upon their penitential Garments . . . ."); 1 ANTONIO DE ULLOA, A VOYAGE TO SOUTH-AMERICA: DESCRIBING AT LARGE THE SPANISH CITIES, TOWNS, PROVINCES, &C. ON THAT EXTENSIVE CONTINENT 411 (1758) (noting that "[a]n Indian" in South America for failing to go to church on Sundays had, at a priest's direction, received "some lashes, the usual punishment for such delinquents"); R. & J. DODSLEY, EDS., THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICKS, AND LITERATURE, OF THE YEAR 1759, at 76 (1760) ("Joseph Halfey was tried for the murder of Daniel Davidson on the high seas, about 100 leagues from Cape Finisterre, found guilty, and immediately sentenced to the usual punishment of such crimes."); 9 W. SANDS, A. MURRAY & J. COCHRAN, EDS., THE SCOTS MAGAZINE: CONTAINING, A GENERAL VIEW OF THE RELIGION, POLITICKS, ENTERTAINMENT, &C. IN GREAT BRITAIN 561 (1747) (noting that "in cases where from some extraordinary circumstance the usual punishment might be too severe," it "therefore required a mitigation"); THE NATURAL HISTORY AND ANTIQUITIES OF SELBORNE, IN THE COUNTY OF SOUTHHAMPTON 372 (1789) ("[T]he usual punishment is fasting on bread and beer.").

[114] *E.g.*, *The Original Meaning of "Unusual"*, *supra* note 24, at 1805, 1809–11 (discussing the concept of "unusual punishments" by Patrick Henry in America's founding era, contending that the use of the word "unusual" in the Cruel and Unusual Punishments Clause "was meant to be a check on the federal government's ability to innovate in punishment," and discussing early American cases, including *Barker v. People*, *Commonwealth v. Wyatt*, and *People v. Potter*, where state courts rejected arguments that punishments were "unusual"); *see also* Barker v. People, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823) ("[T]he disfranchisement of a citizen is not an unusual punishment."); Commonwealth v. Wyatt, 27 Va. (6 Rand.) 694, 701 (Va. Gen. Ct. 1828) ("The punishment of offences by stripes in certainly odious, but cannot be said to be unusual"; the discretion to impose whipping under the statute was said to be "of the same character with the discretion always exercised by Common Law Courts to inflict fine and imprisonment, and subject to be restrained by the same considerations."); People v. Potter, 1 Edm. Sel. Cas. 235, 245 (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.").

[115] 12 T. OSBORNE, A. MILLAR & J. OSBORN, EDS., AN UNIVERSAL HISTORY, FROM THE EARLIEST ACCOUNT OF TIME 451 (1747) ("Upon the accusation of a slave, *Betucius* and *Æmilia* were condemned to the usual punishment."); THE PRO-SLAVERY ARGUMENT, AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES: CONTAINING THE SEVERAL ESSAYS, ON THE SUBJECT, OF CHANCELLOR HARPER, GOVERNOR HAMMOND, DR. SIMMS, AND PROFESSOR DEW 158 (1853) ("Now, in the time of Christ, it was usual for masters to put their slaves to death on the slightest provocation. They even killed and cut them up to feed their fishes."); *id.* at 136 ("'The usual punishment for theft is to place the culprit's head between the legs of one of the biggest boys, and each boy in the pit—sometimes there are twenty—inflicts twelve lashes on the back and rump with a cat.'").

a red-hot iron."[116] The concepts of "usual" and "unusual" punishments were even used by Biblical commentators and playwrights—or at least by their English translators.[117]

References to "usual" and "unusual" punishments pre-date the English Bill of Rights, with many draconian bodily punishments then in widespread use.[118] In a book published in 1661, before the Glorious Revolution of 1688, a chapter titled "Of the Roman Punishments" speaks of "the usual Punishments exercised" for "City Discipline."[119] "Punishments publickly inflicted on malefactors," Thomas Godwyn wrote there, "are either *Pecuniary mulcts*, or *corporal punishments*."[120] "The corporal punishments," he emphasized, "were either such as were *Capital*, depriving a man of his life: or *Castigatory*, such corrections as served for the humbling and reforming of the offender, or for the destroying of him."[121] Those sentenced to prison for "notorious

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[116] 13 T. OSBORNE, AN UNIVERSAL HISTORY, FROM THE EARLIEST ACCOUNT OF TIME 356 (1748).

[117] 1 TERENCE'S COMEDIES, TRANSLATED INTO ENGLISH PROSE, AS NEAR AS THE PROPRIETY OF THE TWO LANGUAGES WILL ADMIT 232 (S. Patrick trans., 3d ed. 1767) (showing a scene involving Pythias and Parmeno contains this line: "Now he threatens him also with the usual Punishment of Adulterers: a thing I never saw in my Life, nor desire to see"); JOHN VANDERKEMP, THE CHRISTIAN ENTIRELY THE PROPERTY OF CHRIST, IN LIFE AND DEATH: EXHIBITED IN FIFTY-THREE SERMONS ON THE HEIDELBERGH CATECHISM 96 (John M. Van Harlingen trans., 1810) ("With regard to Isaiah xxviii. 21, we do not read there, that God's work and act of punishing is strange to God, but only that it is strange: and to whom should it be strange? to God? no: but to the transgressors, on whom God would inflict a strange and unusual punishment."); 1 THE WORKS OF PHILO JUDÆUS, THE CONTEMPORARY OF JOSEPHUS 288 (C. D. Yonge trans., 1800) ("[A]ll those who voluntarily and of deliberated purposes have rejected the living God, exceeding even the bounds of wickedness itself, for what other evil of equal weight can possibly be found? Such men should suffer not the usual punishments of evil doers, but something new and extraordinary.").

[118] There is some evidence—and at least some suggestion—that the provision of the English Bill of Rights proscribing "cruel and unusual punishments" was designed to prevent "illegal" punishments, though the clause, on its face, does not refer to illegal punishments. *See* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 135 (2004) (noting that Clause 19 of a draft of the English Bill of Rights presented to the House of Commons on February 2, 1689, read: "The requiring excessive Bail of Persons committed in criminal Cases and imposing excessive Fines, and illegal Punishments, to be prevented."); *id.* (noting that the final version of the English Bill of Rights recited: "And excessive Fines have been imposed; and illegal and cruel punishments inflicted."); *id.* at 136:

> In the context of common law punishment for common law crimes, to punish illegally was to punish differently for no morally sufficient reason. The word *unusual* "was appropriate to convey the idea that the punishments were 'uncommon' and 'exceptional,' outside what the law permitted." To punish *cruelly* and unusually was to single out an offender on a morally insufficient basis for *more* punishment than was customarily applied.

[119] THOMAS GODWYN, ROMANÆ HISTORIÆ ANTHOLOGIA RECOGNITA ET AUCTA: AN ENGLISH EXPOSITION OF THE ROMAN ANTIQUITIE 182 (1661); *cf. id.* at 203 ("Thus have we generally and briefly touched the more usual Punishments. But sometimes wrongs done between party and party, were punished with a retaliation of the same kind: according to that, *A tooth for a tooth, and an eye for an eye*. And this kind of punishing was called *Talio*.").

[120] *Id.*

[121] *Id.* at 183. Punishments involving the taking of one's life were "called *Ultimum Supplicium*." *Id.*; *cf. id.* at 185 ("Those punishments that deprived of life in ordinary use, and of which there is most frequent mention in *Roman* Authors, are these which follow: *Furca, Crux, Carcer, Culeus, Equuleus, de rupe Tarpeia dejectio, Scala, Gemonia, Tunica, Damnatio, in gladium, in ludum, ad bestias*."). A description of those punishments is set forth elsewhere in the book. *Id.* at 186–88. For example, in a chapter about "*Crux*," it was noted: "Crucifixion hath been a punishment in ancient use among the Romans; it was

crimes," Godwyn relayed, had "shackles and bolts about their legs" to prevent their escape, were forced to labor by digging or tilling the ground or grinding with a hand-mill, and also had "their foreheads marked or burned with some letters of infamy."[122] "[P]ublishing the cause" of one's punishment "either by Inscription, or by the voice of a common Crier," Godwyn added, "was not unusual in . . . capital punishments."[123]

A large number of references to "usual" or "unusual" punishments can also be found in relation to English law,[124] including in the seventeenth and eighteenth centuries,

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abrogated by *Constantine*. It was a death that commonly servants were sentenced unto, seldom times freeman . . . ." *Id.* at 188. Godwyn noted that for floggings, the Romans—"to augment the pains"—"did usually in these scourges tye certain huckle-bones, or plummets of Lead at the end of the whip cords, or thongs, and such scourges they termed *Scorpiones*." *Id.* at 203. "The cruelty of the scourges," he wrote, "was such, that they many times died under them." *Id.*

[122] *Id.* at 200; *cf. id.* at 201 ("[T]he punishment which *Suetonius* speaketh of, is some strange or unusual punishment: now seeing that Senators themselves were often exiled, it could not seem strange that *Roman* Knights should be banished into forraign lands; but this was a matter unusual, and unheard of that a *Roman* Knight should be imployed in such drudgeries.").

[123] *Id.* at 189. Other pre-1688, English-language sources—that is, those pre-dating the Glorious Revolution—also contain the "usual" or "unusual" punishments verbiage. One book, printed in 1678, recited that in 1593 a vagabond attempted to kill France's king. H. C. DAVILA, THE HISTORY OF THE CIVIL WARS OF FRANCE 627 (1678). After being "tortured" and sentenced to die, the man was said to have "suffered the usual punishments." *Id.*

[124] THE STUDENT'S LAW-DICTIONARY; OR COMPLEAT ENGLISH LAW-EXPOSITOR (1740) (showing the entry for "Penance," reads in part as follows: "[I]n the Cases of Adultery, Fornication, &c. for which we are told the usual Punishment is, that the Offender stands in the Church Barefoot and Bareheaded, in a White Sheet, &c."); 1 JOSEPH SHAW, THE PRACTICAL JUSTICE OF PEACE, AND PARISH AND WARD-OFFICER: OR, A TREATISE SHEWING THE PRESENT POWER AND AUTHORITY OF THESE OFFICERS, IN ALL THE BRANCHES OF THEIR DUTY 114 (6th ed. 1756) (showing in a section on "Bastardy" written by a lawyer of the Middle Temple, it is recorded that "[t]he usual Punishment for these Offenders, is Pillory, publick Whipping, &c"); JOSEPH SHAW, PARISH LAW: OR, A GUIDE TO JUSTICES OF THE PEACE, MINISTERS, CHURCHWARDENS, OVERSEERS OF THE POOR, CONSTABLES, SURVEYORS OF THE HIGHWAYS, VESTRY-CLERKS, AND ALL OTHERS CONCERN'D IN PARISH BUSINESS 206 (8th ed. 1753) (showing in a paragraph on "Bastards," it notes that "[t]he usual Punishment for these Offenders, is Pillory, publick Whipping, &c"); 50 SYLVANUS URBAN, THE GENTLEMAN'S MAGAZINE AND HISTORICAL CHRONICLE 249 (1780) ("[H]e sentenced the prisoner to 12 months imprisonment in Newgate, which doubles the usual punishment."); 1 THOMAS CARTE, A GENERAL HISTORY OF ENGLAND 689 (1747) (referring to "the usual punishment for the murder of laymen"); 3 GEORGE LORD LYTTELTON, THE HISTORY OF THE LIFE OF KING HENRY THE SECOND, AND OF THE AGE IN WHICH HE LIVED 210 (1771) (referring to "the usual punishment for the murder of a layman"); 1 WILLIAM RUSSELL, LL.D., THE HISTORY OF MODERN EUROPE: WITH A VIEW OF THE PROGRESS OF SOCIETY FROM THE RISE OF THE MODERN KINGDOMS TO THE PEACE OF PARIS, IN 1763, at 170 (1857) (noting of English law: "That the murderers of a clergyman should be tried before the judiciary, in the presence of the bishop or his official; and besides the usual punishment for murder, should be subjected to a forfeiture of their estates, and a confiscation of their goods and chattels."); 5 DE RAPIN THOYRAS, THE HISTORY OF ENGLAND AS WELL AS ECCLESIASTICAL AS CIVIL 120 (1728) ("[T]he Lord *Scroop* suffered the usual Punishment of Traitors."); CHARLES BOURNE & VILLIAM ISAAC BLANCHARD, THE TRIAL OF LIEUTENANT CHARLES BOURNE, UPON THE PROSECUTION OF SIR JAMES WALLACE, KNT. FOR AN ASSAULT 144 n.† (1783) ("Mr. Bourne must here observe, that he was tried as a citizen for a breach of the common law, as a citizen he was convicted of a common assault upon a fellow citizen, and if the records of the courts are to be believed, many matters of equally serious and important consideration have come before them, though no such cruel and unusual punishment as that under which he suffers, can be shewn since the revolution.").

not too distant from the all-important Glorious Revolution of 1688.[125] For example, in 1700, a dictionary of Greek and Roman antiquities—translated from French into English—was published in London.[126] One entry notes that condemned criminals "were exposed to Beasts without any Arms to defend themselves and often they were bound, and the People were pleased to see them torn to pieces, and devoured by those hungry creatures."[127] "This was the most usual Punishment, which the Pagan Emperors inflicted upon the first Christians, whom they ordered to be given to the Beasts," that dictionary reported just over a decade after the adoption of the English Bill of Rights.[128] Another source, printed in Edinburgh, notes how, in 1594, the Parliament itself—for an attempt on Henry IV's life—condemned a Jesuit, John Chatel, "to the usual punishment due to such offenders."[129]

The number of eighteenth-century English sources referring to "usual punishments" is substantial.[130] Matthew Hale's treatise, *The History of the Pleas of the Crown*, discusses the "usual punishment" of heretics;[131] David Hume's *The History of England*

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[125] SIR RICHARD BAKER, KNIGHT, A CHRONICLE OF THE KINGS OF ENGLAND 490 (1684) (reporting a proclamation from 1641 containing the following language: "*And if any person were censured to the Pillory, or Whipping, it was for known Perjury, the ordinary and usual punishment in such a case* . . . ."); 2 CAPTAIN WILLIAM DAMPIER, VOYAGES AND DESCRIPTIONS IN THREE PARTS 80 (1699) (noting that, in Tonquin, "[t]heir punishment in capital crimes is usually beheading"; also containing the following index entry: "Stocks, an usual Punishment . . . ."); *see also* 2 POPERY NOT FOUNDED ON SCRIPTURE: OR, THE TEXTS WHICH PAPISTS CITE OUT OF THE BIBLE, FOR THE PROOF OF THE POINTS OF THEIR RELIGION, EXAMIN'D, AND SHEW'D TO BE ALLEDG'D WITHOUT GROUND 523 (1689) (printed for Richard Chiswell) (referring to "Leprosy, the usual Punishment of Pride"); TRAFANO BOCALINI, I RAGGVAGLI DI PARNASSO: OR, ADVERTISEMENTS FROM PARNASSUS: IN TWO CENTURIES: WITH THE POLITICK TOUCHSTONE 156 (Henry Earl trans., 2d ed. 1669) ("*Apollo*, who was not well pleased . . . condemned the Literato to the usual punishment . . . that none should excuse his error, none should pity him, and that all men should laugh at him."); *id.* at 160 ("*Apollo* highly offended at the immensity of such a fault, gave Sentence, That the guilty party should undergo the usual punishment for sale of Justice: which was, That he should be slayed alive."); *accord* TRAFANO BOCALINI, I RAGGVAGLI DI PARNASSO: OR, ADVERTISEMENTS FROM PARNASSUS; IN TWO CENTURIES WITH THE POLITICK TOUCHSTONE 181, 186 (Henry Earl trans., 1656) ("*Apollo* . . . condemned the Litterato to the usual punishment of imprudency."; "*Apollo* highly offended at the immensity of such a fault, gave sentence that the guilty party should undergo the usual punishment for sale of Justice.").

[126] PIERRE DANET, A COMPLETE DICTIONARY OF THE GREEK AND ROMAN ANTIQUITIES (1700).

[127] *Id.* (unpaginated).

[128] *Id.* (unpaginated).

[129] ARCHIBALD BRUCE, FREE THOUGHTS ON THE TOLERATION OF POPERY, DEDUCED FROM A REVIEW OF ITS PRINCIPLES AND HISTORY, WITH RESPECT TO LIBERTY AND THE INTERESTS OF PRINCES AND NATIONS 113 (1781).

[130] *E.g.*, 2 PHILIP HORNECK, THE HIGH-GERMAN DOCTOR 86 (1719) (referring to "the usual Punishment inflicted"); BARTHOLOMEW LEONARDO DE ARGENSOLA, THE DISCOVERY AND CONQUEST OF THE MOLUCCO AND PHILIPPINE ISLANDS: CONTAINING, THEIR HISTORY, ANCIENT AND MODERN, NATURAL AND POLITICAL 88 (1708) (noting that an "Ensign" was "Strangled, as a Traytor to his King" and that two other soldiers were "Bannish'd" and that "Severity to some of the Company" was "shew'd . . . on Account of the same Crime, which, it was believ'd, had not been so fully prov'd upon them, as is requisite for inflicting the usual Punishment").

[131] 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 384, 388, 709–10 (1778) (stating the author says he will consider "[w]hat was the usual punishment of heresy here in *England* before the time of *Richard* II. and *Henry* IV."; "As to the penalty of death, *ultimum supplicium*: it should seem the antient imperial constitutions made a difference between heresies in relation to that punishment: it appears by the edict of *Theodofius Codice*, *cap.* 4 the *Manichees* and *Donatists* were punished with death . . . many other

speaks of "the usual punishment for murder";[132] *The Works of Samuel Johnson* contains a reference to "the usual punishment" for felons;[133] Oliver Goldsmith's *The History of England* notes that "the usual punishment" for traitors was for offenders "to be hanged, drawn, and quartered";[134] and other sources contain references to either "the usual Punishment of Law"[135] or "the usual Punishment of the Law."[136] The phrase "usual punishments" is also found in Parliamentary debates[137] and pertaining to the French Revolution.[138]

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heretics were under milder sentences, some were punished with exile, some with extermination from the city, some with pecuniary mulcts, and some with confiscation, which, it seems, was the most usual punishment"; "And tho by the imperial law some particular heresies were punishable with death yet it does not appear, that even in the empire heresy in general was punished capitally, till the constitution of *Frederic* II. about the year 1234, which indistinctly adjudges all heretics to the flames: but in *England* the usual punishment seems to have been imprisonment . . . .") (citations omitted); *see also* FRANCIS DOUGLAS, A GENERAL DESCRIPTION OF THE EAST COAST OF SCOTLAND, FROM EDINBURGH TO CULLEN 24 (1782):

> By an act of King James the First's second parliament, it was enacted, "that heretics should be punished according to the law of the haly kirk, and that the secular power assist." Beaton having called to his assistance a few of the clergy, put this act summarily in execution. It is a pity that a law, so repugnant to religion and humanity, should reproach the reign of one of the wisest and best of our princes. The act is very cautiously worded; it does not mention burning, the usual punishment inflicted upon heretics, as the English statute did, but simply refers to the law of the holy kirk; perhaps from a presumption, that the merciful mother would inflict a milder punishment on her children.

[132] 1 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 196 (1825).

[133] 1 JOHN HAWKINS, THE WORKS OF SAMUEL JOHNSON, LL.D. TOGETHER WITH HIS LIFE, AND NOTES ON HIS LIVES OF THE POETS 520 (1787).

[134] 1 OLIVER GOLDSMITH, THE HISTORY OF ENGLAND, FROM THE EARLIEST TIMES TO THE DEATH OF GEORGE THE SECOND 284 (12th ed. 1823); *see also* 5 TOBIAS GEORGE SMOLLETT & THOMAS FRANCKLIN, EDS., THE WORKS OF M. DE VOLTAIRE: TRANSLATED FROM THE FRENCH, WITH NOTES, HISTORICAL AND CRITICAL 262 (1761) (referring to "the usual punishment for traitors" as being to be "sentenced to be hanged" and to have one's "heart cut out" and "thrown" in one's "face").

[135] 1 THOMAS SALMON, A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II, TO THE END OF THE REIGN OF KING GEORGE I, at 235 (2d ed. 1730) (showing that in a discussion of the Gunpowder Plot, one finds this reference: "The Conclusion shall be from the admirable Clemency and Moderation of the King, in that howsoever these Traitors have exceeded all others their Predecessors in Mischief . . . ; yet neither will the King exceed the usual Punishment of *Law*, nor invent any new Torture or Torment for them; but is graciously pleased to afford them as well an ordinary Course of Trial, as an ordinary Punishments, much inferior to their Offence."); *see also id.* at 722 (showing that in a section on The Trial of Thomas Earl of Strafford, one finds this reference: "And if any Person were censured to the Pillory or Whipping, it was for known Perjury, the ordinary and usual Punishment in such a case."); THE GUNPOWDER-TREASON: WITH A DISCOURSE OF THE MANNER OF ITS DISCOVERY 120–21 (1679) ("[Y]et neither will the King exceed the usual punishment of Law, nor invent any new torture or torment for them.").

[136] 2 GEORGE BUCHANAN, HISTORY OF SCOTLAND 378 (4th ed. 1752).

[137] 3 THOMAS C. HANSARD, ED., THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME 858 (1805) (showing in a debate on March 12, 1805, over the "Mutiny Bill," it is reported: "He did not say, that the usual punishments inflicted were more severe than necessary, for which reason, the clause he should recommend, would, in its effects, rather serve to strengthen the powers of regimental courts

In Great Britain's Parliament, the prohibition against "cruel and unusual punishments" was specifically brought up in discussions of the English Bill of Rights, described as "that important statute."[139] For example, in the parliamentary debates for April 24, 1809, the Petition of Henry White—reprinted as part of those debates—was presented to Parliament by a member of Parliament, a "Mr. Whitbread." Henry White's petition states in part as follows:

> Your Petitioner submits to the consideration of this honourable house, the extreme severity of the sentence passed upon him, as being contrary to the rights and liberties of every British subject in these realms, guaranteed to them by the Bill of Rights, which expressly says, "that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted," your Petitioner having already suffered, under a state of severe and dangerous illness, upwards of nine months imprisonment and banishment in Dorchester-Gaol, from his home, his business, and the Country where he was tried, and which has already subjected him to a pecuniary expense of upwards of 500*l*., and which, unless mitigated by the interference of this honourable house, it is more than probable will prove fatal to the life of your Petitioner, and ruinous to his circumstances, and future welfare of his family.[140]

Commentators on English law also frequently made use of the "usual" punishments terminology. For example, Guy Miège (1644–*c*.1718), a Swiss writer from Lausanne who taught English as a foreign language,[141] published a book in 1691 titled *The New State of England Under Their Majesties K. William and Q. Mary*.[142] In it, Miège described the "the publick Justice administered at four times of the Year in Westminster" and by "Twelve Judges," of the courts known as Assizes, "twice a Year . . . in the Country . . . in

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martial."); 1 THE PARLIAMENTARY REGISTER; OR, AN IMPARTIAL REPORT OF THE DEBATES THAT HAVE OCCURRED IN THE TWO HOUSES OF PARLIAMENT, IN THE COURSE OF THE SIXTH SESSION OF THE FOURTH PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND 552 (1812) (showing in a February 20, debate over "the Local Militia Bill," a "Lord A. Hamilton" remarked that the bill provided that persons belonging to the local militia would were found guilty of offenses would suffer "the usual punishments inflicted in such cases").

[138] 2 JEREMIAH WHITAKER NEWMAN, THE LOUNGER'S COMMON-PLACE BOOK, OR, MISCELLANEOUS ANECDOTES: A BIOGRAPHIC, POLITICAL, LITERARY, AND SATIRICAL COMPILATION 113–14 (1796) (referencing "the massacres of Paris" and "the severities exercised on her sovereign, her nobles, her priests, and her citizens" and that "their numerous executions are in fact no other than the usual punishments inflicted, at various times, by all new governments on rebellious subjects").

[139] 14 T. C. HANSARD, ED., THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME 605 (1809) (quoting discussions during the debate of May 18, 1809).

[140] *Id.* at 182.

[141] A. P. R. HOWATT & H. G. WIDDOWSON, A HISTORY OF ENGLISH LANGUAGE TEACHING 57–59 (2d ed. 2004).

[142] GUY MIÈGE, THE NEW STATE OF ENGLAND UNDER THEIR MAJESTIES K. WILLIAM AND Q. MARY (1691). This book was printed "for Jonathan Robinson, at the *Golden Lion* in St. *Paul*'s Church-yard." *Id.* (unpaginated title page). The dedication page of the book reads: "To the Most Honourable Thomas, Marquess of Caermarthen, Earl of Danby, Viscount Latimer, Baron Osborn of Kiveton, Lord President of His Majesties Most Honourable Privy-Council, And Knight of the most Noble Order of the Garter, This *New State of England* is humbly Dedicated by the Author." *Id.* (unpaginated dedication page).

the several Counties the King is pleased to appoint them for."[143] Noting that England's judicial system was "divided into Six Parts, called Circuits,"[144] Miège wrote in Chapter XVI: "My Business is now to speak of the Punishments inflicted here upon Criminals of what nature soever."[145] In a chapter titled "Of the Punishments inflicted on Malefactors," he took note of "the Manner of Trying Criminals in England; wherein is to be commended our English Humanity towards Prisoners that are upon their Trial."[146] "Hanging," Miège emphasized, "is the usual Punishment of Death in England, either for High Treason, Petty Treason, or Felony."[147] "As to Persons of great Birth and Quality,

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[143] *Id.* at 80–81 (Chapter IX).

[144] *Id.*

[145] *Id.* at 125 (Chapter XVI).

[146] *Id.* Miège compared the English practice to those of "other Nations," which, he wrote, "have devised such racking Tortures to extort the Confession, as make often the Innocent cry Guilty, and prefer Death to the Rack." *Id.* In the course of his book, Miège also described how prisoners could demand "the *Benefit of the Clergy*, an ancient Liberty of the Church, which has been confirmed by divers Parliaments." *Id.* at 88 (Chapter IX). As Miège described the process for invoking that ancient right:

> By vertue whereof one in Orders arraigned of Felony by a Secular Judge, might pray his Clergy, which was as much as if he prayed to be delivered to his Ordinary, to purge himself of the Offence objected. But the ancient Course of the Law in this point of Clergy is much altered, so that Lay-men have been made capable of this Benefit in many Cases; As in Theft of Oxen, Sheep, Mony, and other Things, not forcibly taken to the terrour of the Owner. So favourable is our Law, that for the first Fault the Felon shall be admitted to his Clergy. In order to which the Bishop sends a Clergy-man, with a Commission under his Seal, to be Judge in that matter at every Goal-Delivery. If the Prisoner demands to be admitted to his Book, the Judge commonly gives him a Psalter, and turns to what place he pleases. The Prisoner reads as well as he can, and it happens most times but sadly. Then the Judge asketh of the Bishops Commissary, *Legit ut Clericus?* To which the Commissary must answer *Legit*, or *Non legit*; for these be the formal Words, and our Men of Law are the most precise in their Forms. If he say *Legit*, the Judge proceeds no further to Sentence of Death. But, if he say *Non legit*, the Sentence follows either that Day or the next, in these Words, *Thou A. hast been Indited of* such *a Felony, and therefore Arraigned*; *Thou hast pleaded* Not Guilty, *and put they self upon* God and thy Country; *They have found thee* Guilty, *and Thou hast nothing to say for thy Self*; *The Law is, that Thou shalt return to the Place from whence thou camest, and from thence Thou shalt go to the Place of Execution, where Thou shalt Hang by the Neck till Thou be dead*. Whereupon he charges the Sheriff with the Execution. But he that claimeth his Clergy in Cases where it is admitted is in the presence of the Judges burnt in the brawn of his Hand with a hot Iron, marked with the Letter *T.* for a Thief, or *M.* for Manslayer. Then he is delivered to the Bishops Officer, to be kept in the Bishops Prison; from whence, after a certain time, he is delivered by a Jury of Clerks. But, if he be taken and found Guilty again, and his Mark discovered, then 'tis his Lot to be hanged.

Id. at 88–90.

[147] *Id.* at 125 (Chapter XVI). A later edition of Miege's book said much the same thing. GUY MIEGE, THE PRESENT STATE OF GREAT-BRITAIN AND IRELAND, IN THREE PARTS 295 (4th ed. 1718) ("The most usual Punishment in *England* for capital Crimes, is *Hanging*.").

convicted of High Treason, Petty Treason, or Felony, tho the Judgment be the same with that of common Persons," Miège qualified, "yet by the Kings Favour they are usually *Beheaded*."[148] In other words, a particular method of execution could be a "usual" punishment.

In his popular and widely distributed *Commentaries on the Laws of England*, Sir William Blackstone himself used the phrase "usual punishment" in writing about the punishment of "petit treason" committed "by those of the female sex."[149] In another part of his *Commentaries*, Blackstone specifically referenced the bar on "cruel and unusual punishments." In particular, Blackstone saw the prohibition against cruel and unusual punishments as constraining *arbitrary* and *discretionary* power. As to fines and prison sentences, Blackstone observed that "the duration and quantity" of such fines or terms of incarceration were properly left to judges. "[H]owever unlimited the power of the court may seem," Blackstone emphasized of such judgments, "it is far from being wholly arbitrary," for the judge's "discretion is regulated by law." "For the bill of rights has particularly declared," Blackstone wrote, "that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted."[150]

That the English prohibition against cruel and unusual punishments[151] was seen as a constraint on disproportionate penalties, arbitrary judicial power, and otherwise

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[148] MIÈGE, *supra* note 142, at 127 (Chapter XVI); *compare id.* at 128 ("*Burning alive* is sometimes used, but only for Witches, and Women convicted of High Treason, or Petty Treason."); *id.* ("*Pressing to Death* . . . is a Punishment for those only that being Arraigned either of Petty Treason or Felony, refuse to Answer, or to put themselves upon the ordinary Trial of God and the Country."); *id.* at 129 ("For *Petty Larceny*, or small Theft, that is under the ancient value of 12 d. the Punishment since Edward III. is by *Whipping*, and in the late Reigns has been often by Transportation into the West-Indies, where they live for some Years a slavish Life."); *id.* at 130 ("*Perjury*, whereby Mens Estates, Reputation, and Lives ly at stake, is commonly punished only with the *Pillory*; never with Death, though it has cost the Lives of many."); *id.* ("*Forgery, Blasphemy, Cheating, Libelling, False Weights and Measures, Forestalling the Market, Offences in Baking and Brewing*, are also punished with standing in the *Pillory*. But sometimes the Offender is Sentenced besides to have one or both Ears nailed to the Pillory and cut off, or his Tongue there bored through with a hot Iron."); *id.* at 131 ("*Vagabounds*, and the like, who can give no good account of themselves, are punished by setting their Legs in the Stocks for certain hours. And *Scolding Women* (that are always teazing their Neighbors) by being set in a *Cucking Stool* placed over some deep Water and duck'd therein three several times, to cool their heat . . . ."); *id.* ("Other *Misdemeanours* are commonly punished with *Imprisonment* or *Fines*, and sometimes with both."); *id.* ("Those are the *Corporal Punishments* commonly used in England for Criminals that happen to fall into the hands of Justice.").

[149] The passage in Blackstone's *Commentaries* reads as follows:

> The punishment of petit treason, in a man, is to be drawn and hanged, and, in a woman, to be drawn and burned: the idea of which latter punishment seems to have been handed down to us from the laws of the antient Druids, which condemned a woman to be burned for murdering her husband; and it is now the usual punishment for all sorts of treasons committed by those of the female sex.

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 204 (1769).

[150] BESSLER, *supra* note 7, at 173.

[151] Sometimes the prohibition was expressed as one against "unusual and cruel punishments." *E.g.*, 30 THOMAS JONES 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, WITH NOTES AND OTHER ILLUSTRATIONS 1342 (1822) ("He quoted the declaration of the Bill of Rights against excessive bail, and unusual and cruel punishments . . . ."); A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS: FROM THE REIGN OF

boundless common-law judicial discretion is clear.[152] This extended passage, from "Mr. Emlyn's Preface,"[153] one originally written in 1730 and reprinted in *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783* (1816), published in London, makes that abundantly apparent:

> As to smaller Crimes and Misdemeanors, they are differenced 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 though 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 quality and degree, to the estate and circumstances of the offender, and to the greatness or smallness of the offence; that Fine, which would be a 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 uses 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

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KING GEORGE II, at xi (3d ed. 1742) (referring to "the Illegality of unusual and cruel Punishments"); WILLIAM SULLIVAN, SEA LIFE; OR, WHAT MAY OR MAY NOT BE DONE, AND WHAT OUGHT TO BE DONE BY SHIP-OWNERS, SHIP-MASTERS, MATES AND SEAMEN 75 (1837) ("Unusual and cruel punishments are forbidden; nor could any law of congress make them lawful."); THE PROCEEDINGS AND SPEECHES, AT THE MEETING THE SEVENTEENTH NOVEMBER, 1795, AT ST. ANDREW'S HALL, NORWICH, TO PETITION PARLIAMENT AGAINST LORD GRENVILLE'S AND MR. PITT'S TREASON AND SEDITION BILLS 13 (1795) ("The 10th clause of the Bill of Rights declares, that unusual and cruel punishments shall not be inflicted . . . ."); 38 THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME 1128 (1818) ("[T]hough the bill declared against all unusual and cruel punishments . . . no provisions were made to carry these declarations into effect.").

[152] *E.g.*, 1 THOMAS JONES 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, WITH NOTES AND OTHER ILLUSTRATIONS xxxv (1816).

[153] THOMAS BAYLY HOWELL, ED., COBBETT'S COMPLETE COLLECTION OF STATE TRIALS, AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME xxii, xxxv (1809) (reprinting "Mr. Emlyn's Preface to the Second Edition of the State Trials, in Six Volumes Folio: Printed in the Year 1730"); FRANCIS HARGRAVE, A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS xi–xii (4th ed. 1776) (reprinting the preface to the second edition). Sollom Emlyn (1697–1754) was an Irish legal writer who became a member of Lincoln's Inn, was the compiler of the six-volume second edition of state trials and contributed "a lengthy preface critically surveying the condition of English law at the time." 25 THE ENCYCLOPÆDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION 806 (11th ed. 1911); PETER CANE & JOANNE CONAGHAN, ED., THE NEW OXFORD COMPANION TO LAW 1123 (2008); LOUIS HYMAN, THE JEWS OF IRELAND: FROM EARLIEST TIMES TO THE YEAR 1910, at 16 (1972); BASIL MONTAGU, THE OPINIONS OF DIFFERENT AUTHORS UPON THE PUNISHMENT OF DEATH ix (1812); *Emlyn, Sollom (DNBoo)*, WIKISOURCE, https://en.wikisource.org/wiki/Emlyn,_Sollom_(DNB00) (last visited Feb. 24, 2018).

> Punishments, is equally guilty of perverting justice and acting against law, as he, who in a case, where the law has ascertained the penalty, willfully and knowingly varies from it. If no measures were to be observed in these discretionary Punishments, a man who is guilty of a Misdemeanor might be in a worse condition than if he had committed a capital crime; he might be exposed to an indefinite and perpetual Imprisonment, a punishment not at all favoured by law, as being worse than death itself: nor does an extravagant Fine, which is beyond the power of the offender ever to pay or raise, differ much from it; for if his Imprisonment depend upon a condition, which will never be in his power to perform, it is the same as if it were absolute and unconditional; if the offender be not able to pay such a Fine as his offence deserves, he must then submit to a corporal punishment in lieu of it, according to the old Rule, *Qui non habet in crumena, luat in cute*.[154] It is true, that Clause of Magna Charta which requires the saving every man's contenement, (viz. his means of livelihood)[155] extends only to Amerciaments,[156] which are ascertained by a

[154] This Latin maxim, not defined in the original source, may be unfamiliar to a modern reader but it has been translated as follows: "He who has nothing in his purse must pay the penalty with his body." *See* JAMES A. BALLENTINE, A LAW DICTIONARY OF WORDS, TERMS, ABBREVIATIONS AND PHRASES WHICH ARE PECULIAR TO THE LAW AND OF THOSE WHICH HAVE A PECULIAR MEANING IN THE LAW 410 (1916); ALEXANDER M. BURRILL, A NEW LAW DICTIONARY AND GLOSSARY: CONTAINING FULL DEFINITIONS OF THE PRINCIPAL TERMS OF THE COMMON AND CIVIL LAW, TOGETHER WITH TRANSLATIONS AND EXPLANATIONS OF THE VARIOUS TECHNICAL PHRASES IN DIFFERENT LANGUAGES, OCCURRING IN THE ANCIENT AND MODERN REPORTS, AND STANDARD TREATISES; EMBRACING ALSO ALL THE PRINCIPAL COMMON AND CIVIL LAW MAXIMS 854 (1850) (defining "Qui non habet in crumena, luat in corpore" as "He who has not [the means of satisfaction] in his purse, must pay in his body. If a man cannot pay his fine, he must go to prison").

[155] This doctrine has been explored in a recent law review article. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 834, 835 (2013) (discussing the "largely forgotten principle of English law known as *salvo contenemento suo* (translated as 'saving his contenement,' or livelihood)," a principle "[e]nshrined in the Magna Carta" that "had become firmly established as a fundamental principle at common law by the seventeenth and eighteenth centuries"); *see also* RICHARD BURN & JOHN BURN, NEW LAW DICTIONARY: INTENDED FOR GENERAL USE AS WELL AS FOR GENTLEMEN OF THE PROFESSION 325 (1792):

> AMERCEMENT is, to be at the king's mercy with regard to the *quantum* of a fine imposed. By *magna charta*, c. 14. no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear, saving to the landowner his land, to the trader his merchandize, and to the husbandman his team and instruments of husbandry; in order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms, shall be set or reduced to a certainty by the oath of a jury. In the court-leet and court-baron, this is usually done by *affeerors*, or jurors sworn to *affeere*; that is, to tax and moderate the general amercement according to the particular circumstances of the offence and the offender. In limitation of which, in courts superior to these, the ancient practice was, to inquire by a jury, when a fine was imposed upon any many, how much he was able to pay by the year, saving the maintenance of himself, his wife, and children. And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without

> Jury, and not to Fines, which are imposed by the Court; but nevertheless those Fines ought to be moderate and within bounds; where 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.[157]

That the prohibition against cruel and unusual punishments was targeted at runaway discretion also showed up in America, including, in one case, almost a century after the publication of William Blackstone's *Commentaries on the Laws of England*. On May 30, 1864, at a constitutional convention in Maryland, a Mr. Stockbridge proposed combining into a single provision Maryland's separate prohibitions against "cruel and unusual pains and penalties" and "cruel or unusual punishments."[158] Saying that the proposed change "is one rather of form than of substance," Mr. Stockbridge offered an amendment so that the newly consolidated provision would bar the infliction "in any case" of "cruel, unusual or excessive pains, penalties and punishments."[159] In response, a Mr. Miller objected, saying that the first prohibition was "a prohibition on the power of the Legislature to pass any law inflicting cruel and unusual pains and punishments, and penalties" whereas the second prohibition "relates to the administration of justice by the Courts of Law."[160] Mr. Miller then argued:

> It is well known to gentlemen here, to the gentleman from Baltimore city (Mr. Stockbridge) that the common law prevails in this State, in pursuance of an article adopted in the bill of rights. Under that common law, the Courts, when the party is convicted of any offence, for which no penalty is prescribed by statute, have the power, in their discretion, of inflicting fines, penalties or imprisonment; and this 24th article is directed against undue exercise by the courts of the power they thus have entrusted to them by the common law. When the statutes define the penalty and prescribe

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> touching the implements of his livelihood, but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life, and by the bill of rights it is particularly declared, that excessive fines ought not to be imposed.

[156] An *amercement* is "[a] pecuniary penalty imposed upon an offender by a judicial tribunal." 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION: WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 155 (1892); *see also id.* ("As distinguished from a fine, at the old law an *amercement* was for a lesser offence, might be imposed by a court not of record, and was for an uncertain amount . . . .").

[157] HOWELL, *supra* note 152, at xxxv (citations omitted).

[158] 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, ASSEMBLED AT THE CITY OF ANNAPOLIS, WEDNESDAY, APRIL 27, 1864: BEING A FULL AND COMPLETE REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION, TOGETHER WITH THE OLD CONSTITUTION, THE LAW UNDER WHICH THE CONVENTION ASSEMBLED, AND THE NEW CONSTITUTION 224 (1864).

[159] *Id.* at 224–25.

[160] *Id.* at 225.

> the punishment for any offence, then no Court of Law can exceed it in according the punishment for the offence, And the 24th article is designed to prevent the Courts of Justice from inflicting unusual and cruel punishments in cases where the punishment is left entirely to their discretion; and that I think is a good provision. And as these two articles relate to different subjects-matter, I think they should continue as separate and distinct provisions in the bill of rights. The one prohibiting the passage by the Legislature of an act which would warrant a Court of Justice in inflicting cruel and unusual pains and penalties, and the other providing that, in cases where the common law prevails, no such cruel or unusual punishments should be inflicted at the arbitrary will of the Judge, or in the mere discretion of the Court.[161]

The prohibitions against "cruel and unusual pains and penalties" and "cruel or unusual punishment" in Maryland's constitution remained separate. Article XVI of Maryland's 1867 constitution, using language similar to that in Maryland's 1776 Declaration of Rights,[162] Maryland's 1851 Declaration of Rights,[163] and Maryland's 1864

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[161] HOWELL, *supra* note 152, at xxxv. A Mr. Chambers also objected to Mr. Stockbridge's proposal, saying it would "but save a half-a-dozen words." *Id.* "As has been said," Chambers argued, referencing the earlier statement of Mr. Miller of Anne Arundel, "if gentlemen will look to the two articles referred to, they will find that they refer to two different departments of the Government, the one being a direction to the Legislature, and the other a direction to the Courts themselves." *Id.* Mr. Stockbridge, however, declined to withdraw his proposed amendment, repeating that he considered it "more a matter of form than substance." *Id.* Mr. Stockbridge then stated as follows:

> Now the purpose of this bill of rights is to declare the rights of the people, and this section means only that they shall be exempt from all cruel punishments and excessive bail, and nothing more, and that this principle instead of being incorporated in one section is embodied in two sections, one restraining the legislative department, and the other restraining the judiciary, when they could as well have been embraced in one. There would be just as much propriety in adding another section to restrain the executive department, and so on for every other officer of the government. My object was simply to consolidate these two articles, and make one general declaration that the people shall be protected against all unusual and cruel pains and penalties. Neither the one or the other article amount to much, but as it has been thought best to have this principle asserted, for whatever it may be worth, I thought it best to have it all in one article. However, I am not strenuous on the point.

Id. After further debate, the question of Mr. Stockbridge's amendment was taken up by the state convention and—as the record reflects—"it was not agreed to." *Id.* at 226.

[162] ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 356 (1915) (noting that Article XIV of Maryland's Declaration of Rights (1776) provided: "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, ought to be made in any case, or at any time hereafter.").

[163] *Id*. at 397 (noting that Article XIV of Maryland's Declaration of Rights (1851) provided: "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 ought to be made in any case, or at any time hereafter.").

Declaration of Rights,[164] declared: "That sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter."[165] Meanwhile, Article XXV of Maryland's 1867 constitution, employing language used in Maryland's 1776 Declaration of Rights,[166] Maryland's 1851 Declaration of Rights,[167] and Maryland's 1864 Declaration of Rights,[168] provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the Courts of Law."[169]

B. The Customs and Practices of Nations

There was a fascination in earlier times—as is still the case today—with the social mores and customs and laws of other nations. Thus, in eighteenth-century sources, numerous references can be found to "usual punishments" or "unusual punishments," particularly in relation to the practices of other countries or locales.[170] For example, in a

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[164] *Id.* at 431 (noting that Article XVI of Maryland's Declaration of Rights (1864) provided: "That sanguinary laws ought to be avoided as far as it is consistent with the safety of the State; and no law to inflict cruel and unusual pains and penalties ought to be made in any case or at any time hereafter.").

[165] *Id.* at 36, 476 (citing Article XVI of Maryland's Declaration of Rights (1867)).

[166] Article XXII of Maryland's Declaration of Rights (1776) provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law." *Id.* at 357 (citing Article XXII of Maryland's Declaration of Rights (1776)).

[167] *Id.* at 398 (noting that Article XXII of Maryland's Declaration of Rights (1851) provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the courts of law.").

[168] *Id.* at 432 (noting that Article XXV of Maryland's Declaration of Rights (1864) provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the courts of law.").

[169] *Id.* at 49, 476 (citing Article XXV of Maryland's Declaration of Rights (1867)). Alfred Niles, a lecturer on constitutional law at the University of Maryland, later reported in his treatise, *Maryland Constitutional Law* (1915), that Article XVI of Maryland's 1867 constitution "ought properly to be considered in connection with the last clause of article XXV," with—as Niles emphasized—"article XVI forbidding the passage of any *law* inflicting unusual pains and penalties and the last clause of article XXV prohibiting the *court* from inflicting cruel and unusual punishments, even though the law might upon its face be unobjectionable." *Id.* at 36.

[170] *E.g.*, DANIEL LOMBARD, A SUCCINCT HISTORY OF ANCIENT AND MODERN PERSECUTIONS 123 (1747) (referring to "the usual Punishment for high Treason"); 7 ANDREW REID, ED., THE PRESENT STATE OF THE REPUBLICK OF LETTERS 299 (1731) (noting that when "*Quacks* that practice . . . in a fraudulent manner . . . are catch'd . . . their usual Punishment is to be forc'd to swallow down all the *Aloes*, *Mercury*, and *Pills* that are found in their Houses, &c."); THE NEW ANNUAL REGISTER, OR GENERAL REPOSITORY OF HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1788, at 156 (1789) ("In the Visitatio Notabilis the usual punishment is fasting on bread and beer; and in cases of repeated delinquency, on bread and water."); THE WORKS OF PETRONIUS ARBITER, TRANSLATED BY SEVERAL HANDS 174 (4th ed. 1714) (writing of a soldier "dreading the usual Punishment"); JOHN HOWIE, BIOGRAPHIA SCOTICANA: OR, A BRIEF HISTORICAL ACCOUNT OF THE LIVES, CHARACTERS, AND MEMORABLE TRANSACTIONS OF THE MOST EMINENT SCOTS WORTHIES 490 (2d ed. 1781) (noting that a woman "was burnt at Craigfergus; the usual punishment of malefactors in that country"); JOHN PENNINGTON MUNCASTER, HISTORICAL SKETCHES OF THE SLAVE TRADE, AND ITS EFFECTS IN AFRICA: ADDRESSED TO THE PEOPLE OF GREAT BRITAIN 59 (1792) (discussing that after a writer referenced that a man, "having lain with one of his Majesty's wives," was sentenced by "the King of Dogo or Hindo" to be banished and to have his ears cut off, it was reported that "this was an

section on the "Oriental Islands," a 1751 history of the nations of the world noted: "One of their usual Punishments is to strip the Criminal, bind him Hand and Foot, and tie him to a Post, and expose his Face to the Sun from Morning to Night, when the Musketoes or Gnats almost cover his Body, and sting him unmercifully, and he is perfectly blistered by the Sun's scorching Heat."[171] "[S]ometimes," that source reported, "they lay him flat on his Back on the hot Sands, while he is almost devoured by the Musketoes."[172] The idea of *usual punishments* thus reflected those punishments either commonly or traditionally inflicted in particular places.

The writer's viewpoint—or perception of a place's history—could determine the usage of the "usual" or "unusual" terminology. In discussing Roman history, a subject of great fascination, writers frequently discussed the "usual punishment" of slaves[173] and offenders,[174] including of vestal virgins who violated their vows of chastity.[175] "The breaking of the legs of slaves," one book noted, "was not an unusual punishment among the Romans; which was done by laying the legs on an anvil, and breaking them in two with hammers."[176] The authors of an earlier book, in discussing "an ancient Roman" who learned a "freed-man" had kissed his "marriageable" daughter, reported: "We are not told whether or not he contended himself with the usual punishment inflicted for a kiss"—"which was whipping."[177] Twelve men, "each carrying a bundle of rods bound together

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unusual punishment inflicted on him, and made him be scorned and laughed at by all who saw him"); 1 JOHN LYON, THE HISTORY OF THE TOWN AND PORT OF DOVER, AND OF DOVER CASTLE; WITH A SHORT ACCOUNT OF THE CINQUE PORTS 317 (1813) ("The pilots in the Isle of Thanet were to keep to their own bays, and the North Foreland. The usual punishments were inflicted for their disobedience."); 5 THE WORKS OF NATHANIEL LARDNER, D.D. 261 (1815) ("The usual punishments among the Jews were strangling and stoning . . . .").

[171] A GENERAL HISTORY OF THE SEVERAL NATIONS OF THE WORLD, FROM THE FLOOD, TO THE PRESENT TIMES 401 (1751) (printed in London for D. Browne, J. Shuckburgh, and W. Johnston).

[172] *Id.*

[173] LE FÈVRE DE MORSAN, THE MANNERS AND CUSTOMS OF THE ROMANS 109 (1740) ("The usual punishment of slaves was the whip . . . ."); *cf.* JEAN LOUIS DE LOLME, MEMORIALS OF HUMAN SUPERSTITION 51 (2d ed. 1784) ("It is not to be doubted, that flagellations had been invented, and were become, in early times, a common method of punishment in the Pagan world. Even before the foundation of Rome, we meet with instances which prove that it was the usual punishment inflicted on Slaves.").

[174] 2 WILLIAM GUTHRIE, TRANS., THE ORATIONS OF CICERO 16 n.*b* (1758) ("[W]e must here observe, that a Sentence of Banishment was seldom or never pronounced against any Roman; there being no Law which punished any Crime with Exile. The usual Punishment was a pecuniary Mulct; they were condemned to pay a Sum of Money, in Proportion to the Greatness of their Crime.").

[175] CHARLES ROLLIN, THE ROMAN HISTORY FROM THE FOUNDATION OF ROME TO THE BATTLE OF ACTIUM: THAT IS, TO THE END OF THE COMMONWEALTH 355 (1739) ("The Vestal Oppia was convicted of having broken her vow of chastity, and suffered the usual punishment."); TITUS LIVIUS'S ROMAN HISTORY, TRANSLATED INTO ENGLISH, AND ILLUSTRATED WITH NOTES, CRITICAL, HISTORICAL, AND GEOGRAPHICAL: FOR THE USE OF STUDENTS IN HUMANITY 168 (William Gordon trans., 1783) ("[T]he vestal Opia being convicted of incontinence, was condemned, and suffered the usual punishment."); 1 OLIVER GOLDSMITH, THE ROMAN HISTORY FROM THE FOUNDATION OF THE CITY OF ROME, TO THE DESTRUCTION OF THE WESTERN EMPIRE 3 (1789) ("The mother was condemned to be buried alive, the usual punishment for vestals who had violated their chastity, and the twins were ordered to be flung into the river Tyber.").

[176] 2 JOHANN JAKOB RAMBACH, MEDITATIONS AND CONTEMPLATIONS ON THE SUFFERINGS OF OUR LORD AND SAVIOUR JESUS CHRIST; IN WHICH THE HISTORY OF THE PASSION, AS GIVEN BY THE FOUR EVANGELISTS, IS CONNECTED, HARMONISED, & EXPLAINED 343 (1811).

[177] 8 A GENERAL DICTIONARY, HISTORICAL AND CRITICAL: IN WHICH A NEW AND ACCURATE TRANSLATION OF THAT OF THE CELEBRATED MR. BAYLE, WITH THE CORRECTIONS AND OBSERVATIONS

with a leathern throng, in the midst of which was an ax," a 1740 book detailing Roman customs reported, "served" the Roman king "in the double capacity of guards and officers to execute justice and his commands; whether it were to cut off an head, or whip a criminal; which were the usual punishments amongst the Romans."[178] In another source, from 1680, there is a reference to "some strange or unusual punishment,"[179] suggesting a punishment that was, in the eye of the beholder, out of the ordinary.

Turkish practices, like Roman traditions, also drew considerable attention. As Thomas Salmon's *Modern History* reported: "The usual punishments appropriated to crimes in Turkey are as follow, viz. A murderer is beheaded, a thief strangled, an apostate burnt, a traytor is dragged at a horse's tail, and afterwards impaled; and if one maims or wounds another, the like punishment is inflicted on the offender: an eye for an eye, a limb for a limb, according to the Jewish law." "[T]he usual punishment in Turkey," Salmon said elsewhere, "is the salack; where the offender being obliged to sit down on the ground, and having his legs held up, receives a certain number of blows upon the soles of his feet with a little rattan or cane of the bigness of a man's finger."[180] "The most usual punishments in Turkey for capital offences," one memoir concluded, revealing the context in which the usual terminology was used, "are beheading, drowning, hanging, strangling, burning, impaling, and the strappadoe; the two last as the most cruel, and are appointed only for Turks who renounce the Mahometan faith, or renegadoes who return to the Christian religion."[181] "The usual punishments for slight offences," wrote another historian, "are whipping, or public labour for a length of time proportioned to the nature of the crime."[182]

The "usual" or "unusual" references are found in countless descriptions of many other places or legal systems, too, including Algiers,[183] Carthage,[184] Ceylone,[185] China,[186]

PRINTED IN THE LATE EDITION AT PARIS, IS INCLUDED 588 (John Peter Bernard, Thomas Birch & John Lockman, eds., 1739).

[178] LE FÈVRE DE MORSAN, THE MANNERS AND CUSTOMS OF THE ROMANS 129 (1740).

[179] THOMAS GODWYN, ROMANÆ HISTORIÆ ANTHOLOGIA RECOGNITA ET AUCTA: AN ENGLISH EXPOSITION OF THE ROMAN ANTIQUITIES 201 (1680).

[180] 1 THOMAS SALMON, MODERN HISTORY: OR, THE PRESENT STATE OF ALL NATIONS 441–42 (3d ed. 1744); *see also* JOSEPH RANDALL, A SYSTEM OF GEOGRAPHY; OR, A DISSERTATION ON THE CREATION AND VARIOUS PHÆNOMENA OF THE TERRAQUEOUS GLOBE 316 (1744):

> The usual Punishment appropriated to Crimes are as follow: *viz.* A Murderer is beheaded; a Thief strangled; an Apostate burnt; a Traitor is dragg'd at a Horse's Tail, and afterwards impaled; and, if any one maims or wounds another, the like Punishment is inflicted on the Offender, an Eye for an Eye, a Limb for a Limb, according to the *Jewish* Law. For Perjury they are set upon an Ass, with their Faces towards the Tail, which the Criminal holds in his Hand, and thus they are led through the City, and afterwards burnt in the Cheek.

[181] MEMOIRS OF PETER HENRY BRUCE, ESQ.: A MILITARY OFFICER, IN THE SERVICES OF PRUSSIA, RUSSIA, AND GREAT BRITAIN 64 (1782) (printed for the author's widow).

[182] THOMAS THORNTON, THE PRESENT STATE OF TURKEY; OR A DESCRIPTION OF THE POLITICAL, CIVIL, AND RELIGIOUS CONSTITUTION, GOVERNMENT, AND LAWS, OF THE OTTOMAN EMPIRE 415–16 (1807) ("[I]n instances of greater enormities the guilty person is punished with the loss of his ears, and is sentenced to work in the salt mines for the remainder of his life"; "[t]he punishment of death, though not wholly abolished, is rarely inflicted.").

[183] 1 NEW MEMOIRS OF LITERATURE, CONTAINING AN ACCOUNT OF NEW BOOKS PRINTED BOTH AT HOME AND ABROAD 129 (1725) (printed in London for William and John Innys) ("Burning is the usual

Egypt,[187] France,[188] Germany,[189] Greece,[190] India,[191] Ireland,[192] Japan,[193] Java,[194] Persia,[195] Siam,[196] Sumatra,[197] Sweden,[198] and the West Indies.[199] A translation of

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punishment of the Jews, when they are condemned to death, to make a difference between them, and the Turks, Moors and Christians.").

[184] 1 CHARLES ROLLINS, THE ANCIENT HISTORY OF THE EGYPTIANS, CARTHAGINIANS, ASSYRIANS, BABYLONIANS, MEDES AND PERSIANS, MACEDONIANS, AND GRECIANS 190 (5th ed. 1768) ("[A]fter having been long tormented by being kept for ever awake in this dreadful torture, his merciless enemies nailed him to a cross, their usual punishment, and left him to expire on it."); 1 JACOB ROBINSON, THE HISTORY OF THE WORKS OF THE LEARNED, FOR THE YEAR ONE THOUSAND SEVEN HUNDRED AND FORTY 152 (1740) (reciting that a man was "nailed" to "a Cross," with the history saying that, for "the *Carthaginians*," that was the "usual Punishment among them").

[185] SALMON, *supra* note 180, at 300 ("[T]he most usual way of punishing those that are intended to be restored, is by banishing them to some distant village, where they remain confined till they are made sensible of their faults; and sometimes they are forgotten, and it proves an imprisonment for life.").

[186] 2 THOMAS OSBORNE, A COLLECTION OF VOYAGES AND TRAVELS 72 (1745) ("If the *Chineze* are very liberal in their rewards, they are as severe in the punishments, even of the slightest faults; their punishments are adequate to their demerits. The usual punishment is the bastinado on the back. When they receive but forty or fifty blows, they call this a fatherly correction . . . ."); EUSEBIUS RENAUDOT, ANCIENT ACCOUNTS OF INDIA AND CHINA, BY TWO MOHAMMEDAN TRAVELLERS (1733) (noting the unpaginated index entry for "Bambooing" describes it as "the usual Punishment inflicted in *China*").

[187] JEAN DE THÉVENOT, TRAVELS INTO THE LEVANT 259 (1687) ("The usual Punishments in *Ægypt* are Beheading, which they dexterously perform . . . . Impaling is also a very ordinary Punishment with them . . . .").

[188] 4 STEPHEN ABEL LAVAL, A COMPENDIOUS HISTORY OF THE REFORMATION, AND OF THE REFORMED CHURCHES IN FRANCE 168 (2018) ("He was condemned to the usual Punishment inflicted upon such Traitors.").

[189] 3 JOHN STEPHEN PÜTTER, AN HISTORICAL DEVELOPMENT OF THE PRESENT POLITICAL CONSTITUTION OF THE GERMANIC EMPIRE 303 (1790) ("The usual punishment in Germany for capital offenses is beheading with a broad sword. The criminal is obliged to kneel, and the executioner seldom fails to perform his office with a single blow.").

[190] 5 SAMUEL PARKER, BIBLIOTHECA BIBLICA: BEING A COMMENTARY UPON ALL THE BOOKS OF THE OLD AND NEW TESTAMENT (1735) (showing unpaginated index entry for "Adultery" describes "Stoning to Death" as "the usual Punishment" for adultery "among the primitive *Greeks*"); *id.* at 575 (containing a reference to "*the most usual Punishments inflicted on Slaves*").

[191] THE SENATOR: OR, CLARENDON'S PARLIAMENTARY CHRONICLE: CONTAINING AN IMPARTIAL REGISTER; RECORDING, WITH THE UTMOST ACCURACY, THE PROCEEDINGS AND DEBATES OF THE HOUSES OF LORDS AND COMMONS, BEING THE FIFTH SESSION IN THE SEVENTEENTH PARLIAMENT OF GREAT BRITAIN, HELD IN THE YEAR 1795, at 691 (1795) ("His Lordship said, the history, as far as he had seen, proved that fine and confinement were the usual punishments imposed by absolute Princes in India on their dependents for disobedience and contumacy.").

[192] 3 JOHN PINKERTON, ED., A GENERAL COLLECTION OF THE BEST AND MOST INTERESTING VOYAGES AND TRAVELS IN ALL PARTS OF THE WORLD 819 (1809) ("One of their usual punishments (and by no means the most severe) was taking people out of their beds, carrying them naked in winter on horse-back for some distance, and burying them up to their chin in a hole filled with briars, not forgetting to cut off their ears."); *accord* 49 TOBIAS GEORGE SMOLLETT, ED., THE CRITICAL REVIEW: OR, ANNALS OF LITERATURE 108 (1780) (containing the same language).

[193] SALMON, *supra* note 180, at 45 ("Their usual punishments for great offences are burning, crucifying with the head downwards, tearing them to pieces with horses, and boiling them in oil; and where an offender refuses to come in and submit, he is ordered to be cut in pieces wherever he is found. A gentleman or soldier convicted of any capital crime, has the favour of dying by his own hands; and it is reckoned very ignominious if he waits for the executioner to dispatch him in that case.").

[194] 2 THOMAS STAMFORD RAFFLES, THE HISTORY OF JAVA ccxxxvii (1830) (showing Appendix K contains the following sentence: "The usual punishments are death, confinement, and servitude.").

Plutarch's Lives makes a reference to "the usual punishment,"[200] with another book—on royal genealogies—referencing "the usual Punishment of Sacrilege."[201] Another history,

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[195] SALMON, *supra* note 180, at 56, 191, 348, 352, 441–42 (reciting that in Persia "[t]he usual punishment is a fine, which always goes to the King, or rather to the Governor of the province," but that "the usual punishment for capital offences" is that "the criminal's feet are tied to a camel, and his head hanging down to the ground, his belly is ripped open, so that all his bowels come out and hang over his head" with his body "dragged in this manner through the principal streets of the town, an officer marching before him"; also discussing, as to Persia, "the usual punishment of women who have committed capital crimes" and "the usual punishment" of bakers "for cheating in their weights, and raising provisions to an extravagant price"); JEAN DE THÉVENOT, TRAVELS INTO THE LEVANT 106–07 (1687) ("The usual punishments they inflict upon Malefactors whom they would not put to death, is to pluck out their Eyes; or else to pierce the Nerves of their Ankles, and then hanging them up by the feet, to give them a certain number of blows with a Cudgel, and sometimes also to cut the Nerves short off. When they condemn any to death, the most usual punishment is to rip open the Belly.").

[196] 7 S. RICHARDSON, T. OSBORNE, C. HITCH, A. MILLAR, JOHN RIVINGTON, S. CROWDER, P. DAVEY, B. LAW, T. LONGMAN & C. WARE, EDS., THE MODERN PART OF AN UNIVERSAL HISTORY, FROM THE EARLIEST ACCOUNT OF TIME 266 (1759) (noting that in the Kingdom of Siam "[t]he usual punishment for robbery is to pay double, and sometimes treble, the value of the goods stolen"); ARCHIBALD BOWER, ED., HISTORIA LITTERARIA: OR, AN EXACT AND EARLY ACCOUNT OF THE MOST VALUABLE BOOKS PUBLISHED IN THE SEVERAL PARTS OF EUROPE 393 (1731) ("They punish very severely the smallest Faults: as for instance, if one talks too little they slit his Mouth to his Ears; if too much, they sow it quite up. The usual Punishments for other such minute Offences are to pluck out the Delinquent's Teeth, burn his Arms with a red-hot Iron, drive in sharp-pointed Reeds to the Roots of his Nails, &c.").

[197] JONATHAN CARVER, THE NEW UNIVERSAL TRAVELLER: CONTAINING A FULL AND DISTINCT ACCOUNT OF ALL THE EMPIRES, KINGDOMS, AND STATES, IN THE KNOWN WORLD 41 (1779) ("For murder and adultery, the usual punishment is death, which is not inflicted by a professed executioner, but jointly by every person who happens to be within reach of the criminal; and the common weapon is a crice or dagger.").

[198] 2 JEDIDIAH MORSE, THE AMERICAN UNIVERSAL GEOGRAPHY; OR A VIEW OF THE PRESENT STATE OF ALL THE KINGDOMS, STATES, AND COLONIES IN THE KNOWN WORLD 173 (6th ed. 1812) ("The penal laws are mild. Whipping and confinement are the usual punishments."); 2 AUBRY DE LA MOTRAYE, A. DE LA MOTRAYE'S TRAVEL'S THROUGH EUROPE, ASIA, AND INTO PART OF AFRICA 361 (1723) (discussing beheading and the work of an executioner, the author wrote: "Note, this is the most usual Punishment in *Sweden*; where, for one that is hang'd, a hundred lose their Heads. Amongst others, I have seen him behead a Husband who had left his Wife, and a Wife who had left her Husband . . . .").

[199] 3 THE WEEKLY ENTERTAINER; OR AGREEABLE AND INSTRUCTIVE REPOSITORY; CONTAINING A COLLECTION OF SELECT PIECES, BOTH IN PROSE AND VERSE; CURIOUS ANECDOTES, INSTRUCTIVE TALES, AND INGENIOUS ESSAYS ON DIFFERENT SUBJECTS 185 (1784) (describing "the usual punishment" in the West Indies—that is, for the offender to be "whipped on an ass"—for a violation of the law of "the governor or viceroy" that "no Indian should be employed in carrying the baggage of Europeans"); HOUSE OF COMMONS (GREAT BRITAIN), ABRIDGMENT OF THE MINUTES OF THE EVIDENCE, TAKEN BEFORE A COMMITTEE OF THE WHOLE HOUSE, TO WHOM IT WAS REFERRED TO CONSIDER OF THE SLAVE-TRADE 106 (1789) ("The usual punishments of plantation-slaves according to the nature of their crimes; of a runaway, it is exceedingly severe; four negroes to take hold of each arm and leg, and lay him on the ground, when the chief whipper lays upon their bare back 40, 50, 60, or more lashes, just at the pleasure of the owner or overseer.").

[200] 3 PLUTARCH'S LIVES, TRANSLATED FROM THE ORIGINAL GREEK, WITH NOTES CRITICAL AND HISTORICAL, AND A LIFE OF PLUTARCH 322 (John Langhorne & William Langhorne, trans., 1801) ("Lucullus, at his return, inflicted on the fugitives the usual punishment. He made them strip to their vests, take off their girdles, and then dig a trench twelve feet long; the rest of the troops all the while standing and looking on.").

[201] JAMES ANDERSON, ROYAL GENEALOGIES: OR, THE GENEALOGICAL TABLES OF EMPERORS, KINGS AND PRINCES, FROM ADAM TO THESE TIMES 61 (1732).

published in 1726, also tellingly emphasized that "the usual Punishment of Heretics, according to the Sentence and Decrees" of "ancient Councils" was for offenders to be "divested both of the Name and Office of Priests."[202]

References to "usual" or "unusual" punishments are thus ubiquitous in Anglo-American sources, with those words used in both legal and non-legal sources. In an English dictionary published in Edinburgh in 1816, one finds a reference to "usual punishments" in the entry titled "PUNISHMENT, CAPITAL."[203] That entry reads: "Every mode of taking away life, which the ingenuity of torture could devise, have been used in different cases. We decline the horrid and unnecessary detail. Hanging and beheading are the usual punishments of civilized nations."[204] That source suggests that whereas hanging and beheading were the usual punishments in civilized countries, unusual punishments were, presumably, the ones involving the use of torture.[205] In another book, *The History of the Life and Reign of Alexander the Great*, Chapter IV begins with the following "friendly remonstrance" received by Alexander: "How long, sir, will you gratify your anger, by executions conducted in a foreign manner? Your own soldiers, your fellow-citizens, without being allowed to plead, are hauled to punishment by their captives. If you deem us to merit death, at least change our executioners." "[B]ut," the history reported, "his rage had proceeded to madness" and he thus "ordered those who had charge of the prisoners . . . to plunge them into the river, chained as they were." The history noted: "Nor did this *unusual punishment* raise a second mutiny . . . ."[206]

C. Bodily Punishments and the "Usual" and "Unusual" Terminology: From Corporal Punishments to Methods of Execution

Many of the "usual" or "unusual" punishment references in texts from past centuries are to bodily or corporal punishments.[207] An early nineteenth-century treatise on

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[202] 2 THE WORKS OF THE LEARNED JOSEPH BINGHAM, M.A.: LATE RECTOR OF HAVANT, AND SOMETIME FELLOW OF UNIVERSITY-COLLEGE IN OXFORD 628 (1726).

[203] 18 ENCYCLOPÆDIA PERTHENSIS; OR UNIVERSAL DICTIONARY OF THE ARTS, SCIENCES, LITERATURE, &C., at 481 (2d ed. 1816).

[204] *Id.* That dictionary also defines "PRIVILEGE" as follows: "in law, some peculiar benefit granted to certain persons or places contrary to the usual course of the law." *Id.* at 331.

[205] Of course, early conceptions of torture were much different than modern ones. *See, e.g.*, MICHAEL PEEL & VINCENT IACOPINO, EDS., THE MEDICAL DOCUMENTATION OF TORTURE 3–4 (2002):

> The early history and evolution of torture—from Greek and Roman times to the 20th century—is well examined by Peters and Ruthven, among other authors. The key understanding of torture during the greater part of this period is that it was a part of the legal process, embodied in written laws and procedures and not regarded by states with any shame. It was viewed as a legitimate tool of investigation. This contrasts dramatically with the contemporary practice of torture where denial of any illegal acts of torture is routine; at most it may be explained away as the practice of 'rogue elements' in the police or security forces.

[206] 2 QUINTUS CURTIUS RUFUS, THE HISTORY OF THE LIFE AND REIGN OF ALEXANDER THE GREAT 393 (1809) (emphasis added).

[207] *E.g.*, PLAUTUS'S COMEDIES, AMPHITRYON, EPIDICUS, AND RUDENS, MADE ENGLISH: WITH CRITICAL REMARKS UPON EACH PLAY 128 (1694) (referencing "*Rods* being the most usual Punishment for Slaves").

the law of evidence, written by an English barrister, refers to "standing in the pillory" and "branding" as "being the usual punishments for the *crimen falsi*."[208] In one English dictionary published in 1706, the entry for "Gantlop, or Gantlope" reads: "*as to run the Gantlope*, an usual Punishment among Soldiers, the Offender being to run with his Back naked thro' the whole Regiment or Company, and to receive a Lash with a Switch from every Soldier: It is deriv'd from *Gant*, a Town of Flanders, where this Punishment was invented, and the *Dutch* Word *Lope*, *i.e.*, Running."[209] Other sources make reference to the "usual Punishment" of whipping inflicted upon thieves[210] and the "unusual punishment" of manslaughter, that is, being burned in the hand.[211]

References to "usual" and "unusual" punishments were also routinely used to describe methods of execution, including for acts of treason.[212] In one source printed in London in 1674, just a few years before the adoption of the English Bill of Rights, the following passage appears:

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[208] SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 23 (2d ed. 1815); *see also* HENRY CAMPBELL BLACK, A LAW DICTIONARY CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN AND INCLUDING THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, ECCLESIASTICAL AND COMMERCIAL LAW, AND MEDICAL JURISPRUDENCE, WITH A COLLECTION OF LEGAL MAXIMS, NUMEROUS SELECT TITLES FROM THE ROMAN, MODERN CIVIL, SCOTCH, FRENCH, SPANISH, AND MEXICAN LAW, AND OTHER FOREIGN SYSTEMS, AND A TABLE OF ABBREVIATIONS 300 (2d ed. 1910) ("'Infamous,' as used in the fifth amendment to the United States constitution, in reference to crimes, includes those only of the class called 'crimen falsi,' which both involve the charge of falsehood, and may also injuriously affect the public administration of justice by introducing falsehood and fraud.").

[209] EDWARD PHILLIPS, COMP., THE NEW WORLD OF WORDS: OR UNIVERSAL ENGLISH DICTIONARY (6th ed. 1706) (unpaginated); *see also* 2 BULSTRODE WHITLOCKE, A JOURNAL OF THE SWEDISH AMBASSY, IN THE YEARS M.DC.LIII. AND M.DC.LIV. FROM THE COMMONWEALTH OF ENGLAND, SCOTLAND, AND IRELAND 18 (1772) ("Presently after this execution was past, two other offenders, for smaller crimes, were brought to the same place to suffer the punishment of the law, which they call running the gauntlet; a usuall punishment among soldiers."); ABEL BOYER, THE ROYAL DICTIONARY, FRENCH AND ENGLISH AND ENGLISH AND FRENCH 311 (1768) (listing "Gantlop," or "Gantlope," as "an usual punishment among soldiers"); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1731) (showing the combined, unpaginated entry for "Gantlet" and "Gauntlet" references "an Iron Glove" and the next combined entry for "Gantlope" and "Gantlop" reads: "[of *Gant*, a Town in *Flanders*, and Loop, a Race, or loopen, to run, *Belg*., because this Punishment was first invented there] an usual Punishment among Soldiers.").

[210] HENRI MISSON, MEMOIRS AND OBSERVATIONS IN HIS TRAVELS OVER ENGLAND 359 (Mr. Ozell trans., 1719) ("To be whipp'd thro' the Streets by the Hands of the Hangman, is the usual Punishment inflicted upon those that have stolen any Thing under the ancient Value of Twelve-Pence. Oftentimes this Punishment is commuted for that of being transported into some of the Plantations in the *Indies*, upon Account of the great Want those new Countries are in of People.").

[211] 1 THE COUNTY MAGAZINE, FOR THE YEARS 1786 AND 1787; PARTICULARLY DEDICATED TO THE INHABITANTS OF BERKSHIRE, DORSETSHIRE, HAMPSHIRE, SOMERSETSHIRE, AND WILTSHIRE 80 (1788) (referring to "the usual punishment inflicted on persons convicted of manslaughter, that of being burnt in the hand").

[212] 2 HENRY DAGGE, CONSIDERATIONS ON CRIMINAL LAW 23 (2d ed. 1774) ("[T]he usual punishment for Treason consists only of cutting the body of the criminal into several pieces, ripping up his belly, taking out his entrails, and then throwing his carcass into a river or ditch, and this is commonly done to great malefactors.").

> [F]or *Parricides* the old *Romans* had a strange and unusual punishment, *in culeum dejicere*, to put them alive into a great leather Sack, made of an Ox-Hide, with a live *Dog*, a *Cock*, a *Viper*, and an *Ape*, at first it was with *Serpents*, (after the *murtherers of Parents* had been made bloudy with scourging) then sewed up close, and cast into *Tiber*, or the next *River*, that whiles *alive* they might begin to want the use of all the Elements, not having the benefit of the *Heavens* while they liv'd, nor the burial of the *Earth* when dead. This shews how *odious* this crime was in the height of it to meer *Heathen* men also.[213]

A history published in 1744 also recites that in Tonquin—an Asian locale colonized by the Chinese[214]—"[b]eheading is the usual punishment for murder and other capital crimes, and this is usually performed before the offender's own door."[215] It also notes that in the Sunda Islands "the usual punishment for capital crimes" was revealed by the finding of "carcasses of malefactors fixed to crosses."[216] The cultural context—and, again, the writer's own perspective or judgment—thus could be determinative of whether a punishment was classified as "unusual" or "usual."

In early American cases, the death penalty, imprisonment and fines were each categorized at various points in history as a "usual punishment" for particular acts of criminality in specific locales.[217] For example in the late 1800s, in *State v. Warner*,[218] the Supreme Court of Kansas wrote of all three punishments, emphasizing, in the course of its opinion, the necessary procedural protections for capital punishment:

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[213] SAMUEL ANNESLEY, A SUPPLEMENT TO THE MORNING-EXERCISE AT CRIPPLE-GATE: OR, SEVERAL MORE CASES OF CONSCIENCE PRACTICALLY RESOLVED BY SUNDRY MINISTERS 337 (1674) (quoting from Sermon 17: "What are the Duties of Parents and Children; and how are they to be managed, according to Scripture?"); *see also* 2 WILLIAM YOUNG, ED., QUINTUS CURTIUS, HIS HISTORY OF THE WARS OF ALEXANDER: TO WHICH IS PREFIX'D FREINSHEMIUS'S SUPPLEMENT 182 (John Digby trans., 3d ed. 1747) ("[P]erceiving those who were charg'd with the prisoners, to be dilatory in their office, he commanded them to drown them in the river bound as they were. Nor did this unusual punishment raise any commotion among the soldiers . . . .").

[214] VIMALIN RUJIVACHARAKUL, ET AL., EDS., ARCHITECTURALIZED ASIA: MAPPING A CONTINENT THROUGH HISTORY 89 (2013) (stating that the kingdom of Tonquin, as noted by a Danish geographer in 1804, "once belonged to China"). Tonquin later became part of Vietnam. CATHERINE BETH LIPPERT, EIGHTEENTH-CENTURY ENGLISH PORCELAIN IN THE COLLECTION OF THE INDIANAPOLIS MUSEUM OF ART 172 (1987).

[215] SALMON, *supra* note 180, at 56.

[216] *Id.* at 191; *see also id.* at 348, 352, 441–42 (containing other references to the "usual punishment" for particular conduct).

[217] People *ex rel.* Peabody v. Baker, 110 N.Y.S. 848, 852 (1908) ("[T]he usual punishment for the act . . . is death or a long term of imprisonment."); State v. Foster, 46 A. 833, 837 (R.I. 1900) ("The usual punishment for the violation of statutes of this general character is a fine or imprisonment, or both; and there is certainly nothing in the punishment here prescribed which strikes one as unusual, oppressive, or cruel."); *Ex parte* Swann, 9 S.W. 10, 12 (Mo. 1888) ("The usual punishment for the violation of such statutes is a fine or imprisonment, or both."); *see also In re* Lacov, 142 F. 960, 962 (2d Cir. 1905) (referring to "the usual punishment for contempt"); McClung v. McClung, 40 Mich. 493, 496 (Mich. 1879) (referring to same); Commonwealth v. Silsbee, 9 Mass. 417 (Mass. Sup. Jud. Ct. 1812) (reprinting a lawyer's argument that "the usual punishment applied to the act—that of rejecting the party's vote—is probably all that the government thought necessary or convenient").

[218] 55 P. 342, 343 (Kan. 1898).

> Where the usual punishment for the commission of a felony was death, great strictness in charging the offense, as well as in the mode of trial, was, and ought to have been, maintained; but in this state, and in this country generally, there is no broad distinction between the character of the punishment inflicted for misdemeanors and for felonies other than murder.[219]

"Fines and imprisonment, with or without hard labor," the court further stressed, "are the penalties usually imposed for both felonies and misdemeanors."[220] The pillory and whipping—often inflicted on slaves—have each also been referred to in the past as "the usual punishment" for "one convicted of infamous crimes."[221]

Another reference to "usual punishment" also shows up in antebellum America, in an 1834 case from North Carolina. In that case, *State v. Negro Will, Slave of James S. Battle*,[222] the Supreme Court of North Carolina determined that "[i]f a slave, in defence of his life, and under circumstances strongly calculated to excite his passions of terror and resentment, kills his overseer, the homicide is, by such circumstances, mitigated to manslaughter."[223] In that case, the slave, Will, was described as a "prisoner" and as "the property of James S. Battle."[224] Meanwhile, "the deceased, Richard Baxter," was described as "the overseer of said Battle, and entrusted with the management of the prisoner at the time of the commission of the homicide."[225] The slave's job was said to be "packing cotton with a screw," and the deceased man, the evidence showed, had shot the slave, Will, with a gun, with "the whole load" from the gun's discharge reportedly "lodged in" that slave's back, "covering a space of twelve inches square."[226] In an ensuing fight between the slave and overseer, the overseer was stabbed with a knife and died from loss of blood.[227] The slave then surrendered himself to his master, whereupon Will, the slave, was charged with murder, found to be guilty of murder, and then sentenced to death.[228]

On appeal, the Supreme Court of North Carolina found that Will, the slave, was guilty of manslaughter instead of murder where he was under an impulse of terror and resentment. In the report of that case, which contains the arguments of counsel, there is an explicit reference to "[t]he usual modes of correction" and to the idea that "[p]unishment short of death serves the end of the master, both as a corrective and as an example."[229] The writings of "Baron Montesquieu" were specifically invoked in that legal case. In particular, it was noted that Montesquieu, in his *Spirit of Laws*,

> treats of the subject of slavery, and informs us . . . that in governments whose policy is warlike, and the citizens ever ready with arms in their hands to quell

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[219] *Id.*
[220] *Id.*
[221] Rogers v. Commonwealth, 5 Serg. & Rawle 463, 465 (Pa. 1819).
[222] 1834 WL 460, at *3 (N.C. Dec. 1, 1834).
[223] *Id.* at *1.
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.* at *2.
[229] *Id.* at *5.

> attempts to regain liberty, slaves *may* be treated with great rigour and severity, without the hazard of servile wars; but that in republics, where the policy is essentially pacific, and the citizens devoted to the arts of peace and industry, the treatment of slaves *should* be mild and humane: that the power of the master should not be absolute, and that the slave should be put within the keeping of the law.[230]

In that case, a reference was also made to "the usual punishment" being inflicted,[231] with other sources from around that time also using the "usual punishment" moniker.[232]

D. The Ducking-Stool for Scolds: A "Usual" Corporal Punishment Becomes an Antiquated, Impermissible One

An 1825 Pennsylvania Supreme Court case, *James v. Commonwealth*,[233] specifically considered a corporal punishment—the use of the "ducking-stool"—that was once designated as the "usual punishment" for "scolds."[234] In that case, Nancy James had been convicted of being a common scold and, in 1824, was sentenced in Pennsylvania "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

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[230] *Id.* at *12.

[231] *Id.* at *17. In particular, it was also argued in that case:

> If the master has no right, then, to take the life of his slave, except when he *resists him by force*, or when the death takes place while the usual punishment is inflicting, it is conceived that until the occasion occurs which calls for the exercise of this extreme power—until the necessity actually exists—the master or person representing him has no right to resort to means, or to use weapons likely to produce death, and the very moment he does so, he is guilty of an abuse of his power, and if he slays the slave under these circumstances, he is guilty of murder. While on the other hand, the laws of nature and reason must permit the slave under like circumstances to use and call into action the common instinct of self-preservation, or at least, if he does resort to it, they will not, cannot, esteem him a *murderer*, if he unfortunately slays his oppresser, in obeying the impulse of nature, which is, in this instance, too strong to be repressed by any restraints which the laws of man can impose.

Id.

[232] 3 General Report of the Emigration Commissioners 5 (H.M. Stationery Office, 1838) ("The usual punishment for prison offences, is confinement for a few hours in a solitary cell . . . .").

[233] 1825 WL 1899 (Pa. Jan. 3, 1825).

[234] In *A Treatise of the Pleas of the Crown*, the 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); *see also id.* at 352 n.3 (showing that 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, 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 17 (1870).

twelve o'clock in the morning, and being so placed therein, to be plunged three times into the water."[235] Her counsel asserted the sentence was "illegal" as being violative of both the U.S. Constitution and Pennsylvania's constitution, teeing up a major public controversy.[236] Finding the Eighth Amendment inapplicable to state legal challenges,[237] the Pennsylvania court—in an era before the incorporation of the Bill of Rights against American states[238]—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."[239]

As to Pennsylvania's constitution, which prohibited "cruel punishments," James's counsel contended that ducking "was not a common-law punishment," but had been introduced by statute in the reign of Henry III.[240] "[E]ven if it were a common-law" punishment, counsel contended, "yet it was one of those barbarous customs, which did not suit the spirit of the times in which our ancestors migrated to this country."[241] As counsel asserted: "It had become nearly obsolete in England, and therefore, according to the general rules of colonization, was not included in that part of the common law, which the first settlers brought with them."[242] The record reveals a concerted effort by James's counsel to prove, as a factual matter, that ducking—forthrightly described in William Hawkins's *A Treatise of the Pleas of the Crown* as the "usual punishment" for scolds—was no longer in general use.[243] "[D]ucking," counsel asserted, "is one of those '*cruel*,' or

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[235] *James*, 1825 WL 1899, at *1. 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." Matthew W. Meskell, *The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 841–42 (1999).

[236] *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. of 1790, art. IX, § XIII.

[237] The Fourteenth Amendment was not ratified until 1868. CHARLES WALLACE COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES: A STUDY OF THE OPERATION OF THE RESTRAINT CLAUSES OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 7 (1912). And the Eighth Amendment was not held applicable to the states until 1962. *See* Robinson v. California, 370 U.S. 660 (1962).

[238] The "selective incorporation" doctrine has gradually applied various guarantees of the U.S. Bill of Rights against the states. MILTON R. KONVITZ, FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE 84 (2011) (listing constitutional rights, including the right to be free from cruel and unusual punishment, selectively incorporated against the states via the Fourteenth Amendment).

[239] *James*, 1825 WL 1899, at *2. Elsewhere in the *James* decision, it was noted: "*Common scolding* has been recognised as an indictable offence 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.

[240] *Id.* at *2.

[241] *Id.*

[242] *Id.*

[243] *Id.* The opinion in *James* describes James' counsel's efforts as follows:

> To prove that it was disused, even in England, the counsel referred to the case of Regina v. Foxby, 6 Mod. 11, which occurred a few years after the first settlement of this state. Lord HOLT there makes a jest of the matter, and the defendant was permitted to escape, on promise of future good behavior. Later English writers mention ducking as existing only in the memory of a few superannuated persons, and speak of the mouldering ruins of that formidable engine, the *ducking-stool*, as

barbarous punishments of our British ancestors, the infliction of which is expressly forbidden by the constitution."[244]

In contrast, Pennsylvania authorities sought to preserve their right to resort to the ducking stool. Pennsylvania's deputy attorney general thus tried to show "that ducking was a common-law punishment for scolding, and the statute of Henry III merely applied it to another offence."[245] "Although it was not often carried into execution," he asserted, "it was still in force in England, at the time of the first settlement of Pennsylvania, and therefore, he argued, brought over by the colonists with the rest of the common law."[246] "It is remarkable," the deputy attorney general specifically pointed out, that Pennsylvania's constitution, "many of the articles of which are copied literally from that of the United States, has omitted the word 'unusual,' and prescribes only *cruel* punishments."[247] "He submitted to the court," the record shows, "that the phrase 'cruel punishments,' here means the torture—the *peine forte et dure*,[248] and such others as

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> one of the vestiges of a barbarous antiquity.
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> But supposing this punishment existed at common law, was in full force in England, at the period of William Penn's emigration, and was introduced by his followers into the new province: still the counsel contended the common law had been altered in this particular by the colonists themselves. The attention of the legislature was early attracted to this matter, and we find several laws on this subject in the first years of the infant colony. In 1682, the first years of the settlement, it was enacted by the 34th section of "the great law," that scolding should be punished by "three days' imprisonment." In 1683, the punishment for this offence was changed to "*gagging*," or five shillings fine. In 1700, the legislature again altered this punishment to "five days' imprisonment, or gagging, or five shillings fine." It is true, that this last act was repealed by the queen in council; but that revived the act of 1683, which never having been repealed since, is now in force, and therefore, superseded the provisions of the common law upon this subject.

Id.

[244] *Id.* James' counsel also argued his client's sentence was too severe, especially in light of the cold weather. *Id.* at *3. The record records counsel's argument as follows:

> [H]e contended that whatever the law might be, there was no precedent or authority for that part of the sentence, which directed the prisoner to be "plunged *three times* into the water." The sheriff would be liable to an action of trespass, if he did not execute the sentence exactly; and if the old woman should die, in consequence of such severe treatment, at this inclement season, the judges who had pronounced the illegal sentence, might be held responsible for her death.

Id.

[245] *Id.*

[246] *Id.*

[247] *Id.* at *4; *see also* Ryan, *supra* note 4, at 609 ("The Pennsylvania Constitution omitted the unusualness component of the Clause altogether, providing '[t]hat excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.'").

[248] *Peine forte et dure* was an English practice also known as pressing to death. *E.g.*, 1 T. B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS xxxii (1816) ("There is one thing in our Laws which is very singular, and comes the nearest of any thing to the Tortures used in other countries, *viz. le Peine fort et dure*, or, pressing to death: 'Tis true, this is not

shock the mind of every man possessed of common feeling."[249] In fact, prominent American founders and framers had concluded, decades earlier, that the constitutional prohibition on "cruel and unusual punishments" was meant to outlaw torture,[250] though the concept of torture was understood to mean something much different in the eighteenth century than it means today.[251]

In attempting to defend the use of the ducking stool, Pennsylvania's deputy attorney general argued that it was very difficult to establish that a punishment was cruel—especially since the death penalty, a more severe punishment, was then still explicitly authorized by law.[252] As he asserted before the Pennsylvania court: "In one

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used to force the Prisoner to confess, but to plead one way or other; but yet even this seems a needless piece of severity.").

[249] *James*, 1825 WL 1899, at *4.

[250] Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 131 (2004) (noting that, after reciting the "cruel and unusual punishments" language of the Virginia Declaration of Rights, Patrick Henry asked rhetorically: "What has distinguished our ancestors? – That they would not admit of tortures, or cruel and barbarous punishment."); *id.* (noting that when George Nicholas contended that the declaration of rights had not succeeded in preventing torture, George Mason—the drafter of the Virginia Declaration of Rights—refuted that, replying: "Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.").

[251] BESSLER, *supra* note 46, at 11, 146–47. The concept of mental or psychological torture would have been quite foreign to America's founders. The legal concept of mental or psychology torture is of much more recent vintage. *E.g.*, PAU PÉREZ-SALES, PSYCHOLOGICAL TORTURE: DEFINITION, EVALUATION AND MEASUREMENT 79 (2017) ("Since the *Estrella v. Uruguay* case (1980) there has been increasing jurisprudence from the Human Rights Committee of United Nations, the European Court of Human Rights, and especially the Inter-American Court, that supports the concept of psychological torture as a defined entity."). The concept of *torture*, long prohibited but not necessarily defined or ill-defined, is now expressly defined in international law. *See, e.g.*, GAIL H. MILLER, FLOERSHEIMER CTR. FOR CONSTITUTIONAL DEMOCRACY, BENJAMIN N. CARDOZO SC. OF LAW, YESHIVA UNIV., DEFINING TORTURE 5–6 (2005), https://cardozo.yu.edu/sites/default/files/Defining%20Torture.pdf:

> Myriad international declarations, agreements, and conventions, including Article 5 of the Universal Declaration on Human Rights, Article 7 of the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of Genocide, the European Convention on Human Rights, the American Convention on Human Rights, and the Vienna Declaration and Programme of Action, *prohibit* torture but fail to *define* it. On December 10, 1984, the U.N. General Assembly gave meaning to the term by adopting the CAT, which entered into force on June 26, 1987. With over 135 signatories, the CAT contains the most commonly used and widely endorsed definition of torture. Explaining the international acceptance of the CAT, the International Criminal Tribunal for the Former Yugoslavia has stated that the CAT torture definition reflects "a consensus . . . representative of customary international law."

[252] The State of Pennsylvania divided murder into degrees in 1794. *E.g.*, DAVID C. BRODY & JAMES R. ACKER, CRIMINAL LAW 212 (2010):

> Initially, no discrimination was made between different kinds of murder, and that crime automatically was punished by death. Pennsylvania legislators thought this approach to be excessively harsh and inflexible. In 1794 they passed an innovative statute dividing murder into first degree, which remained a capital crime, and second degree, which was not punished capitally.

sense, *death* is a cruel punishment, and yet no one doubts of its constitutionality. It must be a very glaring and extreme case, to justify the court in pronouncing a punishment unconstitutional on account of its cruelty; and this is not such a case."[253] The deputy attorney general—seeking to show state practice, much as modern lawyers do in twenty-first-century Eighth Amendment challenges—also pointed out that "the penalty of ducking has actually been inflicted upon scolds in the state of Pennsylvania."[254] "The Attorney-General," the case report reflects, "produced the records of the court of quarter sessions of Philadelphia county, by which it appeared that there had been at least three instances of conviction of the offence of being 'a common scold,' in two of which the sentence of ducking had been carried into execution."[255]

The case involving Nancy James attracted considerable interest in Pennsylvania's legal community, especially since state residents thought of themselves as enlightened citizens. After counsel for both sides had made their arguments, a "Mr. *Duponceau*"—a prominent local lawyer who, in 1824, had published *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*[256]—addressed the court,

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The death penalty, however, remained in use in Pennsylvania. *E.g.*, MITCHEL P. ROTH, CRIME AND PUNISHMENT: A HISTORY OF THE CRIMINAL JUSTICE SYSTEM 111 (2010).

[253] *James*, 1825 WL 1899, at *4.

[254] *Id.*

[255] *Id.* "These cases," it was reported, "occurred a few years prior to the year 1790, when the assembly, sitting in this city, new-modelled the penal code of the state, and after abolishing many of the common-law punishments, concluded by declaring, that 'every other felony or misdemeanor whatsoever, not specially provided for by that act, may and shall be punished as heretofore.'" *Id.* The case report continued:

> As the offence of "scolding" is *not* specially provided for by the act of 1790, the Attorney-General insisted that this was an express legislative sanction of the common-law punishment, which had been recently and publicly inflicted in the place where the assembly was then sitting. Moreover, as this offence is not punishable by fine or imprisonment at common law, ducking is the only penalty that can be inflicted in the absence of positive enactment.

Id. In reply, counsel for James argued that "none of the judges who pronounced those sentences" for scolding, which had been drawn from the records of the quarter sessions, "were lawyers." *Id.* "[T]his court," he insisted, "was not bound to receive as law, their crude and ill-digested opinions on this subject." *Id.*; *compare* WILLIAM H. LOYD, THE EARLY COURTS OF PENNSYLVANIA 89 n.1 (1910) (internal citation omitted):

> It is a matter of some doubt as to whether the ducking-stool ever was actually used in Philadelphia. In 1769 a woman was sentenced to be ducked at the end of Market street wharf, but we are not informed whether the sentence was carried into execution. In 1779 Ann Mease was sentenced to the same punishment but the council remitted the ducking January 26, 1780. In 1781 there was another conviction but the sentence was not carried out.

[256] PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES, BEING A VALEDICTORY ADDRESS DELIVERED TO THE STUDENTS OF THE LAW ACADEMY OF PHILADELPHIA, AT THE CLOSE OF THE ACADEMIC YEAR, ON THE 22ND OF APRIL, 1824 (1824) (published in Philadelphia by Abraham Small and dedicated "To the Honourable William Tilghman, LL.D., Chief Justice of the Supreme Court of the Commonwealth of Pennsylvania, and Patron of the Law Academy of Philadelphia"). That dissertation itself distinguished the *American* prohibition on cruel and unusual punishments from the earlier one contained in the *English* Bill of Rights. In his dissertation, Peter Du Ponceau wrote of "certain harsh punishments which our modern manners reprove, but which still stain

the page of the common law; as for instance the punishment of petty treason in men by drawing and quartering, and in women by burning." *Id.* at 95. He then wrote this about the difference between American and English law:

> But the 10th amendment of our Constitution has sufficiently provided that "no cruel and unusual punishment shall be inflicted," which word "unusual" evidently refers to the United States, and the time when the Constitution was made, and therefore is not to be confounded with the same clause in the English bill of rights, which referring to another period and to another country, may have been differently construed. The *peine forte and dure*, and burning in the hand in cases of manslaughter are abolished, and milder substitutes provided by our national statutes; corruption of blood, trial by battle, all other modes of trial, but trial by jury in criminal cases are also abolished; in short the common law as modified by our Constitution, by our laws, manners and usages, is as wholesome and as harmless a system, in criminal as well as in civil cases, as any that can be devised.

Id. at 95–96. As Du Ponceau's *Dissertation* then continued:

> As to offences not capital, cruel and unusual punishments being forbidden by our Constitution, there remains none but fine, imprisonment and, perhaps, whipping and the pillory. I hope I shall hear nothing of the ducking stool and other obsolete remains of the customs of barbarous ages. The pillory and whipping, I know, are out of use in most of the States, imprisonment at hard labour having been substituted in lieu of them. Yet Congress have thought proper to retain the latter punishment in their penal code, and we have seen it inflicted not long since in our city on an offender against the laws of the United States. It is in the power of the national Legislature to alter or amend the law in this respect, as they shall think proper; but until they do so, I see nothing inhuman in the moderate infliction of either of these penalties, nor any reason why we should reject the common law on their account.
>
> It may be said, perhaps, that there is too much left to the discretion of the Judges as to the quantum, and even the nature of the punishment and sometimes also as to deciding what is or what is not an indictable act. As to the quantum of punishment, I know no system of laws in which some discretion at least is not left to the Court according to the greater or lesser magnitude of the offence. It is impossible to avoid this inconvenience by any legislation. The same thing may be said of the authority to choose between two or three mild punishments; there may be cases in which imprisonment would be death to the party, and when a fine may be inflicted upon him with greater effect; others when the reverse may be the case.

Id. at 96–97. The pillory and the whipping post were once usual punishments in colonial and early America. PETER C. HOLLORAN, HISTORICAL DICTIONARY OF NEW ENGLAND 496 (2d ed. 2017) ("Boston last used the pillory in 1803."); HOWARD O. SPROGLE, THE PHILADELPHIA POLICE, PAST AND PRESENT 56 (1887):

> Fraud sent men to the pillory and workhouse. The last remembered exhibition of this kind was that of a storekeeper, who, to build up his failing credit, made too free use with other people's names. He was exposed in the pillory, where the populace pelted him with eggs, and, to conclude, had his ears clipped by the sheriff, who held up his ghastly trophies to the gaze and shouts of the populace. Whipping was the usual punishment for larceny and for felonious assaults.

having obtained leave "to make a few remarks as *amicus curiae*."[257] According to the report: "He felt interested, he said, in the question before the court, because he thought the execution of this sentence would be a disgrace to the state of Pennsylvania, and therefore, he trusted, the court would not feel themselves obliged to pronounce it law."[258] "Whatever might be the common law on this subject," he argued, urging the court to distance itself from Great Britain, "it was not brought to this country by the colonists."[259] He then referred the court to a state law passed in 1806, "which he thought

[257] *James*, 1825 WL 1899, at *5. Pierre Etienne Du Ponceau (1760–1844), also known as Peter Stephen Du Ponceau, was a French-born linguist who learned English as a boy, was educated by Benedictine monks, and who sailed for America in 1777 as a secretary for Prussia Baron von Stueben—a soldier Benjamin Franklin had recruited to help train and organize the American Continental Army. 9 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 179 (J. Jefferson Looney, ed., 2012) [hereinafter THE PAPERS OF THOMAS JEFFERSON]; PAPERS OF JOHN ADAMS 411 n.5 (Gregg L. Lint, et al., eds., 2010); FROM LEX MERCATORIA TO COMMERCIAL LAW 38 (Vito Piergiovanni, ed. 2005); ROBERT M. RIFFLE, THE MIRACLE OF INDEPENDENCE 197 (2009). Du Ponceau was later appointed Assistant Secretary to Robert Livingston, George Washington's Secretary for Foreign Affairs, and became a citizen of Pennsylvania and the U.S., anglicizing his forenames to Peter Stephen. THE PAPERS OF THOMAS JEFFERSON, *supra*, at 179; C. H. FORBES–LINDSAY, WASHINGTON: THE CITY AND THE SEAT OF GOVERNMENT 389 (1908); Mary Orne Pickering, *John Pickering: Life of John Pickering*, NATION, Sept. 29, 1887, at 255; GEORGE S. BROOKES, FRIEND ANTHONY BENEZET 385 n.4 (1937). Du Ponceau lived in Philadelphia for many years, became a lawyer and a member of the American Philosophical Society, and then became a founding member of the Law Academy of Philadelphia in 1821. THE PAPERS OF THOMAS JEFFERSON, *supra*, at 179; 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 189 n.82 (1985). A correspondent of James Madison and Thomas Jefferson, and often retained by French nationals, diplomats and consuls needing legal representation in American courts, Du Ponceau was admitted to practice in the Pennsylvania courts and in the U.S. Supreme Court. 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 20 (Maeva Marcus, ed. 2003); THE PAPERS OF THOMAS JEFFERSON, *supra*, at 179; 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 483 (Maeva Marcus, ed., 1994); ARTHUR E. PALUMBO, THE AUTHENTIC CONSTITUTION: AN ORIGINALIST VIEW OF AMERICA'S LEGACY 227, 227 n.1 (2009). Du Ponceau published one of his most important works, *A Brief View of the Constitution of the United States*, in 1834. *See* PETER S. DU PONCEAU, A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES, ADDRESSED TO LAW ACADEMY OF PHILADELPHIA (1834). That book gave an historical introduction to the Constitution, setting out the "prominent features of our excellent constitution," and ended with its actual text and that of the Declaration of Independence. *Id.* at xi, 51–56, 68–85. Du Ponceau had been elected a member of the American Philosophical Society in 1791, the same year the U.S. Bill of Rights was ratified, and from 1828 until his death served as its President, following in the footsteps of Benjamin Franklin and Thomas Jefferson. ANTHONY F. C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS 319 (1999); DEBRA J. ALLEN, HISTORICAL DICTIONARY OF U.S. DIPLOMACY FROM THE REVOLUTION TO SECESSION 86 (2012); PHILADELPHIA: A GUIDE TO THE NATION'S BIRTHPLACE 288 (1937) (compiled by the Federal Writers' Project Works Progress Administration for the Commonwealth of Pennsylvania). He regularly signed his name "Du Ponceau," but apparently tolerated his name appearing in print as "Duponceau." 2 JOAN LEOPOLD, ED., THE PRIX VOLNEY: EARLY NINETEENTH-CENTURY CONTRIBUTIONS TO AMERICAN INDIAN AND GENERAL LINGUISTICS: DU PONCEAU AND RAFINESQUE 1–2 (2000); *see also* 2 J. THOMAS SCHARF & THOMPSON WESTCOTT, HISTORY OF PHILADELPHIA, 1609–1888, at 1532–33 (1884) ("Peter Stephen Du Ponceau was one of the most eminent of the men who came on after the Revolution, and he is specially to be commended for the services he rendered in the matter of putting the standard of law studies and law literature upon a high eminence . . . .").

[258] *James*, 1825 WL 1899, at *5.

[259] *Id.*

conclusive."[260] He emphasized "that this punishment"—speaking of ducking, the once-decidedly *usual* English punishment for scolds—"had become obsolete in England," expressing the sincere hope "we would not continue their barbarous customs, after they had themselves disused them."[261]

In *James*, the Pennsylvania Supreme Court began its opinion by acknowledging precisely what was at stake, noting in its decision that Nancy James's sentence "has created much ferment and excitement in the public mind; it is considered as a cruel, unusual, unnatural and ludicrous judgment."[262] "[B]ut whatever prejudices may exist against it," the court noted, having separated the words *cruel* and *unusual* by commas but putting them in a list of very judgmental-sounding words, "still, if it be the law of the land, the court must pronounce judgment for it."[263] "But," it continued, "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 inflicted by some positive law; and that that common law or statutory provision has been adopted here, and is now in force."[264] Associate Justice Thomas Duncan[265]—who delivered the Pennsylvania Supreme Court's opinion—stressed at the very outset just how much time had been spent by the court 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."[266]

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[260] *Id.* That Act declared: "in all cases where a remedy is provided or a duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect." *Id.*

[261] *Id.* In response to Du Ponceau's arguments, the record reflects that counsel for the state argued as follows:

> The Attorney-General replied, that only part of "the great law," had been agreed upon in England, and that the provision with respect to scolds, among others, was not added until after the arrival in this country; as would be seen, by a reference to the printed copy of the laws agreed upon in England. As to the act of assembly of 1806, it expressly recognises the common law, and depends upon it in cases not otherwise provided for; and the present is one of those cases, for although it may have been regulated by statutes, they are not now in force, and the common law rules must, therefore, prevail. He had already referred to some of the latest English elementary writers, to show that *ducking* is still recognised there, as the punishment for *common scolding.*

Id.

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *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).

[266] *James*, 1825 WL 1899, at *5. In fact, the use of ducking had a very long history, dating back centuries. *E.g.*, ERNEST W. PETTIFER, PUNISHMENTS OF FORMER DAYS 104 (1992) ("The history of the ducking-stool goes back, at least, to Norman times, and one of the duties of the Court Leet was to examine the state of repair of the ducking-stool, the pillory and the stocks, but it is extremely likely that the history goes back to

It was, obviously, very difficult—indeed, impossible—to determine who had actually come up with the idea of ducking in the first instance.

In the Pennsylvania Supreme Court's opinion, Justice Duncan reflected on the oddity—and the inherently degrading and discriminatory nature—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."[267] "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."[268] "At the common law," Duncan emphasized, "women were denied the benefit of clergy,[269] merely because their sex precluded them from holy orders, however learned they might be, while their more ignorant husbands, who could with difficulty read even the neck-verse,[270] were burnt in the hand with a cold iron, for the offence for which they were doomed to die on the gallows."[271] Duncan pointed out that, under the authority of Blackstone and others, "[t]he right of the husband" is "to beat his wife," with Duncan noting that "if we add the present instance of partiality, that a scolding woman is to be ducked, while the most scandalously abusive and railing man goes unpunished, the iniquity and injustice will be very striking."[272]

Before passing on James' sentence, Justice Duncan—grappling with how to rule at the close of the first quarter of the nineteenth century—also gave an extensive history of the punishment under review. After focusing on the actual instrumentalities previously

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far earlier days."); STEPHANO SKINNER, ETYMOLOGICON LINGUÆ ANGLICANÆ, SEU EXPLICATIO VOCUM ANGLICARUM ETYMOLOGICA EX PROPRIIS FONTIBUS (1671) (referencing "Ducking-*stool*" in unpaginated entry for "Cucking-*stool*" in Latin text).

[267] *James*, 1825 WL 1899, at *6.

[268] *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 Angliea* (On the Laws and Customs of England) that attempted to describe the whole of English law. *See Bracton Online*, HARV. L. SCH. LIBR., bracton.law.harvard.edu (last visited Feb. 26, 2018). In it, Bracton spoke of the "ducking-stool." 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 290, 299, 340 (Samuel E. Thorne trans., 1968).

[269] At common law, *benefit of clergy* was—as *Black's Law Dictionary* puts it—"the privilege of a cleric not to be tried for a felony in the King's Court." *Benefit of Clergy*, BLACK'S LAW DICTIONARY (10th ed. 2014). "[I]n the Middle Ages," that source notes, "any man who could recite the 'neck verse' was granted the benefit of clergy." *Id.*; *see also id.* (citing State v. Bosse, 42 S.C.L. (8 Rich.) 276 (1855)):

> Although *clergy* includes monks and nuns as well as priests, only in rare cases did women claim or receive benefit of clergy. Congress outlawed benefit of clergy in federal courts in April 1790. It was abolished in England in 1827 but survived even longer in some American states, such as South Carolina, where it was successfully claimed in 1855.

[270] THE POETICAL WORKS OF SIR WALTER SCOTT 11 n.* (1868):

> The neck-verse was the first verse of Psalm 51. If a criminal claimed on the scaffold "benefit of his clergy," a priest instantly presented him with a Psalter, and he read his neck-verse. The power of reading it entitled him to his life, which was spared . . .

[271] *James*, 1825 WL 1899, at *5.

[272] *Id.*

used to inflict the punishment,[273] Duncan—writing for the court, and in light of the varied kinds of ducking or cucking stools known to have been employed in the past—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."[274] Justice Duncan specifically recounted how the punishment of ducking was so antiquated in England that examples of the devices used to inflict it could not be readily located.[275] 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

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[273] 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.

Id. at *6.

[274] *Id.* at *7.

[275] 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 unscoured 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 offence, 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 offence. On this judgment, BLACKSTONE, 4th vol. 166, remarks, "but to the honor of our national humanity, there are no instances more modern."

Id.

William Penn."[276] "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."[277]

In the state supreme court's opinion, Justice Duncan, focusing on the disuse of the scolding punishment in spite of its prior statutory authorization, next explained that "[t]he instances are numerous of statutes being repealed in fact—a kind of silent legislation."[278] After considering the evidence, 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."[279] He then turned to the common law, taking it into account as he weighed the facts at issue. "The common law (and this is but a customary punishment), what is it, but common usage?" Duncan offered. "The long disuetude of any law," he concluded, "amounts to its repeal."[280] A "villeinous judgment, by long disuse," he concluded of one

[276] *Id.* Charles I was executed in 1649, and England—during the interregnum (1649–1660)—was then governed by a commonwealth government headed by Oliver Cromwell, a cavalry officer and a Puritan member of the Long Parliament who rose to prominence during the English Civil War (1642–1649). The Restoration (1660–1685) began after Charles II, at age 30, claimed his father's throne after a period of exile. 1 THOMAS F. X. NOBLE, BARRY STRAUSS, DUANE J. OSHEIM, KRISTEN B. NEUSCHEL, ELINOR A. ACCAMPO, DAVID D. ROBERTS & WILLIAM B. COHEN, WESTERN CIVILIZATION: BEYOND BOUNDARIES 455–58 (6th ed. 2011). William Penn's charter for Pennsylvania came in 1682. *See* PAUL E. DOUTRICH, TO FORM A MORE PERFECT UNION: THE FEDERAL CONSTITUTION AND PENNSYLVANIA 18 (1986) ("From the time of William Penn's Charter of Liberties in 1682, Pennsylvania had developed a philosophical foundation upon which a democratic republic could be established. By the time of independence, the State had become one of the foremost proponents of liberty.").

[277] *James*, 1825 WL 1899, at *7.

[278] *Id.* at *8.

[279] *Id. Non-user* is defined as "neglect to use" or "[t]he neglect to make use of a thing." BLACK, *supra* note 208, at 828; 2 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION: WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 303 (1891). *See also id.* ("Non-user for a great length of time will have the effect of repealing an old law. But it must be a very strong one which will have that effect."); RICHARD BURN & JOHN BURN, NEW LAW DICTIONARY: INTENDED FOR GENERAL USE AS WELL AS FOR GENTLEMEN OF THE PROFESSION 385 (1792) ("Forfeiture may accrue . . . by . . . *non-user* . . . . By *non-user*; for if one hath liberties, and doth not use them within memory, they are lost."); O'Hanlan v. Myers, 44 S.C.L. (10 Rich.) 128, 130–31 (1856) (noting an act may become inoperative through non-user or disuse, such as sitting publicly in the stocks).

[280] *James*, 1825 WL 1899, at *8. 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

species of punishment, "has become obsolete, it not having been pronounced for ages."[281] "The barbarous writ of attaint, which has as strong a foundation as any principle in common law," he added, alluding to bills of attainder that had been abolished by the U.S. Constitution, "has been long banished."[282]

Justice Duncan—writing less than thirty-five years after the ratification of the U.S. Bill of Rights, but several decades before the adoption of the Fourteenth Amendment—thus concluded that once-common 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 certain punishments, "every treatise to the present day states; but this does not prove," he quickly clarified, "that they now exist."[283] In other words, punishments previously authorized by law could fade away into oblivion, with the common law itself—the very foundation of Anglo-American law—plainly expected to evolve over time. "They are nothing more," he emphasized of antiquated punishments, "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."[284]

After citing a treatise from 1581 that distinguished between capital and non-capital corporal punishments, Justice Duncan then noted the diminishing use of corporal

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> 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."

Id.

[281] *Id.*

[282] *Id.* 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. As *Black's Law Dictionary* summarizes their prohibition by law:

> 1. *Archaic*. A special legislative act that imposes a death sentence on a person without a trial. 2. A special legislative act prescribing punishment, without a trial, for a specific purpose or group. • Bills of attainder are prohibited by the U.S. Constitution (art. I, § 9, cl. 3; art. I, § 10, cl. 1).

Bills of Attainder, BLACK'S LAW DICTIONARY 198 (10th ed. 2014). "At common law," an attainder was "the act of extinguishing a person's civil rights when that person" was "sentenced to death or declared an outlaw for committing a felony or treason." *Id.* at 152. "'The word *attainder* is derived from the Latin term *attinctus*, signifying *stained* or *polluted*, and includes, in its meaning, all those disabilities which flow from a capital sentence. On the attainder, the defendant is disqualified to be a witness in any court; he can bring no action, nor perform any of the legal functions which before he was admitted to discharge; he is, in short regarded as dead in law.'" *Id.* (quoting 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 725 (2d ed. 1826)).

[283] *James*, 1825 WL 1899, at *8.

[284] *Id.* Such judicial reasoning calls to mind Thomas Jefferson's own words: "laws and institutions must go hand in hand with the progress of the human mind" so that such institutions "keep pace with the times." *Letter to Samuel Kercheval*, TEACHINGAMERICANHISTORY.ORG, http://teachingamericanhistory.org/library/document/letter-to-samuel-kercheval/ (last visited Feb. 26, 2018). As Jefferson wrote in his 1816 letter: "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." *Id.*

punishments and that he could find no evidence of the ducking of scolds for many decades.[285] Duncan referenced both English authorities[286] and Pennsylvania lawyer James Wilson—an American Founding Father and an Associate Justice of the U.S. Supreme Court from 1789 to 1798—in support of his conclusion that ducking was an impermissible and antiquated punishment.[287] Duncan specifically noted that scolds were

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[285] 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.

[286] *Id.* 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.

[287] *Id.*:

> 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

once "indictable in the sheriff's tourn,"[288] 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."[289]

Justice Duncan—in delivering the state court's opinion—noted that all of the Pennsylvania Supreme Court's members might not agree on everything, but they were unanimous as to the question before the court. As Duncan stressed: "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," Duncan emphasized, "that this customary ancient punishment for ducking scolds, was never adopted, and therefore, is not the common law of Pennsylvania."[290] After writing that "the ducking-stool, cucking-stool, or

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

[288] *Id.* 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."

Id.

[289] 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 offence 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.

[290] *Id.* In 1828, Noah Webster, citing Blackstone, defined "DUCKING-STOOL" as "[a] stool or chair in which common scolds were formerly tied and plunged into water." 1 NOAH WEBSTER, AN AMERICAN

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 notion that putting someone "in the pillory" was intended to "disgrace" the offender.[291] "[I]t is very certain," Duncan explained, "that the legislature never considered the ducking-stool a legal 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."[292]

DICTIONARY OF THE ENGLISH LANGUAGE (1828); *see also Ducking stool*, DICTIONARY OF SOCIOLOGY 99 (Henry Pratt Fairchild ed., 2014):

> A stool or chair in which common scolds were formerly tied and plunged into water. It is mentioned in the Doomsday Book, and was extensively used throughout Great Britain from the 15th to the beginning of the 18th century. The last recorded instance of it was in England in 1809.

38 ABRAHAM REES, THE CYCLOPÆDIA; OR, UNIVERSAL DICTIONARY OF ARTS, SCIENCES, AND LITERATURE (1819) (noting in the entry for "WOOTTON-BASSET" that in a "town-hall" there was lately preserved "a machine, called a 'cucking or ducking-stool,' formerly used for the punishment of female scolds"); PETTIFER, *supra* note 266, at 106:

> There seems to be some conflict as to when the ducking-stool was last used in England. Horsfall Turner says he cannot find any record in Yorkshire after 1745: another writer thinks its use persisted until 1770, but William Andrews gives two instances in the nineteenth century, at Plymouth in 1808, and in 1809 at Leominster. In 1817, a woman was sentenced to be ducked at Leominster, and was wheeled round the town in the chair, but was not ducked, as the water, luckily for her, was too low.

[291] *James*, 1825 WL 1899, at *10. James Wilson, the American founder, spoke in his law lectures of the varied language used to describe the devices used to punish common scolds, even using a little satire in discussing the very idea of the punishment. 3 BIRD WILSON, ED., THE WORKS OF THE HONOURABLE JAMES WILSON, L. L. D.: LATE ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, AND PROFESSOR OF LAW IN THE COLLEGE OF PHILADELPHIA 110–11 (1804):

> A common scold, says the law, is a publick nuisance to her neighbourhood: as such she may be indicted, and, if convicted, shall be placed in a certain engine of correction, called the trebucket, castigatory, or *cucking* stool; which, in the Saxon language, signifies the scolding stool; though now it is frequently corrupted into *ducking* stool; because the residue of the sentence against her is, that when she is thus placed, she shall be plunged in the water—for the purpose of prevention, it is presumed, as well as of punishment.
>
> Our modern man of gallantry would not surely decline the honour of her company. I therefore propose humbly, that, in future, the cucking stools shall be made to hold double.

The language Wilson used to describe the ducking stool came in part from Sir William Blackstone. *See infra* text accompanying note 342.

[292] *James*, 1825 WL 1899, at *10. The practice of ducking had a long history, though it eventually passed from the scene. As one English source notes, the ducking-stool "was in use in the parish and town of Liverpool" "[a]s recently as the beginning of the eighteenth century." JOHN HARLAND & T. T. WILKINSON, LANCASHIRE LEGENDS, TRADITIONS, PAGEANTS, SPORTS, &C. WITH AN APPENDIX CONTAINING A RARE TRACT ON THE LANCASHIRE WITCHES, &C. &C. 167 (1873); *see also id.* at 169 ("The ducking-stool, according to Mr Richard Brooks' 'Liverpool from 1775 to 1800,' was in use in 1779, by the authority of the magistrates, in the House of Correction, which formerly stood upon Mount Pleasant, in that town."). Pennsylvania's abolition of the whipping post and the pillory—a historical fact referenced by the Pennsylvania Supreme Court—was praised around the same time as that decision as having put a stop to

Pennsylvania had, by statute, actually begun moving away from draconian corporal punishments decades earlier. In 1790, the Pennsylvania legislature had adopted "An Act to reform the Penal Laws of this state."[293] Among other things, that law substituted prison sentences and hard labor for "whipping" and other previously authorized common-law 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."[294] "The object of the framers of the act of 1790," Justice Duncan opined in the Nancy James's appeal, "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."[295] William Bradford—a prominent lawyer and a

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cruelty. *See* MICHAEL MERANZE, LABORATORIES OF VIRTUE, PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835, at 1 (1996):

> On May 22, 1823, Roberts Vaux—Philadelphia gentleman, merchant, and philanthropist—addressed a crowd assembled to mark the laying of the cornerstone of the Eastern State Penitentiary. Vaux praised his state and its legislators for breaking the fetters of penal tradition and abolishing the pillory, the whipping post, and the chain—"those cruel and vindictive penalties which are in use in the European countries"—and substituting "milder correctives" for crime. In the place of public corporal punishments that, he argued, "were not calculated to prevent crime, but to familiarize the mind with cruelty, and consequently to harden the hearts of those who suffered, and those who witnesses such punishments" would stand the penitentiary.

[293] Act of Apr. 5, 1790, *reprinted in* 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 440–54 (1803).

[294] *Id.* Prior to 1790, Pennsylvania law explicitly authorized ear cropping, public whipping, and the pillory. *See, e.g.*, Act of Mar. 21, 1772, *reprinted in* 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 55–56 (1803) (stating that 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"); Act of Feb. 26, 1773, *reprinted in* 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 82–83 (1803) (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"); Act of Mar. 10, 1780, *reprinted in* 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 255–56 (1803) (any person or persons guilty of stealing a horse "for the first offence, 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 offence 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."); Act of Mar. 16, 1785, *reprinted in* 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 24–25 (1803) (counterfeiters "shall be sentenced to the pillory, and to have both his or her ears cut off, and nailed to the pillory").

[295] 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 offences, 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.

close friend of James Madison from their days together at the College of New Jersey[296]—had published *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania* (1793), an influential essay advocating the curtailment of death sentences.[297]

Outdated punishments were, in fact, referred to in many ways in the early nineteenth century. Along with crediting William Bradford's work, Justice Duncan's opinion also referred to the efforts of Jared Ingersoll, a prominent jurist.[298] "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.'"[299] "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."[300] The reference to "cruel and unnatural punishments" instead of "cruel and unusual punishments" shows that people at that time referred to archaic, barbaric or cruel punishments in varying ways.[301]

James, 1825 WL 1899, at *10.

[296] David Nordquest, *Madison and Philosophy: His Coursework and His Statesmanship*, *in* JOHN R. VILE, WILLIAM D. PEDERSON & FRANK J. WILLIAMS, EDS., JAMES MADISON: PHILOSOPHER, FOUNDER, AND STATESMAN 3 (2008) (discussing James Madison's studies at the College of New Jersey, now Princeton, and his friendship with William Bradford).

[297] BESSLER, *supra* note 7, at 85.

[298] Jared Ingersoll served as Pennsylvania's attorney general from 1790 to 1799 and also from 1811 to 1817. 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, 203–05 (1997). In 1821, Ingersoll became the presiding judge of the District Court for the City and County of Philadelphia, but died a year later. *Id.*

[299] *James*, 1825 WL 1899, at *11.

[300] *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.

[301] *See also* Aldridge v. Commonwealth, 4 Va. (2 Va. Cas.) 447, 450 (Va. Gen. Ct. 1824):

> When this Bill of Rights was declared . . . we knew that the best heads and hearts of the land of our ancestors, had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries; and this section in the Bill of Rights, was framed effectively to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace

Anglo-American judges, as they always have, almost reflexively look to past practice and precedents by virtue of their legal training. Justice Duncan himself spent a lot of time recounting the history of laws punishing scolding, whether by fine, gagging, or confinement at hard labor.[302] After referencing seventeenth-century 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."[303] "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 long before the days of electronic legal research.[304] "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 to become a part of the common law of Pennsylvania."[305] 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."[306] In other words, the corporal punishment at issue—ducking—was seen as an inhumane one.

In the Pennsylvania Supreme Court's ruling, Justice Duncan specifically 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."[307] "Every country, he observed," Duncan recounted of Chief Justice William Tilghman's prior decision in *The Guardians of the Poor of Philadelphia v. Greene*,[308] "had its common law—ours is composed partly of the common law of England, and partly of our own usages."[309] Duncan then emphasized how Americans chose not to adopt English law in a wholesale fashion:

> 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

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> our Code by the introduction of any of those odious modes of punishment.

[302] *James*, 1825 WL 1899, at *11.
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *Id.* "It is not true," Duncan held, "that our ancestors brought with them all the common-law offences; for instance, that of champerty and maintenance, this court decided in *Stoever v. Whitman's Lessee*, 6 Binn. 416, did not exist here." *Id.* at *12.
[307] *Id.* William Tilghman served as the Chief Justice of the Pennsylvania Supreme Court from 1806 until his death in 1827. PETER STEPHEN DU PONCEAU, EULOGIUM IN COMMEMORATION OF THE HONOURABLE WILLIAM TILGHMAN, LL.D.: CHIEF JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA, AND PRESIDENT OF THE AMERICAN PHILOSOPHICAL SOCIETY, HELD AT PHILADELPHIA, FOR PROMOTING USEFUL KNOWLEDGE 23 (1827) ("Mr. Tilghman was appointed to the office of Chief Justice, on the 26th of February, 1806, and held it during the space of 21 years, to the time of his death."); 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 646 (1836) (noting that William Tilghman was born in 1756 and died in 1827).
[308] 5 Binn. 554, 558 (Pa. 1813).
[309] *James*, 1825 WL 1899, at *12.

> 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.[310]

The English Bill of Rights, with its 1689 prohibition against "cruel and unusual punishments," was, of course, considered part of the "English constitution."[311]

In considering the prior practice of ducking scolds, Duncan wrote that "all our legislation has been opposed to this punishment; judicial decisions there are none."[312] "I cannot give to the two precedents from the quarter sessions of Philadelphia," he said, distinguishing a couple of examples he viewed as outliers, "the weight of decisions."[313] 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 sense of the community."[314] "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

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[310] *Id*. Jurist Samuel Chase, in *United States v. Worrall*, 2 Dall. 384 (Pa. 1798), on the same subject, expressed himself in this fashion:

> 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.

Id. at 394.

[311] 1 KARA E. STOOKSBURY ET AL., EDS., ENCYCLOPEDIA OF AMERICAN CIVIL RIGHTS AND LIBERTIES 80 (2d ed. 2017):

> The English Bill of Rights of 1689, also called the Declaration of Right, was a product of the Glorious, or Bloodless, Revolution of 1688 and marked a significant development in English constitutional history. William III's acceptance of the declaration and its passage by Parliament officially subjugated the English monarch to parliamentary law. In addition, the declaration contains some provisions protecting individual civil rights. Like the Magna Carta, it remains one of the core documents of the English constitution.

[312] *James*, 1825 WL 1899, at *12.

[313] *Id.*

[314] *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.

the universal usage through the country."[315] In other words, one could look to the frequency of a practice *throughout America* to help determine its legitimacy—and to assess whether that practice was a common, or usual, one.

At the end of the first quarter of the nineteenth century, Justice Duncan thus took a pragmatic, non-rigid approach by looking at the facts themselves before writing the court's judicial decision, as any good judge would do. "What is the evidence here?" Duncan asked, looking for facts before announcing the few instances he could locate of women being ordered ducked for the offense of scolding.[316] 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.[317] 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 engaged in the conduct in question.[318] The decision-makers in that case, Justice Duncan editorialized, "were glad, as well as the neighborhood, to get rid of her."[319] "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."[320]

While he discussed the common law in some detail, Justice Duncan was clearly not willing to blindly follow ideas—or legal customs—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."[321] "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

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[315] *Id.*

[316] *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 offence, 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 recognised, that she will, within one month, leave the neighborhood and pay the costs."

Id.

[317] *Id.*

[318] *Id.*

[319] *Id.*

[320] *Id.* William Bradford was Pennsylvania's Attorney General from 1780 to 1791, when he was appointed to the Pennsylvania Supreme Court. In 1794, Bradford become the Attorney General of the United States, serving in that position until his death in 1795. *William Bradford (1755-1795)*, U. PA.: U. ARCHIVES & RECS. CTR., http://www.archives.upenn.edu/people/1700s/bradford_wm.html (last visited Apr. 5, 2018).

[321] *James*, 1825 WL 1899, at *13.

impair a structure, which no man can admire more than I do."[322] "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."[323] In other words, the Pennsylvania Supreme Court made the common law—not the U.S. Constitution or Pennsylvania's constitution—the basis of its decision.

In alluding to, but not expressly relying on, Pennsylvania's constitution or the Eighth Amendment's proscription against "cruel and unusual punishments," Justice Duncan's opinion instead focused on the barbarous and undignified nature of ducking as a punishment. 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."[324] "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."[325] "What a spectacle would it exhibit!" he emphasized, worried about "a congregation of the idle" and the disorderly and the lack of any persuasive penological justification.[326] "[T]he day would produce more *scolding*," he said, "in this polite city, than would otherwise take place in a year."[327]

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.[328] 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.[329] "The courts of our sister states of New York and Massachusetts, governed by the same common law as we are,"

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[322] *Id.*
[323] *Id.*
[324] *Id.* Writers like William Bradford had, following Beccaria, emphasized that the sole purpose of punishments was to prevent crimes. *See, e.g.*, SHARON M. HARRIS, EXECUTING RACE: EARLY AMERICAN WOMEN'S NARRATIVES OF RACE, SOCIETY, AND THE LAW 66 (2005):

> William Bradford, the conservative Federalist attorney general under President Washington, subscribed to the anti-capital punishment philosophy of Montesquieu and Beccaria. In excerpts from his tract published in *The New-York Magazine* in 1793, he defined the principles of opposition: the sole purpose of punishment was the prevention of crime; any punishment which is not absolutely necessary constitutes "a cruel and tyrannical act"; and penalties must be appropriate to the act. These principles, Bradford asserted, "protect the rights of humanity, and prevent the abuses of government." Though murder was still seen as a capital crime by many opponents, including Bradford and Jefferson, Bradford pondered whether it should be, since he doubted its effectiveness as a deterrent.

[325] *James*, 1825 WL 1899, at *13.
[326] *Id.*
[327] *Id.*
[328] *See id.* at *14.
[329] *Id.* at *13.

he emphasized, looking beyond the borders of Pennsylvania, "have declared that this strange and ludicrous punishment no longer exists with them."[330] "[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.'"[331]

In the wake of the Pennsylvania Supreme Court's decision, another case—that of a sixty-year-old woman in Washington, D.C.—came into the public eye.[332] Anne Royall (also referred to as Ann Royal) was indicted in 1829 as a "common scold" and as a "common slanderer and a disturber of the peace . . . ."[333] She had allegedly "falsely and maliciously" slandered "good citizens," with the grand jury's indictment saying she had

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[330] *Id.* Ducking was clearly authorized and in use, at least to some degree, in colonial times. *Compare* EMERY E. CHILDS, A HISTORY OF THE UNITED STATES IN CHRONOLOGICAL ORDER: FROM THE DISCOVERY OF AMERICA IN 1492 TO THE YEAR 1885, INCLUDING NOTICES OF MANUFACTURERS AS THEY WERE INTRODUCED; OF OTHER INDUSTRIES; OF RAILROADS, CANALS, TELEGRAPHS, AND OTHER IMPROVEMENTS; OF INVENTIONS, IMPORTANT EVENTS, ETC. 18 (1885) (noting that, in 1692, "[a] whipping-post, pillory, and ducking-stool were established in the city of New York"), *with* HENRY COLLINS BROWN, GLIMPSES OF OLD NEW-YORK 310 (1917) (noting that, in 1691, "[a] ducking stool (for punishment of criminals)" was "erected in front of City Hall"); *see also* KIRSTEN FISCHER, SUSPECT RELATIONS: SEX, RACE, AND RESISTANCE IN COLONIAL NORTH CAROLINA 234 n.12 (2002) ("In 1662 the Virginia legislature allowed that 'brabling women' whose slander involved their husbands in 'vexatious suites' could be ducked in lieu of paying fines."); 2 J. THOMAS SCHARF, HISTORY OF MARYLAND: FROM THE EARLIEST PERIOD TO THE PRESENT DAY 41 (1879) ("The ducking-stool . . . for scolding women, was peculiarly a Puritan punishment. It was probably very seldom resorted to in the colony—at any rate, the Act providing for it was abolished in 1676, chapter XXI., together with a great many other Acts of the Puritan regime."). The ducking stool had a long history in America's mother country. *E.g.*, 2 THE HISTORICAL MAGAZINE, AND NOTES AND QUERIES CONCERNING THE ANTIQUITIES, HISTORY AND BIOGRAPHY OF AMERICA 90 (1858):

> THE DUCKING STOOL.—The singular punishment of women in England for the too free use of the tongue, by immersing them in water through the instrumentality of an apparatus called the "*ducking stool*," was early introduced into this country. Towns were required, in some instances, to provide themselves with this instrument, and women indicted and convicted of being "common scolds," were taken to a neighboring pond or stream, and subjected to that ignominious but legal punishment.

[331] *James*, 1825 WL 1899, at *14 (citing DU PONCEAU, *supra* note 256, at 96). In a "NOTE" that followed the opinion itself, it was added that an act of Henry VIII was once passed for the punishment of a cook who 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). "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.*

[332] JEFF BIGGERS, THE UNITED STATES OF APPALACHIA: HOW SOUTHERN MOUNTAINEERS BROUGHT INDEPENDENCE, CULTURE, AND ENLIGHTENMENT TO AMERICA 103, 105 (2006) (noting that Anne Royall, "a demure, squat, graying woman in her sixties," was born in 1769 and tried as "a common scold" in 1829); *see also* ELIZABETH J. CLAPP, A NOTORIOUS WOMAN: ANNE ROYALL IN JACKSONIAN AMERICA (2016); SARAH HARVEY PORTER, THE LIFE AND TIMES OF ANNE ROYALL (1909); GEORGE STUYVESANT JACKSON, UNCOMMON SCOLD: THE STORY OF ANNE ROYALL (1937).

[333] H.S. Boutell, United States vs. Ann Royal, 9 GEO. L.J. 30, 32 (1921).

engaged in such conduct "in the open and public streets of the city of Washington."[334] Described as "an evil disposed person," she was accused of being "a common brawler and sower of discord among her quiet and honest neighbors" and of acting "against the peace and government of the United States."[335] In an era when ducking as a punishment was still under debate and consideration,[336] her trial took place before a jury on July 18, 1829, with Judge William Cranch presiding.[337] A local newspaper, the *National Intelligencer*, reported on the trial, noting that "[t]he examination and cross examination of the numerous witnesses occupied nearly five hours." After retiring for just a few minutes, the jury returned a guilty verdict, leaving only her punishment in question.[338]

Although Anne Royall was never actually subjected to the punishment of ducking, it was a punishment that might have been imposed had the judge so ruled. In a motion to arrest the judgment that was argued on July 28th, Royall's counsel, Richard Coxe, reportedly "suggested to the Court that according to the authorities, there was no discretion in the court to adjudge any other punishment to a common scold than the ducking stool." Because Coxe believed that ducking was an impermissible punishment, he thus sought the Court's intervention. "[A] learned English judge," Coxe argued, "respited judgment in a case of this description because he was of the opinion that a ducking would only have the effect of hardening the offender." As a report of counsel's argument emphasized:

> There was another consequence of this punishment to which he called attention of the country, which was the privilege, according to legal writers, that it conferred upon the delinquent of ever afterward scolding with impunity. He begged the court to weigh the matter and not be the first to introduce the ducking stool which had been obsolete in England since the time of Queen Anne, reminding him that the very introduction of such an engine of punishment might have the effect of increasing the crimes of this class.[339]

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[334] *Id.* at 33.

[335] *Id.* at 32–33, 43.

[336] *E.g.*, 8 THE PERCY ANECDOTES: ORIGINAL AND SELECT 29, 32–33 (1826):

> How long the ducking-stool has been in disuse in England, does not appear; but that it was not always effectual, is proved from the records of the King's Bench, where we find, that in the year 1681, Mrs. Finch, a most notorious scold, who had been thrice ducked previously, for scolding, was a fourth time convicted for the offence, when the court sentenced her to pay a fine of three marks, and to be imprisoned until it was paid.
>
> In the United States of America, where many English customs, now forgotten in this county, are retained, the ducking-stool is still the punishment inflicted on a common scold, by the law of Baltimore, and some other states of the Union; and in one of the American papers for 1818, there is a mention of one Mary Davis, who had been indicted for the offence, and found guilty by the jury, after a consultation of an hour and a half. She was sentenced to be publicly ducked.

[337] Boutell, *supra* note 333, at 34.

[338] *Id.*

[339] *Id.*; JEFF BIGGERS, THE TRIALS OF A SCOLD: THE INCREDIBLE TRUE STORY OF WRITER ANNE ROYALL 125 (2017) (noting that Richard Coxe was Royall's appointed defense counsel).

In her case, Judge William Cranch was thus forced to confront a plea by Anne Royall's counsel, Mr. Coxe, for an arrest of judgment of the "common scold" charge. As Judge Cranch said in summarizing the arguments of counsel: "In support of the motion to arrest the judgment, it is contended, that the law for the punishment of common scolds is quite obsolete in England, and never was in force in this country; that it is a barbarous and unusual punishment, and therefore is prohibited by the bill of rights, annexed to the constitution of Maryland under whose supposed common law this indictment is framed."[340] Cranch's ultimate conclusion was that Coxe's argument—that the scolding "offence was no longer indictable" because the "only punishment which could be inflicted" was "obsolete"—"rests upon the proposition that ducking was the only punishment which could be inflicted for the offence of being a common scold; and that proposition is supported only by uncertain inferences, drawn from a few loose expressions in the books . . . ."[341] Sir William Blackstone, Cranch pointed out, had written:

> [A] common scold . . . is a public nuisance to her neighborhood. For which offence she may be indicted; and if convicted, shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or cucking stool which in the Saxon language is said to signify the scolding stool: though now it is frequently corrupted into ducking stool, because the residue of the judgment is, that, when she is placed therein, she shal[l] be plunged into the water for her punishment.[342]

"The authorities . . . cited by Blackstone," Judge Cranch found, "do not indicate any opinion that ducking is the only punishment, nor even that it is an indispensable part of the punishment."[343] While Cranch, in discussing Blackstone, wrote that "[i]t is true that the court, in its discretion, might sentence the offender to be ducked only,"[344] he went on to rule:

> If a part of the common law punishment of the offence has become obsolete, the only effect is that the discretion of the court is so far limited. The offence is not obsolete, and cannot become obsolete so long as a common scold is a common nuisance. All the elementary writers upon criminal law admit that being a common scold, to the common nuisance of the neighborhood, is an indictable offence at common law.[345]

"The Court is therefore of opinion," Cranch determined, "that although punishment

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[340] Boutell, *supra* note 333, at 35; BIGGERS, *supra* note 339, at 1, 124–25, 129–30, 159–60, 163–64 (recounting the history of ducking in colonial and early America, and discussing the debate in 1829 over whether 60-year-old Anne Royall, a journalist, should be subjected to the punishment of ducking).
[341] Boutell, *supra* note 333, at 36–37.
[342] *Id*. at 37 (quotations and citations omitted).
[343] *Id.*
[344] *Id*. at 40.
[345] *Id*.

by ducking may have become obsolete, yet, that the offence still remains a common nuisance, and, as such, is punishable by fine and imprisonment like any other misdemeanor at common law; and that therefore the motion in arrest of judgment must be over-ruled."[346] Anne Royall was ultimately ordered to pay a fine of ten dollars, plus costs, and to put up $250 to guarantee her "good behavior for one year."[347]

III. THE ADMINISTRATION OF AMERICA'S DEATH PENALTY

A. The Death Penalty's English Roots and the Abolitionist Movement

The American death penalty has deep roots. It existed in colonial times as an import from Great Britain, just like the punishment of ducking, and it was used during and after the Revolutionary War.[348] Although William Penn, a Quaker, restricted the death penalty's use in Pennsylvania in the seventeenth century, it was only after the publication of Cesare Beccaria's landscape-changing *On Crimes and Punishments* that a broad swath of society began to question the death penalty's legitimacy, efficacy and morality.[349] Scores of public executions took place on American soil from colonial times

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[346] *Id*. at 40–41; *accord* BIGGERS, *supra* note 339, at 165.

[347] Boutell, *supra* note 333, at 42; BIGGERS, *supra* note 339, at 166.

[348] John D. Bessler, *Capital Punishment Law and Practices: History, Trends, and Developments*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker et al. eds., 3d ed. 2014); *compare* ALICE MORSE EARLE, COLONIAL DAMES AND GOOD WIVES 96 (1895):

> One of the last indictments for ducking in our own country was that of Mrs. Anne Royall in Washington, almost in our own day. She was a hated lobbyist, whom Mr. Forney called an itinerant virago, and who became so abusive to congressmen that she was indicted as a common scold before Judge William Cranch . . . . She was, however, released with a fine.
>
> Women curst with a shrewish tongue were often punished in Puritan colonies. In 1647 it was ordered the 'common scoulds' be punished in Rhode Island by ducking, but I find no records of the punishment being given. In 1649 several women were prosecuted in Salem, Mass., for scolding; and on May 15, 1672, the General Court of Massachusetts ordered that scolds and railers should be gagged or "set in a ducking-stool and dipped over head and ears three times," but I do not believe that this law was ever executed in Massachusetts. Nor was it in Maine, though in 1664 a dozen towns were fined forty shillings each for having no "coucking-stool."

[349] *See generally* JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION (2014) (describing the profound influence of Cesare Beccaria's *On Crimes and Punishments* on America's founders); *see also* JOHN D. BESSLER, THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD (2018) (describing Cesare Beccaria's global influence, including in colonial and early America); Kathryn Preyer, *Cesare Beccaria and the Founding Fathers*, *in* BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER 239–51 (Mary Sarah Bilder, Maeva Marcus & R. Kent Newmyer, eds., 2009) (describing the printing and dissemination of Beccaria's book and his ideas in America).

to the 1930s, when the last public executions took place in the United States.[350] From the 1830s to the 1930s, widely attended public, midday executions gradually gave way to much more secretive executions, often at night. The Anglo-American habit of state-sanctioned executions, however, did not die as public executions simply gave way to more private affairs behind thick prison walls.[351]

The anti-death penalty movement, once known as the anti-gallows campaign, has been active in American life since the appearance of Beccaria's book.[352] In fact, eighteenth-century American political leaders articulated their opposition to, or their skepticism of, capital punishment around the time of the ratification of the U.S. Bill of Rights. In 1792, Dr. Benjamin Rush—a Philadelphia physician, a signer of the Declaration of Independence, and an adamant death penalty foe—wrote *Considerations on the Injustice and Impolicy of Punishing Murder by Death*.[353] And in 1793, William Bradford—James Madison's friend and a prominent Pennsylvania attorney—wrote *An Enquiry how Far the Punishment of Death is Necessary in Pennsylvania*, in which he studied, and then questioned the need for, capital punishment.[354] It was only later, though, that states did away with capital punishment entirely. The first states to abolish the death penalty for murder were Michigan (1846), Rhode Island (1852), and Wisconsin (1853),[355] with lots of anti-gallows advocates—from Wisconsin legislator Marvin Bovee to poet Walt Whitman—stepping forward in the nineteenth century.[356] The long history of anti-death penalty activism by prominent Americans—indeed, dating back to colonial times—is often overlooked by modern observers.

B. The Modern Death Penalty's Administration

The administration of the modern American death penalty begins—as it always has—with laws authorizing the death penalty. At present, the death penalty is authorized by the federal government and the U.S. military, as well as by thirty-one American states.[357] Although nineteen American states and the District of Columbia no longer authorize capital punishment,[358] the death penalty's use is still a reality, although death

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[350] *See generally* JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 23–31 (1997).
[351] *Id.* at 41–67.
[352] *See generally* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002); JOHN CYRIL BARTON, LITERARY EXECUTIONS: CAPITAL PUNISHMENT AND AMERICAN CULTURE, 1820–1925 (2014).
[353] BENJAMIN RUSH, CONSIDERATIONS ON THE INJUSTICE AND IMPOLICY OF PUNISHING MURDER BY DEATH (1792).
[354] WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA (1793).
[355] ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 78 (2007).
[356] MARVIN H. BOVEE, CHRIST AND THE GALLOWS; OR, REASONS FOR THE ABOLITION OF CAPITAL PUNISHMENT (1870); PAUL CHRISTIAN JONES, AGAINST THE GALLOWS: ANTEBELLUM AMERICAN WRITERS AND THE MOVEMENT TO ABOLISH CAPITAL PUNISHMENT 95–133 (2011) (Chapter 4 of this book is titled "Walt Whitman's Anti-Gallows Writing: The Appeal to Christian Sympathy").
[357] DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2017), https://deathpenaltyinfo.org/documents/FactSheet.pdf.
[358] The stories about how some states did away with the punishment of death are reported elsewhere. *See, e.g.*, JOHN F. GALLIHER, LARRY W. KOCH, DAVID PATRICK KEYS & TERESA J. GUESS, AMERICA WITHOUT

sentences and executions—even in places where they were once firmly entrenched—are being meted out less and less in modern American life.[359] This raises a question of considerable public importance: Is the death penalty, once a usual punishment, now an unusual one? If one recalls the history of the punishment of ducking, other subsidiary questions also recur: Is capital punishment inherently barbaric? And has the death penalty become obsolete?

The facts show that America's death penalty is now only rarely used and is, in fact, inhumane, barbaric, and unnecessary in modern life. The number of American death sentences fell from more than 300 per year in 1995 and 1996[360] to less than fifty per year in 2015 and 2016.[361] And in recent years, the number of executions has fallen from a high of ninety-eight in 1999 to twenty in 2016.[362] Even in Harris County, Texas, known as the "Capital of Capital Punishment," the death penalty is dying. Over the years, that county has produced many death sentences and executions—more than 125 of the latter since the U.S. Supreme Court, in *Jurek v. Texas*,[363] upheld the constitutionality of Texas's death penalty statute in 1976. Yet, no one was sentenced to death or executed from Harris County in 2017.[364] Newly-elected Harris County District Attorney Kim Ogg, the Houston-area chief prosecutor, unabashedly views that "as a positive thing."[365] "I don't think that being the death penalty capital of America is a selling point for Harris County," she said.[366]

To understand the true nature of the death penalty's administration in today's America, one must actually look beyond statute books and do a county-by-county examination and study local practice. "The vast majority of counties do not use the death penalty at all," explains law professor Robert J. Smith in the *Boston University Law Review*.[367] After conducting a granular, county-by-county analysis of the distribution of death sentences and executions from 2004 to 2009, Smith found that "[j]ust 10% of

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THE DEATH PENALTY: STATES LEADING THE WAY (2002); LARRY W. KOCH, COLIN WARK & JOHN F. GALLIHER, THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY (2012).

[359] FRANK R. BAUMGARTNER ET AL., DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY (2018) (showing the declining usage of death sentences and executions in Table 16.1).

[360] John D. Bessler, *The American Enlightenment: Eliminating Capital Punishment in the United States*, *in* LILL SCHERDIN, ED., CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM? 93 (2016).

[361] DEATH PENALTY INFO. CTR., *supra* note 357, at 3.

[362] *Id.* at 1.

[363] 428 U.S. 262 (1976).

[364] *No Executions in the 'Capital of Capital Punishment' for First Time in 30 Years,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/node/6940 (last visited Feb. 26, 2018) (citing Keri Blakinger, *For First Time in More Than 30 Years, No Harris County Death Row Inmates Executed*, HOUS. CHRON., Dec. 4, 2017; Michael Graczyk, *US Executions Increase Slightly in 2017*, ASSOCIATED PRESS, Dec. 2, 2017); *see also* Jordan Smith, *For the First Time in Three Decades, the 'Death Penalty Capital of America' Goes Without an Execution*, INTERCEPT (Dec. 22, 2017), https://theintercept.com/2017/12/22/death-penalty-harris-county-texas/ ("Indeed, 2017 marked the third year in a row that Harris County did not send any new defendants to death row. Even more dramatic, it was the first year in more than three decades that no one from the county was executed.").

[365] Blakinger, *supra* note 364.

[366] *Id.*

[367] Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227, 227 (2012).

counties nationally returned even a single death sentence during this time period," and that "fewer than 1% of counties in the country sentenced anyone to death (at any point since 1976) whom their respective states executed from 2004 to 2009."[368] With death sentences clustered and concentrated in just a few jurisdictions, Smith emphasized that, in 2009, just "five states—Alabama, Arizona, California, Florida, and Texas—accounted for two-thirds of death sentences nationally."[369] The vast majority of executions take place in the so-called Death Belt: Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas.[370]

In fact, only a handful of American counties have produced the bulk of death sentences and executions, with *2%* of U.S. counties accounting for *the majority* of modern-day death row inmates and recent death sentences.[371] In his 2015 dissent in *Glossip v. Gross*,[372] Justice Stephen Breyer pointedly stressed: "Often when deciding whether a punishment practice is, constitutionally speaking, 'unusual,' this Court has looked to the number of States engaging in that practice. In this respect, the number of active death penalty States has fallen dramatically."[373] Justice Breyer's dissent stressed that, in addition to the nineteen states that had already abolished capital punishment, in eleven of American death penalty states "no execution has taken place for more than eight years," meaning that "30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years."[374] "Of the 20 States that have conducted at least one execution in the past eight years," Breyer pointed out, "9 have conducted fewer than five in that time, making an execution in those States a fairly rare event."[375]

It is thus only a handful of individual prosecutors who actively choose to seek death sentences. Capital charging decisions, which amount, in essence, to pre-trial *threats of death* against the criminal defendant (and which may, themselves, prompt false confessions), begin with the prosecutor's notice of intent to seek the death penalty. For example, under federal law, if the government's attorney "believes that the circumstances of the offense are such that a sentence of death is justified," the attorney "shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign

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[368] *Id.* at 228.
[369] *Id.* at 230.
[370] *Id.* at 230, 230 n.6 (citing Charles Ogletree, *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 19 (2002) (listing states in the Death Belt as Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia).
[371] *See generally* RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL (2013), https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf.
[372] 135 S. Ct. 2726, 2755 (Breyer, J., dissenting) ("[R]ather than try to patch up the death penalty's wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.").
[373] STEPHEN BREYER, AGAINST THE DEATH PENALTY 91–92 (John D. Bessler ed., 2016) (this book was published by Brookings Institution Press, and reprints, contextualizes, and annotates Justice Breyer's dissent in *Glossip v. Gross*).
[374] *Id.* at 92.
[375] *Id.* According to Justice Breyer's dissent: "That leaves 11 States in which it is fair to say that capital punishment is not 'unusual.' And just three of those States (Texas, Missouri, and Florida) accounted for 80% of the executions nationwide (28 of the 35) in 2014." *Id.*

and file with the court, and serve on the defendant, a notice . . . stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death."[376] At the state level, prosecutors in locales that retain capital punishment may also file notices of intent to seek the death penalty but—it turns out—only a fraction of such cases ever receive death sentences or, ultimately, result in actual executions.[377]

For capitally-charged cases that do go to trial, the death-qualification process thereafter ensures that death penalty opponents—an increasing number, according to public opinion surveys[378]—are systematically excluded from jury service.[379] In a process authorized by the U.S. Supreme Court[380] and that, very problematically, results in more conviction-prone juries, a disproportionate number of women and African-Americans and other groups are purged from jury venires.[381] And that occurs even as overt racial

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[376] 18 U.S.C. § 3593(a)(1).

[377] *E.g.*, Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness in Capital Charging*, 49 ARIZ. ST. L.J. 137, 168 (2017):

> During the period under investigation (1993-2000), there were 1,238 cases resulting in a murder conviction that were eligible for the death penalty under Georgia's capital statute. Prosecutors filed a notice of intent to seek the death penalty in 400 cases and 54 defendants ultimately received the death penalty. Of the 395 capitally charged cases in which the method of disposition in known, 59% were ultimately resolved by plea and 41% were resolved by trial.

[378] "'Americans' support for the death penalty has dipped to a level not seen in 45 years," reported an October 26, 2017 Gallup poll. *Gallup Poll: Support for Death Penalty in U.S. Falls to a 45-Year-Low*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/Gallup-Support_for_Death_Penalty_Falls_in_2017 (last visited Feb. 26, 2018) (citing Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP NEWS SERV., Oct. 26, 2017; Jeff Jones & Lydia Saad, *Gallup Poll Social Series: Crime*, GALLUP NEWS SERV., Oct. 26, 2017). In Gallup's nationwide survey of 1,028 adults, 55% of survey respondents said that they were "in favor of the death penalty for a person convicted of murder," down from the 60% level reported in October 2016. *Id.*

[379] *E.g.*, Nancy M. Marder, Foster v. Chatman: *A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1186 n.316 (2017) (citing Lockhart v. McCree, 476 U.S. 162, 176–78 (1986):

> A "death qualified" jury is one in which jurors who are staunchly opposed to the death penalty have been removed for cause. If they say they can consider applying the death penalty, then they can be seated as jurors. If they say they could never apply the death penalty, then they will be removed for cause. The Supreme Court has held that death qualification does not violate the fair cross-section requirement of the Sixth Amendment.

[380] *See* Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 470 U.S. 1039 (1985); Lockhart v. McCree, 476 U.S. 162 (1986); Uttecht v. Brown, 551 U.S. 1 (2007).

[381] *E.g.*, Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U. L. REV. 299, 304–5 (2017):

> [D]eath-qualified juries are more inclined to return convictions and death sentences, undermining defendants' rights to an impartial jury. Processes that siphon women and black venire members off of juries undermine juries' fairness and effectiveness in numerous other ways as well: more diverse juries are likelier to "engage in wider-ranging

discrimination remains a major problem in the capital jury selection process, as the U.S. Supreme Court itself has found in recent cases.[382] Most notoriously, in *Foster v. Chatman*,[383] the Supreme Court found that Georgia prosecutors discriminated against black prospective jurors during the defendant's 1987 capital trial. The prosecutors' files included a list of black venire members' names highlighted in green with the letter "B" written next to them, and prosecutors struck all four black prospective jurors, resulting in an all-white jury.[384]

C. Discrimination, Arbitrariness, and Rampant Errors

In *McCleskey v. Kemp*,[385] the U.S. Supreme Court rejected a death row inmate's Fourteenth Amendment equal protection challenge, ultimately leading to the execution of Warren McCleskey.[386] But it is clear from cases such as *Foster v. Chatman* that the American death penalty—long administered in a racially discriminatory fashion[387]—continues to be infected with significant racial prejudice and bias.[388] Multiple studies, in fact, have shown that the race of the victim plays a material, statistically significant role in the outcome of capital cases, with those who kill whites much more likely to receive the punishment of death than those who kill blacks.[389] Not only has the death penalty been administered in a racially discriminatory manner throughout America's history,[390] but because of the gross inequity in its administration,[391] the concurrent geographic

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deliberations," to address issues of race in their deliberations, and to counterbalance other jurors' biases.

[382] *E.g.*, Miller-El v. Dretke, 545 U.S. 231 (2005); Snyder v. Louisiana, 552 U.S. 472 (2008); Foster v. Chatman, 136 S. Ct. 1737 (2016).

[383] 136 S. Ct. 1737.

[384] Eisenberg, *supra* note 381, at 301.

[385] 481 U.S. 279 (1987).

[386] SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 397 (6th ed. 2016) ("After a series of last-minute appeals, requests for clemency, and requests for commutation were denied, Warren McCleskey was strapped into the electric chair at the state prison in Jacksonville, Georgia. He was pronounced dead at 3:13 a.m., September 26, 1991.").

[387] BEYOND REPAIR? AMERICA'S DEATH PENALTY 123 (Stephen P. Garvey ed., 2003) ("There is no question that the death penalty in this country historically was sought and imposed in a racially discriminatory manner. The 'distorting effects of racial discrimination' in the administration of the death penalty are in truth as old as our Republic.").

[388] *E.g.*, BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 82–86 (2017) (discussing the racial disparity in capital sentencing, race-of-the-victim discrimination, the racial bias in the selection of jurors, and the systematic exclusion of blacks from capital juries); *see also* Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUS. L. REV. 131 (2012); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807 (2008).

[389] ROGER J. R. LEVESQUE, THE PSYCHOLOGY AND LAW OF CRIMINAL JUSTICE PROCESSES 332–33 (2006) (discussing studies).

[390] JAMES R. ACKER, QUESTIONING CAPITAL PUNISHMENT: LAW, POLICY, AND PRACTICE 197 (2014) ("The death penalty in the United States historically has been intertwined with the nation's ignoble legacy of racial discrimination. Capital punishment was employed by Whites in several states as a harsh mechanism for repressing slaves in antebellum America.").

[391] The Civil Rights Act of 1866 required that blacks and whites be subjected to "like punishment," and the Fourteenth Amendment was intended to constitutionalize the protections of that landmark legislation. John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the*

disparities now so closely associated with death sentences, and the infrequency or rarity with which executions are carried out, state-sanctioned killing in the U.S. now resembles a corrupted, state-sponsored lottery system.[392] The nature of the crime has little or no relationship to whether an offender lives or dies; instead, it is the locale of the crime and the race of the victim—along with the defendant's poverty or the effectiveness or ineffectiveness of the defendant's counsel[393]—that largely determines who gets condemned to death.[394]

In his 2015 dissent in *Glossip v. Gross*, Justice Stephen Breyer specifically emphasized that "use of the death penalty has become increasingly concentrated geographically."[395] As Justice Breyer, in an opinion joined by Justice Ruth Bader Ginsburg, wrote: "County-level sentencing figures show that, between 1973 and 1997, 66 of America's 3,143 counties accounted for approximately 50% of all death sentences imposed."[396] "By the early 2000s," Breyer added, "the death penalty was only actively practiced in a very small number of counties: between 2004 and 2009, only 35 counties imposed 5 or more death sentences, *i.e.*, approximately one per year."[397] In tracking the most recent figures, Breyer also emphasized: "And more recent data show that the practice has diminished yet further: between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences."[398] As Breyer concluded: "In short, the number of active death penalty counties is small and getting smaller. And the overall statistics on county-level executions bear this out. Between 1976 and 2007, there were no executions in 86% of America's counties."[399]

Intersection of the Eighth and Fourteenth Amendments, 73 WASH. & LEE L. REV. ONLINE 487, 515, 525–26 (2016). The American death penalty, from the era of slavery to the modern era, has always been used in a discriminatory manner, and the American death penalty has never been carried out in a non-discriminatory way. *Id.* at 542–64.

[392] Corinna Barrett Lain, *Following Finality: Why Capital Punishment is Collapsing Under its Own Weight*, *in* FINAL JUDGMENTS: THE DEATH PENALTY IN AMERICAN LAW AND CULTURE 49 (Austin Sarat ed., 2017) ("In 1972, the Supreme Court invalidated the death penalty because it was arbitrary and capricious as then administered. A sentence of death was like being struck by lightning, Justice Stewart famously lamented—and today that is literally true. In 2016, 20 people were executed; 36 were struck by lightning.").

[393] A recent study found widely different success rates for ineffective assistance of counsel claims by circuit. *See* KENNETH WILLIAMS, MOST DESERVING OF DEATH?: AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE 29 (2012). Whereas inmates in the Ninth Circuit had a 52.6% success rate with respect to ineffective assistance of counsel claims in the five years after *Wiggins v. Smith*, 539 U.S. 510 (2003), the success rate in other circuits—Fourth Circuit (0%), Fifth Circuit (3.8%), and Eleventh Circuit (4.5%)—was much lower. *Id.*

[394] *Strickland v. Washington*, 466 U.S. 668, 687, 692 (1984), held that a defendant must show that his or her attorney performed deficiently—and that the deficient performance was prejudicial—to establish ineffective assistance of counsel. It is also largely men, the poor, and the mentally ill who end up on America's death rows. *See generally* Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671 (2015); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

[395] 135 S. Ct. 2726, 2774 (2015) (Breyer, J., dissenting).

[396] *Id.*

[397] *Id.*

[398] *Id.*

[399] *Id.*

Not only is capital punishment meted out arbitrarily and incredibly sporadically, but the process by which it is meted out is error-ridden. In a recent book, *Deadly Justice: A Statistical Portrait of the Death Penalty*, the authors make the point that "[t]he 'old' death penalty died with *Furman*" while "the new one rose following *Gregg*."[400] While *Gregg v. Georgia*, the U.S. Supreme Court's 1976 decision allowing capital punishment's continuance, insisted on improvements in death penalty laws in an attempt to make America's capital punishment system less capricious, the authors of *Deadly Justice* note that more than 150 people have been exonerated from death row in the modern era—an error rate of approximately 4%.[401] "[I]t is clear," they write, "that the death penalty harbors serious flaws," with the authors emphasizing that "more than 60 percent" of death sentences are overturned and that "only 16 percent of condemned inmates" are actually executed.[402] With all the judicial reversals and recurring miscarriages of justices, it is apparent that, if anything, the arbitrariness and unfairness of America's death penalty has only reached new, unsurpassed heights. The Supreme Court may have insisted on various substantive and procedural protections when it comes to the administration of the punishment of death, but the death penalty remains horrifyingly arbitrary and discriminatory—a total affront to the notion of equal protection of the laws.

D. Threats of Death and Dead Men Walking

Like highly discretionary capital charges, the penalty phases of capital trials aim to focus the jury's attention[403] on whether convicted offenders should live or die. And the penalty phase determinations that ultimately conclude in death sentences result in, in effect, state-sanctioned threats of death (as executions, of course, do not immediately follow the imposition of such sentences). Not all people who are sentenced to death will be executed (not by a long shot), but it is still the case that at least some will be, so these threats of death must be taken extremely seriously by those sentenced to death and their lawyers.[404] In early America, offenders were regularly told by judges that they would be "hanged by the neck" until dead.[405] And in modern American courtrooms, criminal

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[400] BAUMGARTNER ET AL., *supra* note 359, at 4.

[401] *Id.* at 185; *see also National Academy of Sciences Reports Four Percent of Death Row Inmates are Innocent*, INNOCENCE PROJECT (Apr. 28, 2014), https://www.innocenceproject.org/national-academy-of-sciences-reports-four-percent-of-death-row-inmates-are-innocent/ ("In a study released today, the National Academy of Sciences reports that at least 4.1% of defendants sentenced to death in the United States are innocent.").

[402] BAUMGARTNER ET AL., *supra* note 359, at 192.

[403] The U.S. Supreme Court has now made clear that, under the U.S. Constitution's Sixth Amendment, death penalty determinations are to be made by juries. Hurst v. Florida, 136 S. Ct. 616, 619 (2016).

[404] PERSPECTIVES ON HEALTH AND HUMAN RIGHTS 322 n.33 (Sofia Gruskin et al. eds., 2005) ("A recent statistical study that reviewed capital appeals in the United States from 1973 to 1995 found the 'overall Prejudicial error rate in the American capital punishment system was 68%.'") (citing James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 15, 2000)).

[405] *E.g.*, 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, at 320 (1901); A MEMBER OF THE NEW YORK BAR, HANGED BY THE NECK UNTIL YOU BE DEAD: OR WHY THE DEATH SENTENCE SHOULD BE ABOLISHED 20 (1877); JAMES JEFFREY PAUL, NOTHING IS STRANGE WITH YOU: THE LIFE AND CRIMES OF GORDON STEWART NORTHCOTT 225 (2008); HARRY M. WARD, PUBLIC EXECUTIONS IN RICHMOND, VIRGINIA: A HISTORY, 1782–1907, at 178 (2012).

defendants are—at least occasionally—still sentenced to death, though the method of execution has changed.[406] Executions in the United States are now carried out by lethal injection instead of hanging, but the state-issued threats of death that precede executions are plainly designed—as they were in yesteryears—to put individuals on notice that the government plans to intentionally take the lives of such individuals.

In the lead-up to executions, death row inmates are confined in small cells and often spend twenty-three hours a day in those cells.[407] Inmates are also subjected to the torment and uncertainty of the capital litigation process, which can go on for years, frequently decades.[408] Given that wrongful convictions and miscarriages of justice occur with considerable frequency, both the guilty and (until exonerated) the innocent must endure such conditions, with death warrants—highly credible and specific threats of death—setting very real execution dates for those condemned to death. For example, in his book, *The Wrong Man: A True Story of Innocence on Death Row*, Michael Mello described how execution dates for inmates were "triggered by the governor's signing of death warrants."[409] "Unless a stay is obtained prior to a specified execution date," Mello explained, "the subject of the warrant will be put to death, even though his conviction may rest upon legal or factual error of constitutional magnitude."[410]

In her bestselling memoir, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*, the anti-death penalty activist, Sister Helen Prejean, writes of her own first-hand encounters with America's system of capital punishment.[411] In one telling passage, she describes a conversation with C. Paul Phelps, the head of the Louisiana Department of Corrections, after the electric-chair execution of Patrick Sonnier, a man for whom she served as a spiritual advisor. "Pat Sonnier was tortured, Mr. Phelps," she recounted of her conversation.[412] As Sister Prejean recalled what she'd said to Mr. Phelps, the man who designed the execution process and then supervised the executions: "I'm not sure what he felt physically when the nineteen hundred volts hit

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[406] WILLIAM S. MCFEELY, PROXIMITY TO DEATH 27, 50, 74, 113 (2000). Sometimes, modern American judges—echoing a phrase commonly used in early America—declare in open court: "May God have mercy on your soul." *Id.* at 82; *see also* EDWARD BAUMANN, MAY GOD HAVE MERCY ON YOUR SOUL: THE STORY OF THE ROPE AND THE THUNDERBOLT (1993).

[407] The harsh conditions on death row have been summarized elsewhere and will not be repeated here. *See, e.g.*, AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW (2013), https://www.aclu.org/files/assets/deathbeforedying-report.pdf; HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, DESIGNED TO BREAK YOU: HUMAN RIGHTS VIOLATIONS ON TEXAS' DEATH ROW (2017), https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf.

[408] In 2016, Justice Stephen Breyer dissented from a denial of certiorari in the case of Henry Sireci, a man "tried, convicted of murder, and first sentenced to death in 1976." Sireci v. Florida, 137 S. Ct. 470, 470 (2016) (Breyer, J., dissenting from denial of certiorari). As Breyer wrote of Sireci: "He has lived in prison under threat of execution for 40 years. When he was first sentenced to death, the Berlin Wall stood firmly in place. Saigon had just fallen." *Id.* Justice Breyer then cited *In re Medley*, 134 U.S. 160, 172 (1890), which, referring to a death row inmate's *four-week* period of uncertainty before execution, held that such uncertainty is "one of the most horrible feelings to which he can be subjected." *Id.*

[409] MICHAEL MELLO, THE WRONG MAN: A TRUE STORY OF INNOCENCE ON DEATH ROW 89 (2001).

[410] *Id.*

[411] HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993).

[412] *Id.* at 105.

him, but certainly he agonized emotionally and psychologically—preparing to die, anticipating it, dreaming about it."[413] "Amnesty International," she pointed out in her conversation, "defines torture as an extreme physical and mental assault on a person who has been rendered defenseless."[414] "That is what happened to Patrick Sonnier, isn't it, Mr. Phelps?" she queried, with Phelps nodding in response.[415] "Dead man walking," the phrase popularized by Sister Prejean, refers to someone—in the death penalty context, a condemned inmate—who is walking or heading towards death.[416]

In fact, the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person," for, among other things, "punishing him for an act he . . . has committed . . . ."[417] That convention, ratified by the United States, provides that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[418] For centuries, the death penalty has been considered a permissible and lawful sanction—one used by many countries time and time again at various points in world history. But today, the death penalty is no longer lawful in many countries and in nineteen American states,[419] even though death sentences and executions—while declining in number[420]—are still in use in select locales.[421] Most importantly for assessing whether the death penalty is cruel and unusual, death sentences and executions—though long characterized as lawful sanctions—have the *immutable* characteristics of torture,[422] the aggravated form of cruelty.[423]

Death sentences are, at bottom, credible threats of death, and as an inmate's execution date approaches, the inmate is fully aware of his or her impending death but is utterly helpless to prevent that death.[424] The classic definition of *psychological torture* is—as even jurists in death penalty states freely acknowledge—an awareness of one's

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[413] *Id.*
[414] *Id.*
[415] *Id.* at 101, 105. The death penalty's use, of course, affects more than just death row inmates; its use also impacts the family members of such inmates. *E.g.*, Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195 (2007).
[416] LISA BRUCE, REVIVING THE DEAD: 10 KEYS TO UNLOCK PURPOSE AND DESTINY 20 (2011); JAMES GARBARINO, LISTENING TO KILLERS: LESSONS LEARNED FROM MY TWENTY YEARS AS A PSYCHOLOGICAL EXPERT WITNESS IN MURDER CASES 57 (2015).
[417] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).
[418] *Id.*
[419] *E.g.*, SANGMIN BAE, WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT 24–28, 53–55 (2007) (discussing the death penalty's abolition in Europe, South Africa and elsewhere); *see also* THOMAS S. MOWLE, ALLIES AT ODDS?: THE UNITED STATES AND THE EUROPEAN UNION 102–07 (2004) (discussing the history of the divergence of approach to the death penalty in Europe versus the United States).
[420] *See generally* GARRETT, *supra* note 388.
[421] *See generally* ANDREA D. LYON, THE DEATH PENALTY: WHAT'S KEEPING IT ALIVE (2015).
[422] BESSLER, *supra* note 46, at xxiv–xxv, 225–26, 316.
[423] David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343, 375 (2011).
[424] BESSLER, *supra* note 46, at 87, 89, 91, 154, 225.

impending death but a helplessness to prevent that death.[425] As a result, death sentences and executions—when fairly considered—should be classified under the rubric of torture as they bear all the characteristics and indicia of torture.[426] To aggravate and exacerbate the torment further, the average time inmates spend on death row between sentencing and execution is now more than fifteen years. It is, certainly, an extremely cruel and unusual act—indeed, a torturous one—to subject a person to a continuous threat of death by unnatural means for years, even multiple decades, at a time.[427]

IV. THE LINE BETWEEN "USUAL" AND "UNUSUAL" PUNISHMENTS, AND THE DEATH PENALTY AS A CRUEL AND UNUSUAL PUNISHMENT

A. The Prohibition Against Cruel and Unusual Punishments

Notions of cruelty and unusualness long pre-date the English Bill of Rights (1689), the predecessor of the U.S. Constitution's Cruel and Unusual Punishments Clause. Before the English safeguard against the infliction of "cruel and unusual punishments" was put in place, British writers frequently used the words "cruel" and "unusual." One seventeenth-century dictionary associated *cruel* with "anger," "wrath," and "[h]atred,"[428] while another defined cruel, a commonly used word, simply as "cruel."[429] Other books published before the Glorious Revolution of 1688 also liberally used the words "cruel"

[425] *Ex parte* Deardorff, 6 So.3d 1235, 1240 (Ala. 2008) ("'Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent, impending death. Such torture 'must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering.'") (quoting Norris v. State, 793 So.2d 847, 861 (Ala. Crim. App. 1999); and *Ex parte* Key, 891 So.2d 384, 390 (Ala. 2004)); Smith v. State, 122 So.3d 224, 241 (Ala. Crim. App. 2011); *id*. at 242 ("After the initial gunshots rendered Smith helpless to prevent her death she suffered great psychological torture as she listened to her abductors discuss how they were going to kill her and dispose of her body while she begged for medical attention."); State v. Bell, 603 S.E.2d 93, 121 (N.C. 2004) (describing killings involving "psychological torture where the victim is left to her 'last moments aware of but helpless to prevent impending death'") (quoting State v. Hamlet, 321 S.E.2d 837, 846 (N.C. 1984)); State v. Mann, 560 S.E.2d 776, 788 (N.C. 2002) ("An example of psychological torture is when the victim is left 'in [her] last moments aware of but helpless to prevent impending death.'") (quoting *Hamlet*, 321 S.E.2d at 846).

[426] BESSLER, *supra* note 46, at 217–37.

[427] *See, e.g.*, Angela April Sun, *"Killing Time" in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row are Cruel and Unusual*, 113 COLUM. L. REV. 1585, 1586–89, 1615–18 (2013); *see also* Caycie D. Bradford, *Waiting to Die, Dying to Live: An Account of the Death Row Phenomenon from a Legal Viewpoint*, 5 INTERDISC. J. HUM. RTS. L. 77, 93–94 (2011) (noting that death row inmates are subjected to the mental torture of not knowing when their sentences will be carried out, that "[t]he sentencing of individuals to long drawn-out incarcerations under the conditions of death row has been shown to have prolonged psychological effects on the inmates," and that the right to life "does not allow for the psychological implications of the death row phenomenon, which are affecting the inmates' right to life").

[428] THOMAS WILSON, A COMPLETE CHRISTIAN DICTIONARY: WHEREIN THE SIGNIFICATIONS AND SEVERAL ACCEPTATIONS OF ALL THE WORDS MENTIONED IN THE HOLY SCRIPTURES OF THE OLD AND NEW TESTAMENT ARE FULLY OPENED, EXPRESSED, EXPLAINED 132 (1661).

[429] *Cruel*, GUY MIÈGE, A SHORT DICTIONARY ENGLISH AND FRENCH ACCORDING TO THE PRESENT USE AND MODERN ORTHOGRAPHY (1684) (unpaginated). In other entries, that dictionary also associated "cruel" with words such as "barbarous," "Bloudy," "Hard-hearted," "Incompassionate," "inhumane," "pitiless," and "sanguinary." *Id.* (unpaginated).

and "unusual," with one source speaking, for example, in terms of "unusual cruelty."[430] In addition, the words "cruel" and "unusual"—commonplace terms in English-speaking societies—appear in a number of religious[431] and non-religious tracts.[432]

In one history published in London in 1678, the word "cruel" appears literally dozens of times.[433] There are references to "cruel disposition," "cruel severity," "cruel death," "cruel trade," "cruel Prisons," "cruel Creditors," "cruel Persecutor," "cruel Massacres," "cruel sentence," "cruel Father," "cruel wife," "cruel Tyrant," "cruel torments," "cruel tortures," and "cruel execution."[434] In one passage, there is a description of a man condemned to die for writing this rhyme about King Richard III: "*The Cat, the Rat*; *and* Lovel *our Dog* / *Rule all* England *under the Hog*."[435] That man, the history reported, "was put to a most cruel death; for being hang'd and cut down alive, his bowels rip't out and cast into the fire, when the executioner put his hand into the bulk of his body, to pull out his heart."[436] In another passage, there is a reference to the "cruel custom" of another country's king "to put to death every Tenth Stranger, that came into his Dominions."[437] In that history alone, there are also multiple references to "unusual."

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[430] *E.g.*, NATHANIEL WANLEY, THE WONDERS OF THE LITTLE WORLD: OR, A GENERAL HISTORY OF MAN 22, 54–55, 418 (1678).

[431] A CONTINUATION OF MORNING-EXERCISE QUESTIONS AND CASES OF CONSCIENCE, PRACTICALLY RESOLVED BY SUNDAY MINISTERS, IN OCTOBER, 1682, at 109 (Samuel Annesley ed., 1683); RICHARD BAXTER, THE REASONS OF THE CHRISTIAN RELIGION 145 (1667); FRANCIS ROBERTS & CLAVIS BIBLIORUM: THE KEY OF THE BIBLE, UNLOCKING THE RICHEST TREASURY OF THE HOLY SCRIPTURES 148, 211 (1675); THE WORKS OF THE REVEREND AND LEARNED JOHN LIGHTFOOD D.D., at 797 (George Bright ed., 1684); *see also* JOSEPH HALL, THE SHAKING OF THE OLIVE-TREE: THE REMAINING WORKS OF THAT INCOMPARABLE PRELATE JOSEPH HALL, D.D. LATE LORD BISHOP OF NORWICH 13 (1660) (referencing "cruell" and "unusuall").

[432] CORNELIUS NEPOS, THE LIVES OF ILLUSTRIOUS MEN 123 (2d ed. 1685); THE WORKS OF SIR WILLIAM D'AVENANT 9 (1673).

[433] *See generally* WANLEY, *supra* note 430.

[434] *Id.* at 55, 89, 116, 149, 152, 157–58, 206, 233, 364, 369, 377–78, 383–84, 401, 438, 458, 609, 620, 629.

[435] *Id.* at 206.

[436] *Id.*

[437] *Id.* at 169; *see also* THE WORKS OF FRANCIS OSBORNE, ESQ. 90, 280, 304, 314 (8th ed. 1682) (making reference to "cruel Contention," "cruel death," "*cruel examples*," and "cruel Family"). The word "cruel" was an especially popular work in the wake of the Glorious Revolution of 1688. *E.g.*, GUY MIÈGE, THE NEW STATE OF ENGLAND UNDER THEIR MAJESTIES K. WILLIAM AND Q. MARY 3 (1691) ("After the *Saxons* came the *Danes*, the next considerable, and the most cruel Actors on the Stage of England."); *id.* at 10 ("How could he answer the late cruel Burnings and Devastations the French made in Germany, contrary to the Rules of War, and the very Practice of the most barbarous Nations?"); *id.* ("The Breaking on the Wheel, and other like torturing Deaths, are lookt upon here as too cruel for Christians to use. Neither are the Criminals, who with their Lives have expiated their Crimes before the World, denied Christian Burial, except in particular Cases."); *id.* ("All this shews a great deal of Moderation, and averseness from Cruelty."); *id.* at 40 ("Cock-fighting shews the Courage of their Cocks . . . . Throwing at Cocks is not only rude, but cruel."); *id.* at 72 ("The Popish Massacre of the French Protestants in the Reign of Charles IX, as cruel and bloody as it was, was nothing to the late refined Persecution."); *id.* at 76 ("Men had as good live in a state of Anarchy, as ly at some Princes Mercy, whose unlimited Power serves only to make them furious and outrageous. And where lies the Advantage, when the King proves a cruel Tyrant, to be Robbed or Murdered by a Royal, or a common Robber?"); *id.* at 125–26 (describing the punishment of "a Traytor"—"to be drawn upon a Hurdle or Sledge to the Gallows, and there to be hanged by the Neck," and to be "cut down alive, his Entrals pulled out of his Belly and burnt before his Face, his Head cut off, and his Body divided into four Parts"—as follows: "This Punishment indeed, considering all its Circumstances,

Among many others, one encounters "unusual Diseases," "unusual means," "unusual manner," "unusual horrors," and "unusual cruelty."[438] Chapter XXXVI is itself titled "Of the different and unusual ways, by which some men have come to their deaths."[439]

The "cruel and unusual punishments" prohibition in the English Bill of Rights was seen from an early date as restricting the discretionary sentencing authority of abusive judges.[440] For example, in *On the Powers and Duties of Juries, and on the Criminal Laws of England*, Sir Richard Phillips—the former sheriff of London and Middlesex—wrote: "The practice of banishing persons convicted of misdemeanors to distant prisons, is evidently contrary to the tenth clause of the Bill of Rights, which prohibits the infliction of cruel and *unusual* punishments."[441] As Phillips explained: "Of course this clause had reference only to *discretional* punishments, and not to those defined by law, and consequently applies particularly to punishments inflicted for misdemeanors, and still more particularly to discretionary punishments in regard to liberty, the only punishments in which a sound discretion would ever be likely to be abused."[442] After reciting that view, Phillips then argued:

> I contend then, that the sending or banishing a man to a prison distant from the place where he committed the crime, is contrary to law, simply because it is *unusual*. In former times, when communication was difficult, it would have been *impracticable*, and therefore could not have been exercised; it is also *unreasonable*, inasmuch as a distant county is mulcted in the expence of

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seems cruel to such as do not narrowly consider the nature of the Crime."); *id.* at 245 ("[A] long and cruel Civil War was ended."); *id.* at 268 ("[W]ho sometimes proves magget-headed, cruel, or tyrannical.").

[438] WANLEY, *supra* note 430, at 2, 15–16, 18, 20–21, 23, 36, 39, 54–57, 91, 106, 112, 165, 214, 239, 240–41, 270, 418, 459–61, 510, 515, 594, 600.

[439] *Id.* at 59.

[440] *See supra* text accompanying notes 149–50 (discussing William Blackstone's view of the English prohibition against "cruel and unusual punishments").

[441] RICHARD PHILLIPS, ON THE POWERS AND DUTIES OF JURIES, AND ON THE CRIMINAL LAWS OF ENGLAND 298 (2d ed. 1813). Exile, banishment or transportation were once usual punishments in various locales. *E.g.*, 1 THE OXFORD ENCYCLOPEDIA OF ANCIENT GREECE AND ROME 145 (2010) ("Exile was the usual punishment for murder."); 3 THE AMERICAN ECLECTIC: OR SELECTIONS FROM THE PERIODICAL LITERATURE OF ALL FOREIGN COUNTRIES 506 (1842) ("Capital punishment has become exceedingly rare, exile to Siberia being now the usual punishment."); THE SECRET HISTORY OF THE COURT AND CABINET OF ST. CLOUD 112 (4th Am. ed. 1807) ("[T]ransportation was an usual punishment."); CARL PETER THUNBERG, TRAVELS IN EUROPE, AFRICA, AND ASIA: PERFORMED BETWEEN THE YEARS 1770 AND 1779, at 138 (1793) ("[T]he usual punishment, which is transportation to Batavia."). Those punishments are no longer used. *See, e.g.*, United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926) ("However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples."); *see also* Saad Gul, *Return of the Native? An Assessment of the Citizenship Renunciation Clause in Hamdi's Settlement Agreement in the Light of Citizenship Jurisprudence*, 27 N. ILL. U. L. REV. 131, 145 (2007) ("[F]ederal courts have held that banishment is prohibited as cruel and unusual punishment."); *see also* Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758 (1963) (arguing that banishment is a cruel and unusual punishment).

[442] RICHARD PHILLIPS, ON THE POWERS AND DUTIES OF JURIES, AND ON THE CRIMINAL LAWS OF ENGLAND 298–99 (2d ed. 1813). The Eighth Amendment's Cruel and Unusual Punishments Clause itself makes no distinction between felonies and misdemeanors. Every punishment is subject to scrunity under the Eighth Amendment's broad and plain language, and the death penalty's constitutionality—like the constitutionality of non-lethal corporal punishments—must thus be scruntized by modern American judges.

> maintaining the prisoner; and it is *inexpedient*, because, as punishments are inflicted as a warning to others, such remote punishments serve as no warning either at the place where the crime was committed, or at that where the punishment takes place—Those who contend, that the King's Bench has a universal jurisdiction, are right—but they forget that this jurisdiction is universal only for *lawful* purposes: I agree with them that it is universal, for the purpose of correcting the mal-administration of Gaolers and Sheriffs; that it is universal for the purpose of referring a man by sentence back again to his native county for a crime committed there—but not universal for imposing the novel punishment of banishment for a misdemeanor, which is *unusual*—therefore contrary to *the Bill of Rights*—therefore contrary to *law*.[443]

The former sheriff then expanded upon his assertions about the "cruel and unusual punishments" prohibition. As Richard Phillips wrote in an extended argument:

> On a point in which the feelings of the people of England are at present deeply interested, I beg leave to urge some other considerations which may probably have weight with the Judges. Their Lordships are aware, 1. That they are not empowered to order any punishment, or pass any sentence, except such as are directed or sanctioned by the statute or common law; 2. That there is no law which empowers them in terms to send persons convicted of misdemeanors or libels to distant prisons; 3. That to carry into execution the legal sentences of the Courts of Law, is the province of the Executive Government; 4. That to prescribe the place of imprisonment when it is not prescribed by law, is to assume the powers of the Executive, and to combine the judicial authority with the executive power; 5. That this can only be legally done under those statutes which especially prescribe particular punishments in houses of correction, *or* in common gaols; 6. That where a statute or the common law directs imprisonment generally as the punishment, the Judges have no legal power to prescribe to the Executive Government in regard to the mode, manner, or place of imprisonment; and, 7. That Judges are legally restricted in the sentences they pass, by the very terms of the statutes, and by the ascertainable usage of the ancient common law, and have no liberty to pass sentences which prescribe the particular execution of general punishments to the Executive Government, nor which exceed, vary, or differ from the terms of the penal laws.
>
> In regard to the duty of the Executive, it is bound by the Bill of Rights, in executing the judgments of the Courts, to conform to immemorial *usage*, and to inflict no punishment in a *cruel* or *unusual* manner; and consequently to inflict imprisonment in the common gaol, except in cases in which the law has specially conferred a discretionary power on the

[443] *Id.* at 299–300; *see also id.* at 391 (showing an index entry reads: "Banishment for misdemeanours an unusual punishment.").

> Judges, and these have thought it necessary and proper to exercise that discretion.[444]

The mid-1680s punishment of Titus Oates—the clergyman convicted of perjury and notoriously sentenced by Lord Chief Justice George Jeffreys to be defrocked, fined, whipped and then to be pilloried *for every year for life*—was itself described in that era as "cruel" and "unusual."[445] In 1685, Oates—a Protestant cleric—had been tried and convicted of perjury before the King's Bench.[446] He had falsely accused, and caused the execution of, fifteen prominent Catholics for allegedly organizing, in 1679, a "Popish Plot" to overthrow King Charles II.[447] Oates's actual crime, which at one time had been treated as murder and been punishable by death but which was not then a capital offense, was "bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed."[448] At Oates's sentencing, Lord Chief Justice Jeffreys had complained that death was not available as a penalty and lamented that "a proportionable punishment of that crime can scarce by our law, as it now stands, be inflicted upon him."[449] According to Jeffreys, the judges who sat in judgment unanimously agreed that "crimes of this nature are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or member."[450] One justice, taunting Oates, told him "we have taken special care of you," with Oates fined "1000 marks upon each indictment," "stript of [his] Canonical Habits," and ordered to be whipped by "the common hangman" "from Aldgate to Newgate" and then "from Newgate to Tyburn," and also imprisoned for life and ordered to stand in the pillory annually at certain specified times and places.[451]

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[444] *Id.* at 300–02. Phillips, the ex-sheriff, added:

> I know that many persons of the highest influence in the British Government are solicitous for some change in our code of punishments, and that even our heads of the law are no sticklers for many of the present practices. The enormous expence of transportations to Botany Bay, the cruel and crying injustice of sending persons to the Antipodes for terms short of life, the want of moral reform in the hulks, and the barbarity as well as inutility of hanging for so great a variety of offences, are faults of our penal code felt and deplored by many Statesmen; and I am not without hopes that a radical change will be one of the glorious achievements of this enlightened age.

Id. at 302–03.

[445] Harmelin v. Michigan, 501 U.S. 957, 972 (1991); *see also* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 236 (2001) (noting that the provision of the English Bill of Rights of 1689 prohibiting cruel and unusual punishments "derived mainly from the reaction to the case of Titus Oates").

[446] *Harmelin*, 501 U.S. at 969.

[447] *Id.* at 969–70.

[448] *Id.* at 970.

[449] *Id.*

[450] *Id.*

[451] *Id.* According to a prominent English historian, Thomas Macaulay, "[t]he judges, as they believed, sentenced Oates to be scourged to death." 2 LORD MACAULAY, HISTORY OF ENGLAND 67 (1880) (quoted in *Harmelin*, 501 U.S. at 970). But Oates did not die and four years later petitioned the Parliament to set aside his sentence as illegal. 6 THOMAS BABINGTON MACAULAY, HISTORY OF ENGLAND 138–41 (1899) (quoted in *Harmelin*, 501 U.S. at 970). As that historian wrote of the deliberations of the House of Lords: "Not a

After the Glorious Revolution of 1688 and the adoption of the English Bill of Rights,[452] Oates petitioned Parliament for relief from his sentence, asserting that it violated the newly promulgated English Bill of Rights.[453] Although the House of Lords rejected his petition, a minority of Lords dissented, asserting that his sentence violated the "cruel and unusual punishments" provision of the Bill of Rights.[454] The House of Commons voted to annul Oates' sentence, and also issued a report detailing its position.[455] One portion of the dissenting statement by the House of Lords described Oates' sentence as "contrary to the declaration on the twelfth of February last . . . that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."[456] The dissenting Lords, writing when whipping was still lawful, described Oates' punishment as "barbarous, inhuman, and unchristian," with the report of the House of Commons emphasizing that "it was illegal, cruel, and of dangerous Example, That a Freeman should be whipped in such a barbarous manner, as, in Probability, would determine in Death."[457] The House of Commons further stressed that "[i]t was of ill Example, and unusual, That an Englishman should be exposed upon a Pillory, so many times a Year, during his Life."[458]

Titus Oates was sentenced when bodily punishments, such as executions and whipping, were still in widespread use in England. But it was the combination (and extent) of punishments imposed on Oates that attracted so much public attention and that drew the ire of British MPs. Sir William Williams, in the House of Commons,

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single peer ventured to affirm that the judgment was legal: but much was said about the odious character of the appellant." *Id.* at 140 (quoted in *Harmelin*, 501 U.S. at 970).

[452] Jency Megan Butler, *Shocking the Eighth Amendment's Conscience: Applying a Substantive Due Process Test to the Evolving Cruel and Unusual Punishments Clause*, 48 HASTINGS CONST. L.Q. 861, 864–85 (2016):

> In 1689, the English Bill of Rights was created by Parliament, affirming that "cruel and unusual punishments" *ought* not to be inflicted. The Titus Oates case is a famous example of the first application of the English Cruel and Unusual Punishments Clause. Titus Oates, an Anglican cleric, was convicted of lying in court. Oates's lies resulted in the execution of fifteen innocent people. Oates was sentenced to imprisonment, annual pillory, and one day of whipping. What offended the English Members of Parliament was that the pillory would occur annually, and the repetition of pillory made the punishment excessive and disproportionate.

[453] In framing the English Bill of Rights of 1689, the House of Commons later indicated that it had a "particular regard" to Oates's sentence, "amongst others," when the English prohibition against "cruel and unusual punishments" was first made. The House of Commons asserted the "ancient Right of the People of England that they should not be subjected to cruel and unusual Punishments." *The Original Meaning of "Unusual"*, *supra* note 24, at 1762. William Blackstone, in an apparent reference to the case of Titus Oates, himself indicated that the English prohibition on "cruel and unusual punishments" came about because of "some unprecedented proceedings in the court of king's bench, in the reign of king James the Second." *The Original Meaning of "Cruel"*, *supra* note 23, at 478.

[454] *Harmelin*, 501 U.S. at 970.

[455] *Id.* at 971.

[456] *Id.*

[457] *Id.* at 973.

[458] 2 THE HISTORY OF KING WILLIAM THE THIRD 101–02 (1702) (printed for "A. Roper"); *see also id.* at 82 (referring to "strange and unusual Cruelties").

specifically protested: "There may be a precedent for whipping, but for all these parts in one Judgment, let any man give us a Precedent to square with that Judgment."[459] In its report on the Titus Oates affair, the House of Commons criticized, in these words, the discretion exercised by Lord Chief Justice Jeffrey and his fellow judges: "That as soon as they had set up this Pretence to a discretionary Power, it was observable how they put it in Practice, not only in this, but in other Cases, and for other Offences, by inflicting such cruel and ignominious Punishments, as will be agreed to be far worse than Death itself to any Man who has a sense of Honour or Shame."[460] In *The History of England*, Thomas Macaulay offered his own telling historical commentary on the high-profile Titus Oates case and the English Bill of Rights.[461] Infamous and degrading punishments, especially among the elite, were clearly seen by some as a fate worse than expiating one's crimes on the gallows.

B. The Characteristics of the American Death Penalty

The American death penalty has, of course, been a discretionary punishment for some time. In 1971 in *McGautha v. California*,[462] the Supreme Court rejected a due process challenge to the death penalty, holding that "committing to the untrammeled discretion of the jury the power to pronounce life or death" is not "offensive to anything in the Constitution." As the Court ruled in *McGautha*: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present

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[459] LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 236–37 (2001); Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 91–94, 94 n.156 (2012); *see also Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, *supra* note 11, at 970 ("Parliament condemned the punishment inflicted on Titus Oates as 'contrary to Law and ancient Practice.'").

[460] *Harmelin*, 501 U.S. at 973 (quoting 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

[461] 1 LORD MACAULAY, THE HISTORY OF ENGLAND: FROM THE ACCESSION OF JAMES THE SECOND 238 (1871):

> [T]he punishment which was inflicted upon [Oates] cannot be justified. In sentencing him to be stripped of his ecclesiastical habit and imprisoned for life, the judges exceeded their legal power. They were undoubtedly competent to inflict whipping; nor had the law assigned a limit to the number of stripes . . . . That the law was defective is not a sufficient excuse: for defective laws should be altered by the legislature, and not strained by the tribunals; and least of all should the law be strained for the purpose of inflicting torture and destroying life. That Oates was a bad man is not a sufficient excuse; for the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent. Thus it was in the present case. Merciless flogging soon became an ordinary punishment for political misdemeanours of no very aggravated kind. Men were sentenced, for words spoken against the government, to pain so excruciating that they, with unfained earnestness, begged to be brought to trial on capital charges, and sent to the gallows. Happily the progress of this great evil was speedily stopped by the Revolution, and by that article of the Bill of Rights which condemns all cruel and unusual punishments.

[462] 402 U.S. 183 (1971).

human ability."[463] Just a year later, in 1972, *Furman v. Georgia* struck down then-existing death penalty laws, effectively putting a moratorium on executions.[464] But death penalty statutes—ones bifurcating the guilt/innocence and penalty phases and often asking juries to weigh "aggravating" versus "mitigating" factors—got passed in more than thirty states in *Furman*'s wake.[465] That, in turn, led to the U.S. Supreme Court's decision in *Gregg v. Georgia*, a ruling once again giving the judicial green light to executions.[466] Though provisions of law authorizing the death penalty's infliction can now be found in the United States Codes and in various state statute books, the mandatory death penalty has already been declared to be unconstitutional by the U.S. Supreme Court.[467] What remains of death penalty laws are the so-called "guided discretion" statutes that leave life-or-death decisions in the hands of juries.[468]

In late seventeenth-century England, Titus Oates was singled out for a set of punishments (a fine, imprisonment, flogging, and the pillory) that, while each lawful under English law at the time, were not inflicted on others in the particular manner that Oates had been made to suffer. Something quite similar is, in effect, playing out in modern America with the administration of capital punishment. While the death penalty is still authorized by statutes in American jurisdictions, just as whipping and the pillory were authorized in Titus Oates's time, American executions are being imposed in a manner that arbitrarily singles out particular individuals, whether at random, in a racially discriminatory fashion, or based on some factor that runs afoul of the doctrine of equal protections of the laws. These days, it is race, geography, gender, or other factors, such as the poor quality of a legal counsel, that largely determines who lives and who dies—and that determines who gets treated in a grossly disparate and disproportionate manner.

The American death penalty is rife with discrimination and arbitrariness, something that, in truth, has long been the case. Racial discrimination—the discriminatory treatment of minorities—is rampant in America's criminal justice system, with the consequences of that prejudice particularly pronounced in death penalty cases.[469] Most executions take place in the South, where lynchings were once so common,[470] and only a small handful of

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[463] *Id.* at 208.

[464] CHARLES F. MANSKI, PUBLIC POLICY IN AN UNCERTAIN WORLD: ANALYSIS AND DECISIONS 49 (2013).

[465] LOUIS FISHER & KATY J. HARRIGER, AMERICAN CONSTITUTIONAL LAW 681 (2009).

[466] LeBeau v. State, 337 P.3d 254, 275 (Utah 2014).

[467] Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[468] DAVID SCHULTZ, ENCYCLOPEDIA OF AMERICAN LAW 205 (2002) ("Guided discretion statutes require juries and judges to consider various aggravating and mitigating circumstances when deciding whether a defendant should receive the death penalty.").

[469] *E.g.*, Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 38 (2007):

> Between 1930, when nationwide official statistics began, and 1972, when the Supreme Court of the United States decided *Furman v. Georgia*, almost exactly half of the persons executed for murder in the United States and about 90% of those executed for rape were African-American, although African-Americans never constituted more than 11% of the nation's population during this period. Unofficial figures running from 1864 to 1972 paint the same picture.

[470] PAUL KAPLAN, MURDER STORIES: IDEOLOGICAL NARRATIVES IN CAPITAL PUNISHMENT 54 n.3 (2012) ("During the contemporary era, the South accounts for 81% of executions while the northeast accounts for 0.05 percent executions."). The region where executions most often occur is the same region where

jurisdictions produce death sentences. It is overwhelmingly men who are slated to be put to death—and who are put to death.[471] As Victor Streib, Sam Kamin and Justin Marceau summarize the current state of affairs in *Death Penalty in a Nutshell*: "[T]he hapless few who are actually executed tend not to be the 'worst of the worst' of all of killers. Too often those against whom the penalty is imposed are distinguishable only on the basis of race, sex, poverty, or the luck of the draw with regard to the judge, jury, and defense counsel assigned to their case."[472] The death penalty's administration—and the judicial system's handling of capital punishment cases—is the direct opposite of a model system of justice that aims to rationally and equally protect each individual's human rights.

C. The Death Penalty as a Highly Unusual Punishment

There was an awareness, even centuries ago, that what might be considered "usual" at one time might be deemed "unusual" later. Through the centuries, many punishments—from fines to imprisonment to exile or banishment—were described as usual punishments. "Fine and Imprisonment," one 1750 law dictionary recited, "is the usual Punishment at this Day on Indictment for *Conspiracy*."[473] "[T]he usual punishment of death inflicted upon deserters," another source reported in 1784, "was changed in 1775 to an order for all future deserters to work as slaves on the public roads."[474] Yet another source reported that "[t]he usual Punishment . . . for *Non-Payment*" of monies owed was "chang'd from *Imprisonment*, into *perpetual Banishment*."[475] On occasion, some

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lynchings were once so prominent. MARGARET VANDIVER, LETHAL PUNISHMENT: LYNCHINGS AND LEGAL EXECUTIONS IN THE SOUTH 9 (2006) ("The great majority of mob killings took place in the South; lynchings in the eleven states of the former Confederacy accounted for 74% of all lynchings in the United States between 1882 and 1968.").

[471] *E.g.*, Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 427 (2000); Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609 (2006); Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC'Y REV. 367 (1991); Steven F. Shatz & Naomi R. Shatz, *Chivalry is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64 (2012); Harry Greenlee & Shelia P. Greenlee, *Women and the Death Penalty: Racial Disparities and Differences*, 14 WM. & MARY J. WOMEN & L. 319 (2008); *see also* Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581, 588 (2000) ("Throughout American history, from early colonial times until the pre-*Furman* moratorium period during which no executions took place, women have been executed; females account for approximately 3% of all executions, or 556 women, from 1632 until the execution of Elizabeth Duncan in California in 1962.").

[472] VICTOR STREIB, SAM KAMIN & JUSTIN MARCEAU, DEATH PENALTY IN A NUTSHELL 19 (5th ed. 2017).

[473] *Conspiracy*, GILES JACOB, A NEW LAW-DICTIONARY: CONTAINING, THE INTERPRETATION AND DEFINITION OF WORDS AND TERMS USED IN THE LAW (6th ed. 1750).

[474] A GENERAL INDEX TO THE ANNUAL REGISTER: OR, A SUMMARY VIEW OF THE HISTORY OF EUROPE, DOMESTIC OCCURANCES, STATE PAPERS, PROMOTIONS, MARRIAGES, BIRTHS, DEATHS, CHARACTERS, NATURAL HISTORY, USEFUL PROJECTS, ANTIQUITIES, LITERARY AND MISCELLANEOUS ESSAYS, POETRY, AND ACCOUNT OF PRINCIPAL BOOKS PUBLISHED, FROM THE YEAR 1758 TO THE YEAR 1780, BOTH INCLUSIVE (2d ed. 1784) (unpaginated chapter on the "History of Europe").

[475] D'BLOSSIERS TOVEY, ANGLIA JUDAICA: OR THE HISTORY AND ANTIQUITIES OF THE JEWS IN ENGLAND, COLLECTED FROM ALL OUR HISTORIANS, BOTH PRINTED AND MANUSCRIPT, AS ALSO FROM THE RECORDS IN THE TOWER, AND OTHER PUBLICK REPOSITORIES 198 (1738).

offenders were said to have avoided "the usual Punishment" through acts of mercy.[476] It was thus not just ducking that was described as a "usual" punishment.

Yet, the societal abandonment or the declining frequency of a punishment—or, perhaps, the simple lack of necessity for it—might, as some sources and authorities have recognized, change a "usual" punishment into an "unusual" one.[477] For example, the stocks, the pillory, and *peine forte et dure*—or pressing to death—are no longer in use and have long been considered to be cruel punishments that civilized societies can—and should—do without.[478] Once *usual* punishments, ones that have historical precedent, may even be classified later as *torturous* ones. By way of example, in discussing acts of "torture" previously used in England, a 1796 treatise wrote of everything from the punishment of pressing to death (the practice known as *peine forte et dure*),[479] to criminals' thumbs being tied together to force them to plead, to the rack.[480] Over time, customary punishments once widely accepted by societies thus become unthinkable acts of torture.

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[476] 2 CALEB D'ANVERS, THE CRAFTSMAN: BEING A CRITIQUE ON THE TIMES 10–11 (1731) (noting that a man "received a Sentence somewhat uncommon in this Country; where *Death*, thou knowest, is the usual Punishment of *such Offenders*; which this Man escaped, more by the Lenity of his *Accusers* and the Indulgence of his *Royal Master*, than his *own Deserts*; being only dismissed from all his *Employments*; and render'd *incapable* of holding any Office for the future; his Goods *confiscated*, and his Person *banish'd* for Life to a little Province on the Confines of *Russia*").

[477] The cruelty of a punishment may itself be indicative of its unusualness (just as the unusualness of a punishment may reflect its cruelty). HUGO ADAM BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 97 (1987) ("Were we to try to isolate the unusualness of a punishment from its cruelty, we would focus on a property of punishments that has little or nothing to do with moral condemnation."); *see also id.* ("[A] mode of punishment may be unusual today even though it was common in an earlier, less civilized age"; "[i]n such cases describing the punishment as 'unusual' may well imply not only that it is no longer widely used, but that its use is now intolerable."). A punishment that has become an "unusual" one can be—and has been—judged to be unconstitutional. People v. Anderson, 493 P.2d 880, 883 (Cal. 1972) (noting that "the California Constitution prohibits imposition of the death penalty if, judged by contemporary standards, it is either cruel or has become unusual").

[478] J. THOMAS SCHARF, HISTORY OF MARYLAND: FROM THE EARLIEST PERIOD TO THE PRESENT DAY 41 (1879) (calling the stocks, the pillory, the whipping-post and "the gallows, the ugliest spectacles"—"the active employment" of which occurred "[a]bout the central date of 1770"—"cruel punishments," but noting that "[t]he stocks, the pillory and the gibbet did not pass out of vogue in Maryland, in fact, until about 1810, when, following the impulse given to the science of punishment by Bentham and his school, we adopted the penitentiary system and thus began to build the Maryland penitentiary"). "Previous to the construction of that building, and after the War of Independence had necessarily done away with the sale of white convicts into labor," the historian J. Thomas Scharf wrote of the construction of Maryland's penitentiary, "the usual punishment of convicts, after the preliminary whipping and pillorying was done, consisted in putting them in the chain-gang to work on the public roads, or, as it was popularly called, 'sending them to the wheelbarrow.'" *Id.*

[479] *Peine forte et dure* refers to pressing to death or to what has been called "[t]he strong and hard pain." PETTIFER, *supra* note 266, at 124; *see also* 2 POLITICAL DICTIONARY; FORMING A WORK OF UNIVERSAL REFERENCE, BOTH CONSTITUTIONAL AND LEGAL; AND EMBRACING THE TERMS OF CIVIL ADMINISTRATION, POLITICAL ECONOMY AND SOCIAL RELATIONS, AND OF ALL THE MORE IMPORTANT STATISTICAL DEPARTMENTS OF FINANCE AND COMMERCE 500 (1846) (describing *peine forte et dure* as "[t]he 'strong and hard pain'" as "a species of torture used by the English law to compel persons to plead, when charged with crimes less than treason, but amounting to felony").

[480] DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES FROM MAGNA CHARTA TO THE TWENTY-FIRST OF JAMES I, at 81, 85–86, 88 (5th ed. 1796).

In that particular treatise, the Hon. Daines Barrington pointed out that Lord Chief Justice Hale had said that "the punishment of pressing to death . . . was anciently inflicted by the common law."[481] But, Barrington wrote, editorializing a bit, "whatever this punishment might have been by the common law," it had been "superseded" by statute.[482] "[H]aving recourse to this severity, when the criminal stands mute and will not plead," he wrote, "is very unnecessary,"[483] with Barrington, taking a measure of historical practice, also noting that the rack—"with all its attendant terrors"—"was formerly not unknown in this country."[484] "It is not pretended by this," that instances of torture "were frequent," Barrington qualified, emphasizing that "fortunately this most horrid practice hath been discontinued, so that there cannot be the least legal pretence ever to revive it."[485] "The usual punishment for refusing to plead was the 'peine forte et dure,' of pressing to death," one history emphasized, taking note of the long-abandoned practice.[486] In a book published in London in 1719 one also finds a reference to "the usual punishment" at the end of an "account of the *Peine forte et dure*, or pressing to death."[487]

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[481] *Id.* at 81.
[482] *Id.* at 87, 92.
[483] *Id.* at 87.
[484] *Id.* at 88. "Torture," Barrington noted, "was used by the ancient Germans, from whom we are supposed to have derived our laws." *Id.* Barrington also detailed other instances where torture was either used or contemplated. *Id.* at 92 (referring to "the actual proofs of torture having been formerly, at least in some instances, used in this country"); *id.* ("King James, in his Works, mentions, that the rack was shewn to Guy Fawkes during his examination."); *id.* at 92–93 ("Upon the murder of the duke of Buckingham by Felton, the judges were asked whether he could be tortured in order to extort a confession? They answered indeed to their honour in the negative; but their being thus consulted shews, that, in the apprehension of some of the king's counsellors, they might have inflicted this punishment.").
[485] *Id.* at 93. A footnote after Barrington's use of the word "frequent" read in part as follows: "It may likewise perhaps surprize the read to find, by the 39 th Eliz. cap.iv. published at length by Rastal, that the gallies of this realm seem to have been not an unusual punishment; and Lord Coke mentions it in his 3d Inst. cap. 40. without taking notice of its being uncommon." *Id.*
[486] 2 WILLIAM PAGE, ED., THE VICTORIA HISTORY OF THE COUNTY OF WARWICK 182 (1908).
[487] The account of *peine forte et dure* in that source was as follows:

> When a Felon, punishable with death, takes a resolution not to make any answer to his Judges, after the second calling upon, he is carry'd back to his dungeon, and is put to a sort of rack called *peine forte et dure*. If he speaks, his indictment goes on in the usual forms; if he continues dumb they leave him to die under that punishment. He is stretched out naked upon his back, and his arms and legs drawn out by cords and fasten'd to the four corners of the dungeon; a board or place of iron is laid upon his stomach, and this is heap'd up *with Stones* to a certain weight. The next day they give him at three different times, three little morsels of barly bread, and nothing to drink: the next day three little glasses of water and nothing to eat: and if he continues in his obstinacy, they leave him in that condition 'till he dies. This is practis'd only upon felons, or persons guilty of petty Treason. Criminals of High Treason in the like case, would be condemned to the usual punishment; their silence would condemn them.

3 C. H. EVELYN WHITE, ED., THE EAST ANGLIAN; OR, NOTES AND QUERIES ON SUBJECTS CONNECTED WITH THE COUNTIES OF SUFFOLK, CAMBRIDGE, ESSEX & NORFOLK 280 (1889–1890) (quoting Mission, *Memoirs and Observations in His Travels through England, London* (1719)).

This naturally raises the question of what factors, or criteria, American jurists should use in making the judgment of when a usual punishment has crossed over into an unusual one. One lawyer, Joshua Shapiro, notes the importance of this inquiry in the *University of Memphis Law Review*, observing at the outset that "capital punishment is—at least arguably—inherently cruel."[488] As he explains: "If one accepts the view that the Cruel and Unusual Punishments Clause is 'a mandate for recognition and protection of human dignity,' then it is hard to find a punishment that is more antithetical to this norm than the death penalty. As Justice William Brennan remarked in *Furman v. Georgia*, '[t]he calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.'"[489] "If a cruel punishment is one that is an affront to human dignity," Shapiro observes, "then surely a punishment that ends human life—that ultimately denies a person his or her humanity by literally extinguishing it—would be the most cruel punishment possible."[490]

In his law review article, Joshua Shapiro—using a different analysis than Akhil Amar, who focused on the cumulative *population* of states that bar or outlaw a particular practice[491]—concludes that "the number of state legislatures that have (or do not have) capital punishment provisions may be indicative of whether a punishment is unusual."[492] Almost needless to say, the very structure of America's republic, with power divided between the federal and state systems, will always mean that some jurisdictions will punish certain crimes more harshly than others.[493] That is, after all, the inherent nature and very character of a system of federalism. However, Shapiro—aware that the U.S. Supreme Court sometimes sets a constitutional floor, beneath which no state may go without running afoul of the Eighth and Fourteenth Amendments—goes on in his article to propose a bright-line test. "[T]he appropriate benchmark for determining whether a punishment is unusual," he asserts, "is when three-fourths of states forbid its imposition."[494] "Until no more than one-fourth of the states allow for capital punishment," he claims, "the death penalty cannot, as a constitutional matter, be unusual."[495] In laying out his preferred interpretive approach to the Constitution's Cruel and Unusual Punishments Clause, Shapiro specifically argues that a three-fourths rule—or benchmark—is necessary to avoid results-oriented Eighth Amendment jurisprudence.[496]

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[488] Shapiro, *supra* note 92, at 465–66.
[489] *Id.* at 466 (citations omitted).
[490] *Id.*
[491] *See supra* text accompany notes 28–29.
[492] Shapiro, *supra* note 92, at 471.
[493] Rummel v. Estelle, 445 U.S. 263, 282 (1980) ("Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.").
[494] Shapiro, *supra* note 92, at 471–72.
[495] *Id.* at 472.
[496] *Id.* at 477–78 ("[A]lthough using the number of states that outlaw a punishment must arguably be an objective measure of the 'evolving standards of decency,' the problem is that the Court uses such statistics in a results-oriented and undisciplined manner without imposed some measurable or quantifiable ceiling, such as the three-fourths rule, to clearly indicate when a given form of punishment actually satisfies evolving decency standards."); *see also id.* at 484 ("The most appropriate numbers is three-fourths of the states, which is the number required to amend the Constitution."); *id.* ("When at least thirty-eight states

But at least when it comes to the death penalty, the creation of a three-fourths-of-the-states rule is far too simplistic and ignores important human rights—and the underlying constitutional values, including the protection of human dignity—at stake. First, the U.S. Constitution absolutely prohibits "cruel and unusual punishments" and, therefore, if a punishment is cruel and unusual, it is unconstitutional, regardless of how many laws are passed that purport to authorize the punishment.[497] Second, the right to life is a fundamental right,[498] and the arbitrary deprivation of that right has long been condemned by international[499] and domestic law.[500] The lottery-like quality of death

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remove capital punishment from their sentencing arsenal, only then should that punishment become effectively rare and unusual. That thirty-eight states agree with the Court would give legitimacy to any pronouncement from the bench.").

[497] Obviously, the more states that abolish the death penalty through legislative means only makes the country's death penalty *more* unusual. *E.g.*, Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 81 (2010):

> Constitutionally, states may be forced to surrender the punishment if it is considered cruel, and, as a result of a large number of states renouncing it, the punishment also becomes unusual. If a punishment is thus found to be both cruel and unusual, it will be proscribed under the Eighth Amendment Punishments Clause of the U.S. Constitution.

[498] *Panetti*, 551 U.S. at 957 (referring to the "'fundamental right to life'") (quoting *Ford*, 477 U.S. 399); *see also Furman*, 408 U.S. at 359 n.141 (Marshall, J., concurring) (citations omitted):

> The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (*i. e.*, the right to life), the State needs a compelling interest to justify it. Thus stated the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—*i. e.*, punishment may not be more severe than is necessary to serve the legitimate interests of the State.

[499] International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 990 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

[500] Barbier v. Connolly, 113 U.S. 27, 31 (1884):

> The fourteenth amendment, in declaring that no state 'shall 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,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; . . . and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.

See also Hodgson v. Vermont, 168 U.S. 262, 272–73 (1897) ("We concede the proposition . . . that by the fourteenth amendment it is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a state, it is sought to arbitrarily deprive any person of his life . . . or to refuse him the equal protection of the laws."); Jones v. Brim, 165 U.S. 180, 182 (1897) ("[T]he clause of the fourteenth amendment of the constitution referred to was undoubtedly intended to prohibit an arbitrary deprivation of life or liberty, or arbitration spoliation of property."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 586 (1996) (Breyer, J., concurring) ("The Court's opinion, which I join, explains why we have concluded that this award, in this case, was

sentences and executions is, in fact, directly contrary to due process and equal protection values.[501] Third, Shapiro's proposed three-fourths-of-the-states rule, which focuses exclusively on what *laws* are on the statute books, does not take into an account whether those laws are being actively enforced or are dormant or inactive. In that vein, Shapiro's proposal does not take into consideration the practices of states, be they jury verdicts, gubernatorial actions, or prosecutorial decisions not to seek the death penalty in the first place. Only by gauging the actual practices of states, juries and public officials—as well as by considering if a punishment squares with human dignity and other human rights values, such as the right to be free from torture—can the U.S. Supreme Court, or any other court, fully gauge whether *the infliction* of a punishment such as the death penalty is or has become truly unusual.[502]

The criteria for gauging the death penalty's unusualness should include (1) an assessment of how widely it is used, and in fact just how sporadically it is used, *throughout the country*; (2) the viability of any viable alternatives to it (*i.e.*, life without parole or life sentences) and whether it is truly necessary; (3) how arbitrary, discriminatory, and error-prone the punishment has proven to be; (4) whether death sentences and executions bear the indicia or immutable characteristics of acts of torture (which they do); and (5) what is actually at stake (*i.e.*, the fundamental right to life), including whether the use of the punishment comports with human dignity (it does not). Punishments falling short of death do not necessarily raise the same considerations as capital punishment, but as noted earlier, even *non-lethal* corporal punishments have, from time to time, already been adjudged—and properly so—to be cruel and unusual. Executions, though, irrevocably deprive people of their fundamental rights and the most basic right of all: the right to life. Those who are executed are stripped of that right *and*, by definition, all other rights, including their right to use the privilege of the writ of habeas corpus to prove, if possible, that they are not guilty of the crimes they were convicted of. When the five criteria set forth above are carefully weighed and examined in light of the evidence and the text and values of the U.S. Constitution, the conclusion is inescapable: death sentences and executions should be declared to be unconstitutional.

'grossly excessive' in relation to legitimate punitive damages objections, and hence an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause.").

[501] Bank Markazi v. Peterson, 136 S. Ct. 1310, 1327 n.27 (2016) ("Laws narrow in scope, including 'class of one' legislation, may violate the Equal Protection Clause if arbitrary or inadequately justified."); *see also* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citations omitted):

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In doing so, we have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment 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.'"

[502] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also Ex parte* Wilson, 114 U.S. 417, 426–27 (1885) ("Infamous punishments cannot be limited to those punishments which are cruel or unusual, 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.").

The law has, through the centuries, changed dramatically, and a twenty-first century declaration by the U.S. Supreme Court that capital punishment is unconstitutional would be a welcome, long-overdue development. Language from the U.S. Supreme Court's own decision in *Trop v. Dulles*,[503] the 1958 case that established the "evolving standards of decency" test, itself supports such a change in the law. In that case, which declared the decidedly non-lethal punishment of denationalization to be an Eighth Amendment violation, the Supreme Court justified its ruling by emphasizing the punishment at issue would lead to "the total destruction of the individual's status in organized society."[504] "It is," the Court ruled of denationalization, "a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[505] "In short," the Court concluded, "the expatriate has lost the right to have rights."[506] If the Eighth Amendment prohibits stripping an offender of the right to have rights (and *Trop* held that it does), the death penalty (which, of course, does just that) should not be permitted by the U.S. Constitution or American society, especially since the death penalty bears all the characteristics of an act of torture.

Whether any punishment is usual or unusual is, in truth, a fact that is readily capable of adjudication.[507] In the past, when a punishment or some particular treatment was described as either *usual* or *unusual*, it was frequently a characterization of the writer's or the speaker's view or judgment of the *severity* or *frequency* of the punishment or treatment—or an expression as to whether the punishment or treatment comported with societal values or was traditionally authorized or not. For example, in 1898, the U.S. Court of Appeals for the Second Circuit emphasized that "three men claimed that they were justified in leaving the ship by the unusual and cruel treatment" to which "they had been subjected."[508] In an even earlier case, one pre-dating the Civil War, the Supreme Court of Alabama noted that the plaintiff had sought to ask the following question: "whether the use of a cowhide in punishing a slave, so as to produce wales on the arms two or three inches long, and as large as his finger, which could be seen on him a year afterwards, was not an unusual and cruel whipping"?[509]

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[503] 356 U.S. 86 (1958).

[504] *Id.* at 101.

[505] *Id.*

[506] *Id.* at 102.

[507] Whether a punishment is cruel or unusual, or both, is something that judges may be called upon to adjudicate not just in the Eighth Amendment context, but in other contexts as well. For example, the U.S. Code of Military Justice prohibits the infliction of "cruel or unusual punishment"—a prohibition that, on its face, already encompasses flogging and branding. 10 U.S.C. § 855 ("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. The use of irons, single or double, except for the purpose of safe custody, is prohibited.") (emphasis added); *see also* Rich Federico, *The Unusual Punishment: A Call for Congress to Abolish the Death Penalty Under the Uniform Code of Military Justice for Unique Military, Non-Homicide Offenses*, 18 BERKELEY J. CRIM. L. 1, 4–5 (2013) ("The last service member executed for a unique military offense was Private Eddie D. Slovik, who was executed by firing squad on January 31, 1945 for desertion during a time of war.").

[508] The W. F. Babcock v. The W. F. Babcock, 85 F. 978, 979–80 (2d Cir. 1898).

[509] Hall v. Goodson, 32 Ala. 277, 279 (Ala. 1858); *see also* State v. Maner, 20 S.C.L. (2 Hill) 453, 454–55 (S.C. 1834) (citations omitted):

> The *criminal* offence of assault and battery cannot at common law be committed on the person of a slave. For notwithstanding for some

Life sentences are now the common, or *usual*, punishment for particularly heinous crimes, including first-degree murder.[510] According to a 2013 report of Washington, D.C.'s The Sentencing Project, as of 2012, 159,520 people were serving life sentences in the United States, an 11.8% rise since 2008. That report further noted that "[t]he population of prisoners serving life without parole (LWOP) has risen more sharply than those with the possibility of parole: there has been a 22.2% increase in LWOP since just 2008, an increase from 40,174 individuals to 49,081."[511] And that number has only increased over time. According to the latest report of The Sentencing Project, titled *Still Life: America's Increasing Use of Life and Long-Term Sentences*, as of 2016, 161,957 people were serving life sentences, or "one of every nine people in prison." An additional 44,311 individuals are serving "virtual life" sentences (i.e., sentences of 50 years or more), bringing the total number of people serving a life or virtual life sentence up to 206,268, or 13.9% of America's prison population (i.e., approximately one of every seven prisoners). As of 2016, 53,290 people were serving LWOP sentences.[512]

In contrast, there are now fewer than 3,000 people on American death rows, many of whom have been languishing there for years or even decades. As of July 1, 2017, per the NAACP Legal Defense Fund's report, "Death Row USA," there were 2,817 inmates

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> purposes a slave is regarded in law as a person, yet generally he is a mere chattel person, and his right of personal protection belongs to his master, who can maintain an action of trespass for the battery of his slave. There can be therefore no offence against the State for a mere beating of a slave, unaccompanied by any circumstances of cruelty or an attempt to kill and murder . . . .
>
> But notwithstanding these may be regarded as common law principles in this State in relation to slaves, yet our statute law has made some important provisions for the punishment of the more aggravated offences against their persons. The Act of 1740 . . . makes any unusual and cruel treatment of a slave an indictable offence. It provides that "in case any persons shall wilfully cut out the tongue, put out the eye, castrate or cruelly scald, burn, or deprive any slave of any limb or member, or *shall inflict any other cruel punishment*, other than by whipping or beating with a horsewhip, cowskin, switch, or small stick, or by putting irons on, or confining or imprisoning such slave, every person shall, for every such offence, forfeit the sum of one hundred pounds current money." I think, under this act, the shooting a slave might be indicted as a cruel punishment.

[510] Confinement within a prison, even for one's natural life, has long been described as a usual punishment. *E.g.*, Vera v. United States, 288 F.2d 25, 26 (8th Cir. 1961) (describing confinement as a "usual punishment"); *see also* Rummel v. Estelle, 445 U.S. 263, 285 (1980) ("We . . . hold that the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments."); People v. Williams, No. 241427, 2003 WL 22928768, at *4 (Mich. Ct. App. Dec. 11, 2003) (noting that the Michigan Supreme Court held in *People v. Hall*, 242 N.W.2d 377 (Mich. 1976), that life sentences without the possibility of parole do not constitute cruel and unusual punishments).

[511] ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), https://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf.

[512] ASHLEY NELLIS, THE SENTENCING PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 1, 5, 9 (2017), *available at* https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/.

then housed on death row.[513] The largest death row in the United States—at 746 inmates—is in the State of California, but California has not actually carried out an execution in more than a decade.[514] While life sentences, which have emerged as the standard punishment for heinous offenses, are necessary to protect the public and to prevent dangerous offenders from posing a future risk or danger to society,[515] putting inmates to death cannot be seen as a legitmate or necessary—let alone an *absolutely* necessary—criminal sanction.[516] Going back all the way to the eighteenth century, a well-known maxim of the Enlightenment—one publicized and promoted by Montesquieu, Beccaria, and early American political leaders—was that any unnecessary punishment is "tyrannical."[517]

Through the years, American courts have frequently had to grapple with whether a specific punishment constitutes a "cruel and unusual punishment." For example, in *People v. Mire*,[518] the Supreme Court of Michigan held in 1912 that a term of imprisonment between fifteen and thirty years for a burglary accompanied with the use of high explosives was not a cruel and unusual punishment. In the course of so ruling, the state's highest court held: "The punishment prescribed in the act in question is imprisonment, a most common and usual method of punishment the world over."[519] In upholding the punishment provided for by statute, the court stressed: "That class of cruel and now unusual punishments at one time sanctioned and prevalent under the common law of England, such as burning at the stake, drawing and quartering, mutilation, starvation, and lesser forms of physical torture, to which the constitutional prohibitions were primarily directed, is not involved here."[520] "Approaching the dividing line," the court ruled, "the inquiry as to what does in any particular case constitute cruel and unusual punishment under the constitutional provisions, turns, not only upon the facts,

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[513] DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2018), https://deathpenaltyinfo.org/documents/FactSheet.pdf.

[514] Maura Dolan, *Pace of Executions in California may be up to Gov. Jerry Brown*, L.A. TIMES (Nov. 25, 2017), http://www.latimes.com/local/lanow/la-me-ln-prop-66-executions-20171125-story.html ("Gov. Jerry Brown's administration has yet to finalize an execution protocol, which is necessary to resolve a federal court case that has blocked lethal injection in California for nearly 12 years.").

[515] ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE 218 (1983): Incarceration became a standard punishment in the nineteenth century. The first American prison was the Walnut Street Jail in Philadelphia, which accepted its first prisoner in 1790. Its example was not generally followed until well into the nineteenth century. Since that time the physical punishments, except for the gallows, have gradually disappeared. They are no longer allowed, even for the discipline of prisoners, and capital punishment has been discarded—with no apparent ill effects—in fourteen states. In those states in which it is still authorized by law, it has certainly become an unusual punishment.

[516] Under the Rome Statute, which set up the International Criminal Court, a life sentence is now the maximum punishment for the worst of the worst offenses of international law: genocide, war crimes, and crimes against humanity. WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 1159 (2d ed. 2017); ANDREW S. THOMPSON, IN DEFENCE OF PRINCIPLES: NGOS AND HUMAN RIGHTS IN CANADA 114 (2010).

[517] BESSLER, *supra* note 349, at 43, 171–72, 246, 288, 378, 439; BESSLER, *supra* note 46, at 37, 80–81, 255, 303.

[518] 138 N.W. 1066 (Mich. 1912).

[519] *Id.* at 1067.

[520] *Id.*

circumstances, and kind of punishment itself, but upon the nature of the act which is to be punished."[521]

Ordinarily, the impulse of American courts to defer to legislative prerogative is a healthy one.[522] After all, a representative democracy gets its legitimacy from the people, and people choose their own legislative representatives to express their will.[523] But since *Marbury v. Madison*,[524] American courts have properly claimed the power of judicial review[525]—and the U.S. Supreme Court must remain the final arbiter of what the U.S. Constitution means.[526] English subjects were concerned about the infliction of cruel or novel punishments, as reflected in early writings,[527] and it is certainly true that, in modern

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[521] *Id.*

[522] *See, e.g.*, JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUED FROM ABORTION TO ZONING 295 (1999) ("Those who find judicial rejection of legislative enactments problematic point to its anti-majoritarian nature: unelected judges overturn policies of elected legislators and chief executives in apparent contradiction to the sovereignty of the people."); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 6 (1980) (noting in Chapter 1 that when U.S. Supreme Court Justices "exercise the power of judicial review to declare unconstitutional legislative, executive, or administrative action—federal, state, or local—they reject the product of the popular will by denying policies formulated by the majority's elected representatives or their appointees").

[523] In early American jurisprudence, and especially before the Eighth Amendment was first applied against the states in *Robinson v. California*, 370 U.S. 660 (1962)—which held that a statute making it a crime to be addicted to narcotics violates the Eighth and Fourteenth Amendments—courts expressed great reluctance to overturn a legislative enactment. *E.g.*, People *ex rel.* Bradley v. Superintendent of Ill. State Reformatory, 36 N.E. 76, 79 (Ill. 1894):

> When the legislature has authorized a designated punishment for a specific crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment, not known to the common law, or is a degrading punishment which had become obsolete in the state prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community.

[524] 5 U.S. (1 Cranch) 137 (1803).

[525] ALAN AXELROD & CHARLES PHILLIPS, WHAT EVERY AMERICAN SHOULD KNOW ABOUT AMERICAN HISTORY: 225 EVENTS THAT SHAPED THE NATION 67 (3d ed. 2008) ("[T]he Founding Fathers had expected the courts to have some control over the executive and legislative branches of government. The decision reached in *Marbury v. Madison*, however, formalized that control, and the high court has exercised that power since 1803.").

[526] HARLOW GILES UNGER, JOHN MARSHALL: THE CHIEF JUSTICE WHO SAVED THE NATION 293 (2014) ("Together with *Marbury v. Madison*, the decisions from 1819 to 1832 firmly established the Supreme Court of the United States as the third pillar of America's federal government and final arbiter of the nation's legal matters.").

[527] *Saturday, February 18, 1769*, N. BRITON, *reprinted in* THE NORTH BRITON, FROM NO. I. TO NO. XLVI. INCLUSIVE 556–57 (1769) ("'We recommend that you exert your utmost endeavours, that the proceedings in the case of libels, and all other criminal matters, may be confined to the rules of law, and not rendered dangerous to the subject by forced constructions, new modes of enquiry, unconstitutional tribunals, or new and unusual punishments, tending to take away or diminish the benefit of trial by juries.'"); *id.* at 557:

> And of new and unusual punishments, it may be sufficient to observe, that the publisher of the North Briton has suffered and is now suffering a very new and unusual kind of punishment; for he has been and is now imprisoned, not in execution for any offence he has committed, but to

America, there can be shades of gray when it comes to evaluating whether a particular punishment runs afoul of the Eighth Amendment prohibition. But the bar on "cruel and unusual punishments" sets forth a moral imperative that is not only subject to adjudication but that is capable of more than just restricting lawless or newly devised punishments or forms of cruelty. Indeed, the Eighth Amendment does not restrict "new and unusual punishments" or "unauthorized and unusual punishments," it restricts "cruel and unusual punishments."[528] And the very idea behind the U.S. Bill of Rights—and the Eighth Amendment in particular—was to protect individual rights in the face of laws passed by legislative majorities.[529]

It is true that, when the U.S. Constitution and its Bill of Rights were framed, the death penalty was still a ubiquitous presence in American life. Every American state still made use of death sentences, and Congress, in its Crimes Act of 1790, specifically authorized capital punishment along with the use of the pillory.[530] And it is also true that American courts, through the centuries, have allowed executions to be carried out, finding no constitutional impediment to their infliction. In *State v. Woodward*,[531] the Supreme Court of Appeals of West Virginia raised this fundamental, long-asked question back in 1910: "What is meant by the provision against cruel and unusual punishment?" "It is hard to say definitely," the court conceded.[532] As that court then wrote of that legal prohibition at that point in time: "Here is something prohibited, and in order to say what this is we must revert to the past to ascertain what is the evil to be remedied. Within the pale of due process, the Legislature has power to define crimes and fix punishments, great though they may be, limited only by the provision that they shall not be cruel or unusual or disproportionate to the character of the offense."[533]

> compel him to subject to a species of inquisition, which, whatever may be the practice of courts, he is credibly informed, is absolutely inconsistent with the laws of the land. In a word, if these arbitrary and despotic modes of proceeding are suffered to continued, the trials by juries, in the case of libels, will be very soon abolished; for it will always be in the power of any time-serving or prostitute set of judges to construe any paper into a libel upon themselves, and then, by exercising the distinct and incompatible provinces of party, accuser, evidence, jury, and judge, they will at once try, condemn, and inflict upon any person whatever punishment they please.

[528] U.S. CONST. amend. VIII.

[529] EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 23 (2013) ("If the Eighth Amendment only prohibited punishments already condemned by public opinion, then it would be a 'dead letter,' since these punishments would already have been abolished by the legislature. 'The Eighth Amendment was intended as a counter-majoritarian limitation on government action,' [Justice Arthur] Goldberg wrote.").

[530] Crimes Act of 1790, ch. 9, 1 Stat. 112 (1790) (making treason, murder, murder or robbery on the high seas, piracy, mutiny, hostilities against the United States, and being an accomplice to murder, robbery or piracy, counterfeiting, assisting in a prison break anyone "found guilty of treason, murder, or any other capital crime" punishable by death; making larceny, accessory after the fact to larceny, and corruption of judicial records punishable, among other things, by up to "thirty-nine stripes"; and making perjury and subornation of perjury punishable, among other things, by standing in the pillory for one hour).

[531] 69 S.E. 385 (W. Va. 1910).

[532] *Id.* at 387.

[533] *Id.* Due process has both procedural and substantive components. In his 1972 concurrence in *Furman v. Georgia*, Justice Thurgood Marshall emphasized that an analysis under the Eighth Amendment's Cruel and

At a distance of more than 100 years ago, the Supreme Court of Appeals of West Virginia, found that a law closing saloons on Sunday—and penalizing those who violated it—was not unconstitutional as imposing a cruel and unusual punishment. In the course of that ruling, the court had this to say about legislative prerogative: "This matter falls under the rule that the Legislature is clothed with power well-nigh unlimited to define crimes and fix their punishment. So its enactments do not deprive of life, liberty, or property without due process of law and the judgment of a man's peers, its will is absolute. It can take life, it can take liberty, it can take property, for crime."[534] In that case, which upheld a jury's guilty verdict and a judgment that the defendant pay a $50 fine for opening a saloon on Sunday and lose his liquor license for one year, the court emphasized: "How can we say that the statute before us inflicts cruel punishment when our statutes have punished with death, lifelong imprisonment, and fines, and forfeiture of instruments of crime through centuries? Nobody can question their validity."[535] "Inflicting death by electricity," the court observed, citing the U.S. Supreme Court's decision in *In re Kemmler*,[536] "is unusual, in a sense, a new mode, but held not contrary to the probibition; not as cruel as hanging, which is surely not prohibited."[537]

But that was in 1910, before notions of human rights (and our understanding of universal human rights) matured after the horrors of World War I and World War II. And the fact that punishments such as branding and the pillory and ducking and hanging were once in use in the young, newly forged republic,[538] vestiges of America's colonial heritage,[539] does not mean that their use is, or would be, legitimate or morally defensible

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Unusual Punishments Clause "parallels in some ways the analysis used in striking down legislation on the ground that it violates Fourteenth Amendment concepts of substantive due process . . . ." *Furman*, 408 U.S. at 359 n.141 (Marshall, J., concurring). As Justice Marshall wrote:

> The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (i.e., the right to life), the State needs a compelling interest to justify it. Thus stated, the substantive due process argument reiterates what is essentially the primnary purpse of the Cruel and Unusual Punishments Clause of the Eighth Amendment—i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State.

Id. (citations omitted).

[534] *Woodward*, 69 S.E. at 386.

[535] *Id.* at 388.

[536] 136 U.S. 436 (1890).

[537] *Woodward*, 69 S.E. at 388.

[538] CYNDI BANKS, PUNISHMENT IN AMERICA: A REFERENCE HANDBOOK 9–12 (2005) (discussing the history of corporal punishments, including flogging, mutilation, branding, the stocks and the pillory, and the use of the ducking stool for "village scolds and gossips").

[539] EDMUND S. MORGAN, AMERICAN HEROES: PROFILES OF MEN AND WOMEN WHO SHAPED EARLY AMERICA 70 (2009) (noting that, for Puritans, "[t]he usual punishment" for adultery was "a whipping or a fine, or both, and perhaps a branding, combined with a symbolical execution in the form of standing on the gallows for an hour with a rope about the neck"); *see also* Douglas Litowitz, *The Trouble with 'Scarlet Letter' Punishment: Subjecting Criminal to Public Shaming Rituals as a Sentencing Alternative Will Not Work*, 81 JUDICATURE 52, 53 (1997) ("In Colonial days, the courts favored primitive methods of punishment such as the whipping post, the pillory, stocks, branding, banishment, the dunking stool, and a

now. The United States is a representative democracy. But it is also a *constitutional* democracy, one with a *written* constitution that sets forth the rights to due process and equal protection and the bar against cruel and unusual punishments. And the U.S. Supreme Court has the solemn responsibility of enforcing the provisions of the U.S. Constitution, which protects the rights of every American citizen. In performing its duties, the Supreme Court should not allow a wholly arbitrary, long discriminatory, and torturous punishment, such as the death penalty, to endure.

The fact that a punishment, even one so deeply rooted in history, was once a *usual* punishment is not a legitimate or morally sufficient justification for continuing that punishment's use. Punishments such as the pillory, the stocks, and the use of the public whipping post were, the record shows, once considered usual punishments. Yet civilized societies now recoil from the knowledge that such punishments were once in use. For decades, the Eighth Amendment has wisely been read in a *non-static* manner. And the Supreme Court should continue to take that dynamic, flexible approach in the Eighth Amendment context, one that allows it to assess and re-assess the legality of particular punishments under the U.S. Constitution as societal understandings of human rights evolve. That approach, employed to gauge everything from conditions of confinement[540] to the conduct of prison officials[541] to methods of execution, has already been used to restrict the death penalty's use for—among other groups—juveniles[542] and the intellectually disabled.[543]

When the Eighth Amendment is seen through the lens of the Fourteenth Amendment, it may actually make little difference whether a modern-day court adopts academic John Stinneford's view of the proper interpretation of "unusual" (*i.e.*, punishments not of long or immemorial usage) or continues to use, as it long has, the standard dictionary definition of "unusual" (*i.e.*, punishments that are rare or uncommon). Before the Fourteenth Amendment's ratification, the courts did not have to concern themselves with equality of treatment in interpreting the U.S. Constitution's Cruel and Unusual Punishments Clause.[544] After the Fourteenth Amendment's ratification,

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device known as the 'brank,' a metal mask that wrapped around the face of a woman who talked too much.").

[540] Rhodes v. Chapman, 452 U.S. 337, 346 (1981) ("No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'") (quoting *Trop*, 356 U.S. at 101).

[541] Farmer v. Brennan, 511 U.S. 825, 833 (1994) (the gratuitous beating or rape of one inmate by another is not consistent with the evolving standards of decency).

[542] Roper v. Simmons, 543 U.S. 551, 574 (2005) (barring the imposition of death sentences for those under the age of eighteen) (abrogating Stanford v. Kentucky, 492 U.S. 361 (1989)).

[543] Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (finding that the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society, and barring the execution of intellectually disabled offenders) (abrogating Penry v. Lynaugh, 492 U.S. 302, 314, 321 (1989), which found that the death penalty was not a cruel and unusual punishment for that category of offenders).

[544] AUSTIN SARAT & PATRICIA EWICK, EDS., THE HANDBOOK OF LAW AND SOCIETY 214 (2015):

> Before 1868 when the Fourteenth Amendment was drafted, there was no mention of the term equality in the US Constitution. In fact, before the Fourteenth Amendment, the US Constitution explicitly encouraged and perpetuated inequality among people through its pro-slavery

however, every American court must—both as a matter of fairness and justice and because the Fourteenth Amendment's text and history require it[545]—concern itself with whether a particular punishment is being meted out in a discriminatory fashion.[546] In short, no matter whether a particular punishment is of ancient heritage, of recent vintage, or is now common or uncommon, a punishment (especially one as severe and as arbitrarily and discriminatorily applied as the death penalty) cannot be applied in an unequal fashion.[547]

A punishment that is administered in a lottery-like or unequal fashion would, almost by definition, seem to be an "unusual" one in the post-Equal Protection Clause era

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> provisions, found in several sections of the Constitution. It was not until after the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments that the Constitution established the right of equality regardless of race.

[545] The Fourteenth Amendment was specifically designed, in part, to equalize punishments between people of different races. Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 111 (1984) (after noting that Fourteenth Amendment prohibits the denial of "equal protection," recounting that "[t]he sponsors of the fourteenth amendment unquestionably intended this language to prohibit unequal punishments for defendants of different races"); *see also* Stan Robin Gregory, *Capital Punishment and Equal Protection: Constitutional Problems, Race and the Death Penalty*, 5 ST. THOMAS L. REV. 257, 268–69 (1992) ("The framers of the Fourteenth Amendment intended to prohibit unequal punishments for defendants of all races. As the legislative history of the Fourteenth Amendment clearly illuminates, one of their main goals was to 'constitutionalize' the provision of the Civil Rights Acts of 1866, to embrace the requirement that in every state 'inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall be subject to like punishment, pains, and penalties, and no other.'").

[546] MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 51 (1999) (discussing the Fourteenth Amendment and how it constitutionalized the Civil Rights Act of 1866, which required that "white citizens" and others be subject to "like punishment"); *see also* Shelley v. Kraemer, 334 U.S. 1, 23 (1948):

> The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.

[547] *E.g.*, Vest v. Lubbock Cty. Comm'rs Court, 444 F. Supp. 824, 833–34 (N.D. Tex. 1977) (stating procedures in meting out mass punishment to entire cell-blocks, holding inmates in solitary confinement, and imposing other forms of punishment without any hearing or impartial determination of a particular inmate's participation in infraction of rules "are contrary to the mandates of the Due Process Clause of the Fourteenth Amendment and the unequal manner in which punishment is imposed among the various classes of prisoners denies equal protection under the Fourteenth Amendment"). Under existing law, an inmate must show that a government official "acted with an intent or purpose to discriminate" to state a claim under 42 U.S.C. § 1983 for a violation of the Fourteenth Amendment's Equal Protection Clause. Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (citing cases). But even in the absence of intentional discrimination in a given capital case, the fact that the death penalty has a long, well-documented history of racial prejudice and bias in its administration is certainly a relevant factor that the U.S. Supreme Court can and should consider in making the determination that the death penalty is both cruel and unusual. Bessler, *supra* note 391, at 548 ("While the Eighth Amendment forbids 'cruel and unusual punishments,' the Fourteenth Amendment was put in place to end the nineteenth-century scourge of unequal punishments based on race.").

no matter which definition or understanding of that word is applied. And that is especially so given that American law has common-law origins, with the common-law tradition focused on treating societal members alike for like offenses.[548] When one considers that a person's very life is on the line in capital punishment proceedings, the inequality of the death penalty's administration is grotesque and especially appalling.

It is one thing for American courts to generally defer to legislative bodies around the country so long as such bodies act in a reasonable fashion within a constitutionally acceptable range of legislative prerogative. After all, reasonable lawmakers can disagree about how best to fight crime and reduce violence, and there are, therefore, multiple legal and policy approaches that can be pursued or taken for legitimate purposes when it comes to punishing misdemeanors and felonies. And in actuality, some differences of opinion, or in outlook, are to be expected from lawmakers, and are healthy even. "In a number of the Supreme Court proportionality opinions," one book on sentencing notes of how the U.S. Supreme Court has handled the issue thus far in the Eighth Amendment context, "the Justices have emphasized their deference to legislative decisions."[549] But when it comes to the death penalty, such a severe punishment—especially given its inherent and torturous characteristics and the more-or-less randomized way it is administered—should no longer be tolerated by the courts. It is tremendously cruel—and tremendously unusual and uncivilized—to allow the death penalty to be used at all. And it is exponentially more cruel—and even more unusual and uncivilized—given the incredibly disparate fashion in which capital punishment is carried out.

Already, the U.S. Supreme Court—in laying out its general approach to the law—has interpreted the Fourteenth Amendment to prohibit the "arbitrary deprivation of life," with the Court emphasizing that, "in the administration of justice," the Fourteenth Amendment "requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses."[550] The bar on "cruel and unusual punishments" in the English Bill of Rights, it is worth recalling, was itself intended to reign in arbitrary punishments and judicial discretion[551]—and there is no better example

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[548] Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 162 (2004):

> The American founders in 1791, like their English predecessors in 1689, believed that the common law could be discovered only through faithful analysis of precedent. The word "unusual" in the Cruel and Unusual Punishments Clause reflected a commitment to the common law method. That method in turn reflected a commitment to the *commonality* of the common law—a commitment to the principle that like cases be treated alike.

See also id. at 122 ("'Unusual' was a synonym for 'illegal' at common law because the common law doctrine of precedent insisted that judicial decisions could succeed in articulating law if and only if they served an underlying principle of moral—and therefore legal—equality among litigants.").

[549] NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 445 (4th ed. 2018).

[550] John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1932–33 (2012) (citing cases). The U.S. Constitution's Fifth Amendment states that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment also provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

[551] *See supra* text accompanying notes 149–50.

of an arbitrary punishment in modern life than the American death penalty.[552] The arbitrary, almost random infliction of capital punishment is, simply put, totally at odds with American constitutional values.[553]

Even if the death penalty was once considered to be a "usual" punishment because it has long been used,[554] today's death penalty (actively used in just a small number of

[552] The U.S. Supreme Court has held that "death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary fashion." California v. Brown, 479 U.S. 538, 541 (1987) (citation omitted). At the same time, the Supreme Court has required that courts consider the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (plurality opinion). Despite the Supreme Court's best efforts to ensure that the death penalty is not administered in an arbitrary fashion, the death penalty's administration is as arbitrary as ever. Lindsey S. Vann, *History Repeats Itself: The Post*-Furman *Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255 (2011). Capital punishment is, it has been noted, in decline. *See generally* Brandon L. Garrett, Alexander Jakubow & Ankur Desai, *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561 (2017). And although some prosecutors use capital charges to gain plea-bargaining leverage, many prosecutors are no longer even actively seeking capital charges. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 230–31 (2017). In retentionist jurisdictions, the fact that highly discretionary plea bargaining is used so frequently in the criminal justice system—a practice that often results in pleas to life sentences to avoid the death penalty—actually ensures that the death penalty (already highly arbitrary and discretionary in nature) will continue to be employed in a very arbitrary fashion. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ ("[O]ur criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors with no judicial oversight. The outcome is very largely determined by the prosecutor alone.").

[553] Daniels v. Williams, 474 U.S. 327, 331 (1986) (referring to "the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta . . . was intended to secure the individual from the arbitrary exercise of the powers of government") (citations omitted); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); Philip Morris USA v. Williams, 549 U.S. 346, 352 (2007) ("[W]e have emphasized the need to avoid an arbitrary determination of an award's amount"; "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose,' it may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'") (citations omitted).

[554] Historical sources equate "long usage" with a prevailing custom. ENCYCLOPÆDIA BRITANNICA: OR, A DICTIONARY OF ARTS AND SCIENCES, COMPILED UPON A NEW PLAN 301 (1777) ("Custom is hence, both by lawyers and civilians, defined *lex non scripta*, a law, or right, not written, established by long usage, and the consent of our ancestors: in which sense it stands opposed to the *lex scripta*, or the written law."); *Custom*, THE COMPLETE DICTIONARY OF ARTS AND SCIENCES, IN WHICH THE WHOLE CIRCLE OF HUMAN LEARNING IS EXPLAINED, AND THE DIFFICULTIES ATTENDING THE ACQUISITION OF EVERTY ART, WHETHER LIBERAL OR MECHANICAL, ARE REMOVED, IN THE MOST EASY AND FAMILIAR MANNER (1766) (defining same in unpaginated entry); 1 GILES JACOB, COMP. & T. E. TOMLINS, ED., THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW, IN THEORY AND PRACTICE; DEFINING AND INTERPRETING THE TERMS OR WORDS OF ART; AND COMPRISING COPIOUS INFORMATION, HISTORICAL, POLITICAL, AND COMMERCIAL, ON THE SUBJECTS OF OUR LAW, TRADE, AND GOVERNMENT 171 (1797) (showing entry for "CUSTOM" begins: "Is a law not written, established by long usage, and the consent of our ancestors. No law can oblige a free people without their consent: so wherever they consent and use a certain rule or method as a law, such rule, &c. gives it the power of a law; and if it is *universal*, then it is *common-law*: if particular to this or that place, then it is *custom*."); GILES JACOB, THE STUDENT'S COMPANION: OR, THE REASON OF THE LAWS OF ENGLAND 25, 112 (1725) ("Custom is what is established

American jurisdictions by just a small number of individual prosecutors) does not, as a factual matter, resemble how death sentences were used much more systematically in the past. The way the American death penalty is applied today—in an increasingly random, discretionary, and arbitrary manner[555]—simply is not rooted, and cannot be said to be grounded, in some kind of long or immemorial usage. In the five-year period from 2011 to 2015, FBI data show that, in the U.S., there were more than 60,000 murder victims.[556] In contrast, for that same five-year period, there were 188 executions carried out in the United States.[557]

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by long Use, and the Consent of our Ancestors."; "Custom, which is Law, is what is Established by long Usage, and the general Consent and Approbation of the People, by their own Act; and what being Practiced Time out of Memory, hath the Binding Quality of a Law."); 4 DEWITT C. BLASHFIELD & GEORGE F. LONGSDORF, EDS., ABBOTT'S CYCLOPEDIC DIGEST OF ALL THE DECISIONS OF ALL THE COURTS OF NEW YORK FROM THE EARLIEST TIME TO THE YEAR 1900, at 964 (1901) (citing Wilcox v. Wood, 9 Wend. 346 (N.Y. 1832)) ("Custom is a law established by long usage. A universal custom becames common law . . . ."); *see also* THE CHRISTIAN EUCHARIST NO PROPER SACRIFICE, CLEARLY PROVED IN A LETTER TO THE LORD BISHOP OF NORWICH 39 (1714) (stating "according to a long usage, or *prevailing Custome*"); 7 HENRY GWILLIM, AN APPENDIX TO BACON'S NEW ABRIDGEMENT OF THE LAW, ALPHABETICALLY DIGESTED UNDER PROPER TITLES 406 (1801) ("Long usage . . . ought not to be shaken lightly"; "the right claimed by the plaintiffs . . . is supported by long usage."); Alan Watson, *An Approach to Customary Law*, *in* 1 ALISON DUNDES RENTELN & ALAN DUNDES, EDS., FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF LEX NON SCRIPTA 142 (1994) ("The Roman sources clearly indicate that some additional factor is needed to recognize custom as law, even if the nature of this factor is not apparent. For example, the *Epitome Ulpiani* states that '[c]ustom is the tacit consent of the people, deeply rooted through long usage.'"); ANDY WOOD, THE MEMORY OF THE PEOPLE: CUSTOM AND POPULAR SENSES OF THE PAST IN EARLY MODERN ENGLAND 94 (2013) ("In 1612, the Attorney-General for Ireland, Sir John Davies, summarized the customary basis of the common law as follows: 'the Common Law of England is nothing else but the Common Custome of the Realm; and a Custome which hath obtained the force of a Law is always said to be *Jus non scriptum*.'").

[555] King, *supra* note 415, at 228:

> The death penalty has, in some sense, become a symbolic punishment. Less than 1% of murders result in a death sentence, but there is no indication that the minority who are actually sentenced to death are the most serious offenders. Professor David McCord examined all death penalty cases in 2004, examining facts about each death-eligible case. He identified a total of 469 defendants who met the "worst-of-the-worst" standard. He found that, of those 469, only 30% had been sentenced to death, meaning that the vast majority received a sentence other than death. Moreover, many of the 341 murderers who were spared the death penalty had more serious cases than those who received it. In the two most aggravated cases that year—Oklahoma City bomber Terry Nichols and serial killer Charles Cullen—neither man received the death penalty. Of the eleven serial killers in the group, only five were sentenced to death.

[556] *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2011–2015*, FED. BUREAU INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_8_murder_victims_by_weapon_2011-2015.xls (last visited Apr. 10, 2018) (listing 12,795 murder victims in 2011; 12,888 in 2012; 12,253 in 2013; 12,270 in 2014; and 13,455 in 2015).

[557] DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2018), https://deathpenaltyinfo.org/documents/FactSheet.pdf (listing 43 executions in 2011; 43 in 2012; 39 in 2013; 35 in 2014; and 28 in 2015).

The modern system of capital punishment began in 1972 with *Furman*, but the attempt to reign in arbitrariness and discrimination in the death penalty's administration has been an utter and abject failure. And American law, for that reason and many others, should no longer tolerate the use of death sentences and executions. As I argued in a recent law review article, "The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments": "When the Eighth and Fourteenth Amendments are read together, punishments cannot be 'cruel and unusual' and, to avoid that nomenclature, they must not be inflicted in an *unequal* manner either. The words that adorn the U.S. Supreme Court building—'EQUAL JUSTICE UNDER LAW'—must be given effect in the context of *punishment* (just as they were, for example, in the context of *public education* in *Brown v. Board of Education*) if the Fourteenth Amendment is to be meaningful and fully implemented."[558]

One badly decided U.S. Supreme Court case has contributed to the current state of affairs and corrupted and marred Eighth Amendment case law, allowing the death penalty to linger on in spite of all the racial prejudice and bias long associated with it. In 1987 in *McCleskey v. Kemp*,[559] the Supreme Court rejected an Equal Protection Clause challenge to Georgia's death penalty. In that case, the death row inmate, Warren McCleskey, argued that race had infected the administration of the state's death penalty in two ways: first, those who murdered whites were more likely to be sentenced to death than those murdering blacks; and second, that black murderers were more likely to be sentenced to death than white murderers.[560] In rejecting the equal protection challenge, the Supreme Court held that McCleskey had to prove "the existence of purposeful discrimination" and that decision-makers "in *his* case acted with discriminatory purpose."[561] In further rejecting McCleskey's Eighth Amendment challenge, the Court observed that "our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty,"[562] and that, "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty."[563] It was a highly controversial, 5-4 decision that swept under the rug clear evidence of racial prejudice where a person's life was at stake, and the author of the *McCleskey* majority opinion—Justice Lewis Powell—later famously regretted his vote in that case.[564]

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[558] Bessler, *supra* note 391, at 553.
[559] 481 U.S. 279 (1987).
[560] *Id.* at 291–92.
[561] *Id.* at 292.
[562] *Id.* at 305.
[563] *Id.* at 306–07. In his opinion, Justice Powell—drawing considerable public criticism—made this statement: "Apparent disparities in sentencing are an inevitable part of our criminal law system." *Id.* at 312. Asserting that McCleskey's arguments about racial discrimination "are best presented to the legislative bodies," Justice Powell contended that it was a legislative, not a judicial, responsibility to determine the punishments for particular crimes. *Id.* at 319. "Capital punishment," he wrote, "is now the law in more than two-thirds of our States," though he conceded that "[i]t is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution." *Id.*
[564] *Id.* at 282; *Justice Powell's New Wisdom*, N.Y. TIMES (June 11, 1994), https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html ("Too late for Warren McCleskey and numerous other executed prisoners, retired Justice Lewis Powell now concedes that he was

Most notoriously, Justice Powell employed a slippery slope argument in rejecting Warren McCleskey's unrebutted statistical proof of racial discrimination in Georgia's death penalty system. As Powell wrote: "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties."[565] "[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision," he wrote in the opinion he came to regret, "we could soon be faced with similar claims as to other types of penalty."[566] "The Constitution," Powell concluded, "does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment."[567] But the fear of too much justice expressed in *McCleskey* is not only regrettable, it is morally bankrupt. In fact, the death penalty is unlike *any* other punishment that human societies still use, and its use runs afoul of core constitutional values and basic human rights.

The concept of human dignity is one that regularly informs—and that certainly should continue to inform—the U.S. Supreme Court's Eighth Amendment jurisprudence. As Justice Anthony Kennedy wrote in *Brown v. Plata*,[568] for example: "[P]risoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons."[569] As Justice Kennedy's majority opinion in *Brown v. Plata* continued: "Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."[570] The Supreme Court's consideration of the concept of dignity, in fact, dates back many decades, finding voice in the very first case that established the lofty sounding "evolving standards of decency" test.[571] A punishment that does not comport with human dignity is also one that must be scrutinized as a "cruel and unusual punishment."[572] It is especially cruel and unusual to dehumanize someone—

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wrong to cast the deciding fifth Supreme Court vote to uphold Mr. McCleskey's death sentence in a major case.").

[565] *McCleskey*, 481 U.S. at 314.

[566] *Id.* at 315.

[567] *Id.* at 319.

[568] 563 U.S. 493 (2011).

[569] *Id.* at 510.

[570] *Id.*

[571] Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . .") (quoting *Trop*, 356 U.S. at 100 (plurality opinion)).

[572] Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("The [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which we must evaluate penal measures.") (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); *cf.* Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977):

> Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions does violence to our societal notions of the intrinsic worth and dignity of human beings and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment.

indeed, to take someone's life—in a manner that involves runaway arbitrariness or that is a reflection of racial prejudice.

Law professor John Stinneford, as one commentator notes, "has argued that we *do* know exactly what the word 'unusual' in the English Bill of Rights signified to the English: 'the word 'unusual' was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.'"[573] As that commentator, Michael Perry acknowledges, though, the implications of Stinneford's observation about the historical record are less than clear. As Perry explains:

> Let's assume, for the sake of discussion, that Stinneford is right about what "unusual' meant in the English Bill of Rights of 1689. Stinneford goes on to argue that the framers of the American Bill of Rights knew what "unusual" meant in the English Bill of Rights and that they intended "unusual" in the Eighth Amendment to mean the same thing. There is reason to doubt that the framers of the American Bill of Rights did in fact know what "cruel and unusual" meant in the English Bill of Rights. But even if we grant to Stinneford that the framers of the Eighth Amendment intended "unusual" in the Eighth Amendment to mean what "unusual" meant in the English Bill of Rights, this problem remains: The issue for an originalist is not what those who drafted the Eighth Amendment—"the framers"—meant by "unusual." The issue, rather, is what "We the People" in 1789-91, on whose behalf the Eighth Amendment was made a part of the Constitution, understood "unusual" to mean.[574]

At this point in American history, it is actually the "evolving standards of decency" test—a legal standard in place and in use *for six decades*—that is of long use. It has thus been clear, *for decades*, that what is considered cruel and unusual can and will change with the times. In fact, if one goes back in time, Michael Perry—an originalist[575] who is, as a scholarly matter, very interested in history—also makes this critique of Stinneford's analysis and approach:

> For an originalist, the question is "not what the Framers or Ratifers meant or understood subjectively, but what their words would have meant objectively—

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[573] MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT 55 (2009).

[574] *Id.* at 55–56.

[575] As two scholars have written of Michael Perry's brand of originalism:

> Perry endorses a jurisprudence that seeks the "'objective meaning' to the public at the time the provision was ratified." Perry explains that this inquiry is hypothetical: "it is what the public 'would have' understood that should matter." But his originalism has a unique flavor. It "does not entail . . . a small or passive judicial role." Rather, because the Constitution is so textually vague and open-ended, Perry believes that judges can legitimately choose between many plausible original meanings, at varying levels of generality, such that much of the Supreme Court's modern individual rights jurisprudence can (and should) be defended on originalist grounds.

Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 240, 257 (2009).

> how they would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them. The Preamble to the Constitution tells us who the true authors of the constitutional text are: not the drafters (framers) but "We the People." "It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals." And there is nothing in the historical record to suggest that the public (We the People) in 1789-91 would have understood—indeed, it is less than clear that even the framers understood—"unusual" in the Eighth Amendment to be "a term of art" that meant just what is meant in the English Bill of Rights a hundred years earlier.[576]

"It is much more likely that the public," Michael Perry stresses, would have understood both *cruel* and *unusual* in the U.S. Constitution's Eighth Amendment "to mean what Samuel Johnson's *A Dictionary of the English Language*, first published in 1756, tells us those two words were conventionally understood to mean at the time." As Perry writes of that popular source: "In volume 1, at page 250, 'cruel' is defined as: '1. Pleased with hurting others; inhuman; hard-hearted; barbarous. 2. [Of things.] Bloody; mischievous; destructive.' In volume 2, at page 503, 'unusual' is defined as: 'Not common; not frequent; rare.'"[577] Although Perry, in 2009, asserted that under the Eighth Amendment "a punishment is not unconstitutional unless it is both 'cruel and unusual'," [578] he simultaneously wrote:

> Few would deny that the Eighth Amendment bans any punishment that is intrinsically barbaric: barbaric in and of itself, no matter how heinous the crime, how culpable the criminal, or how effectively the punishment would deter. (Torture is the paradigmatic example of such a punishment.) Intrinsically barbaric punishment is "cruel" within the meaning of the Eighth Amendment; such punishment is also (we may assume) "unusual" in the sense of "not common; not frequent; rare"—not common, that is, as an officially sanctioned punishment.[579]

"Unless it has a deterrent effect," Perry offers, "capital punishment is significantly harsher than necessary to serve the legimate aims of punishment."[580]

V. CONCLUSION

[576] PERRY, *supra* note 573, at 56–57.
[577] *Id.* at 57–58. Samuel Johnson's dictionary has been described as "the standard authority at the time when the Constitution was drawn up in 1787." *Id.* at 57 n.10 (citation omitted).
[578] *Id.* at 80; *see also id*. (describing *cruel and unusual* as "significantly harsher than necessary to serve the legitimate aims of *punishment and evidenced as such by the fact that the punishment is not commonly used*").
[579] *Id.* at 58 (original italics omitted).
[580] *Id.* at 78. For Perry, the necessity of punishment is an important part of the Eighth Amendment calculus. *Id.* at 64 ("[C]apital punishment is *not* consistent with the cruel and unusual punishments clause—the clause *as originally understood*—if: 'no matter what the crime and who the criminal, capital punishment is significantly harsher than necessary to serve the legitimate aims of punishment; and as evidence that it is significantly harsher than necessary, capital punishment is not commonly used for any crime.'").

The prohibition against "cruel and unusual punishments" can be broken down into three concepts: cruelty, unusualness, and punishment. As just noted, Samuel Johnson's *A Dictionary of the English Language* gave this definition of *cruel*, a word that means basically the same thing today: "Pleased with hurting others; inhuman; hard-hearted; barbarous."[581] That source also lists this definition of *unusual*, one that also still captures the essence of that word's widely accepted meaning in the modern world: "Not common; not frequent; rare."[582] And to finish out the Cruel and Unusual Punishments Clause's trifecta of concepts, Johnson's famed dictionary—the one so popular at the time—defined *punishment* as "[a]ny infliction imposed in vengeance of a crime."[583] "Punish" itself was defined as "[t]o chastise; to afflict with penalties" and "[t]o revenge a fault with pain or death."[584] The death penalty, of course, qualifies as a punishment, one that must be subjected to constitutional scrutiny just like any non-lethal corporal punishment.[585]

Regardless of whether a particular punishment was once authorized or imposed, every modern American jurist has a duty, in his or her own time, to decide whether that punishment must *now*—in this day and age—be adjudged cruel and unusual.[586] It has

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[581] *Cruel*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768) (unpaginated entry). That dictionary also makes numerous additional references to *cruel*. The dictionary, among others, makes two separate references to "cruel death"; lists "Cruel; inhuman" as one of the definitions of "BARBAROUS"; lists "Cruel; murderous" as one of the definitions of "BLOODY"; lists "Savage; cruel, inhuman" as one of the definitions of "BRUTAL"; defines "BUTCHERLY" as "Cruel; bloody; barbarous"; defines "CUT-THROAT" as "Cruel; inhuman; barbarous"; defines "DOGHEARTED" as "Cruel; pitiless; malicious"; defines "FELON" as "Cruel; traitorous; inhuman"; defines "INHUMAN" as "Barbarous; savage; cruel; uncompassionate"; defines "MARBLEHEARTED" as "Cruel; insensible; hard-hearted"; lists "Cruel; inhuman; unjustly exactious or severe" as one of the definitions of "OPPRESSIVE"; defines "REMORSELESS" as "Unpitying; cruel; savage"; defines "SANGUINARY" as "Cruel; bloody; murtherous"; lists "Untamed; cruel" as one of the definitions of "SAVAGE"; lists "Cruel; inexorable" as one of the definitions of "SEVERE"; defines "TYRANNICAL" and "TYRANNICK" as "acting like a tyrant; cruel; despotick; imperious"; lists "cruel power" and "Cruel government" as definitions of "TYRANNY"; lists "A cruel despotick and severe master" as one of the definitions of "TYRANT"; lists "Cruel; severe; not clement" as one of the definitions of "UNMERCIFUL"; and lists "cruel" among the definitions of "WRATH." *Id.* (unpaginated entries).

[582] *Id.* (unpaginated entry); "USUAL," by contrast, was defined as "Common; frequent; customary." *Id.* (unpaginated entry); *see also id.* (unpaginated entries) (defining "USUALLY" as "Commonly; frequently; customarily" and "UNUSUALNESS" defined as "Commonness; frequency"). Two of the definitions of "COMMON" are listed as "Frequent; usual; ordinary" and "Commonly; ordinarily"; one of the definitions of "ORDINARY" is listed as "Common; usual"; and "CUSTOMARY" lists "Usual," "Habitual," and "Conformable to established custom" as dictionary definitions. *Id.* (unpaginated entries). While "ACCUSTOMED" is defined as "[a]ccording to custom; frequent; usual," "UNACCUSTOMED" is defined as "1. Not used; not habituated" and "2. New; not usual." *Id.* (unpaginated entries).

[583] *Id.* (unpaginated entry); *see also id.* (showing unpaginated entry for "INFLICT" provides: "To put in act or impose as a punishment").

[584] *Id.* (unpaginated entry).

[585] 18 ENCYCLOPÆDIA PERTHENSIS; OR UNIVERSAL DICTIONARY OF THE ARTS, SCIENCES, LITERATURE, &C. 481 (2d ed. 1816) (defining "PUNISHMENT" as "[a]ny infliction or pain imposed in vengeance of a crime."); *id.* (defining "PUNISH" as "1. To chastise; to afflict with penalties or death for some crime," and "2. To revenge a fault with pain or death—I will *punish* your offences with the rod. *Bible*.").

[586] ANDREW NOVAK, THE GLOBAL DECLINE OF THE MANDATORY DEATH PENALTY: CONSTITUTIONAL JURISPRUDENCE AND LEGISLATIVE REFORM IN AFRICA, ASIA, AND THE CARIBBEAN 14 (2014):

> [I]n the United States after ratification of the Eighth Amendment, one of the first acts of Congress was to enact a law creating offenses

been clear for more than a century, in fact, that the U.S. Supreme Court has rejected an "originalist" interpretation of the U.S. Constitution. As legal scholar Andrew Novak writes: "The first successful challenge to a form of punishment and its appropriateness for an offense under the Eighth Amendment was in *Weems v. United States* in 1910, a constitutional attack on the punishment of cadena temporal (chaining with hard labor) for the crime of forgery of an official document in American-occupied Philippines."[587] "The Court's decision in *Weems*," Novak observes, "was the first to turn away from an 'originalist' view of the Eighth Amendment and find that even forms of punishment in existence at the time the constitution entered into force could be unconstitutional."[588]

In the distant past, various acts—from beatings and whippings to manslaughters and murders—were described as, or were said to have the characteristics of, "cruel"[589] or "cruel and unusual" acts.[590] For example, in *The Magistrate's Criminal Law*, one grade of manslaughter committed "in the heat of passion" (*i.e.*, second-degree manslaughter) was classified as one "[w]hen done in a cruel and unusual manner."[591] Likewise, in 1853, a

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> punishable by death and by corporal punishment. Yet, the proportionality principle in American criminal sentencing has a long history in the United States and beyond since its articulation in Cesare Beccaria's book *On Crimes and Punishments* in 1764, which was widely read in the early American colonies by such important figures as John Adams, Thomas Jefferson, and George Mason.

[587] *Id.* at 15.

[588] *Id.* Prisoners in early America were sometimes forced to perform hard labor in chains. RANDOLPH SHIPLEY KLEIN, ED., SCIENCE AND SOCIETY IN EARLY AMERICA: ESSAYS IN HONOR OF WHITFIELD J. BELL, JR. 228–29 (1986); MICHAEL SHERMAN & GORDON HAWKINS, IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE 50 (1981).

[589] In English broadsides, murders were frequently described as "cruel." *E.g.*, *An Account of the Cruel and Barbarous Murder of James Heron, Pitman, at Benwell, near Newcastle, on Saturday, Jan. 19, 1811*, HARV. LIBR., http://pds.lib.harvard.edu/pds/view/4787459 (last visited June 19, 2012); Robert Bruce, *An Account of the Cruel and Barbarous Murder of Janet Simpson, Between Earsdon and North-Shields, on Saturday Evening, Jan. 12, 1811*, HARV. LIBR., http://pds.lib.harvard.edu/pds/view/4788567 (last visited June 19, 2012). A reference to an "unusual Crime" is found in an Old Bailey record from 1677. *The Proceedings of the Old Bailey, London's Central Criminal Court, 1674 to 1913, Ref. No. t16770117-3*, OLD BAILEY PROC. ONLINE, http://www.oldbaileyonline.org/images.jsp?doc=16770117006 (last visited June 19, 2012) ("A man was likewise Condemned to die for a kind of unusual Crime, but such as the Law, by reason of its bad example and mischievous tendency, has thought fit to restrain with capital Punishment . . . He begg'd heartily for Transportation, but it could not be granted.").

[590] *E.g.*, TRIAL OF THOMAS O. SELFRIDGE, ATTORNEY AT LAW, BEFORE THE HON. ISAAC PARKER, ESQUIRE FOR KILLING CHARLES AUSTIN, ON THE PUBLIC EXCHANGE, IN BOSTON, AUGUST 4TH, 1806, at 146 (1806) ("[I]f 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 is guilty of murder by express malice."); GEORGE CUSTANCE, A CONCISE VIEW OF THE CONSTITUTION OF ENGLAND 344 (1808) (stating "[i]t is also murder by express malice, if a master or teacher upon a sudden provocation beat his servant or scholar in a cruel and unusual manner"); *see also* THE TRIAL OF THE BRITISH SOLDIERS, OF THE 29TH REGIMENT OF FOOT, FOR THE MURDER OF CRISPUS ATTUCKS, SAMUEL GRAY, SAMUEL MAVERICK, JAMES CALDWELL, AND PATRICK CARR, ON MONDAY EVENING, MARCH 5, 1770, at 6, 33, 44 (1824) (referencing a killing in a "cruel and inhuman manner" and in a "cruel and unusual manner").

[591] OLIVER L. BARBOUR, THE MAGISTRATE'S CRIMINAL LAW: A PRACTICE TREATISE ON THE JURISDICTION, DUTY, AND AUTHORITY OF JUSTICES OF THE PEACE IN THE STATE OF NEW-YORK IN CRIMINAL CASES 58, 60, 63 (1841).

Mississippi slave was found to have been whipped in a "cruel and unusual manner."[592] Many courts used the "cruel and unusual manner" phraseology even before the Civil War, so that language—indicating that certain acts can be found to be cruel and unusual because of their inherent characteristics—has been employed for a very long time.[593] If a beating or a whipping or a manslaughter or a murder can be carried out in a cruel and unusual manner and classified as such,[594] then surely a death sentence or an execution—one intentionally designed to dehumanize and kill, and thus strip a person of all rights—might also earn the "cruel and unusual" moniker.

The U.S. Supreme Court itself has long recognized that once-common punishments can fall out of favor—and in fact have throughout world and American history. For example, in *District of Columbia v. Clawans*,[595] the Supreme Court noted: "If we look to the standard which prevailed at the time of the adoption of the Constitution, we find that confinement for a period of ninety days or more was not an unusual punishment for petty offenses, tried without jury."[596] Yet, in noting that punishments such as whippings were no longer in use, the Court in that case went on to emphasize in 1937: "Laying aside those for which the punishment was of a type no longer commonly employed, such as whipping, confinement in stocks, and the like, and others, punished by commitment for an indefinite period, we know that there were petty offenses, triable summarily under English statutes, which carried possible sentences of imprisonment for periods from three to twelve months."[597] There, the Court expressed the view that the protections of the

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[592] BESSLER, *supra* note 7, at 198.

[593] *E.g.*, Dedieu v. People, 8 E.P. Smith 178, 182 (N.Y. Ct. App. 1860) ("In manslaughter, the most usual example is the killing of another in the heat of passion, but in a cruel and unusual manner. This is the offence in the second degree."); Staten v. State, 30 Miss. 619, 621 (Miss. 1856) ("To constitute manslaughter in the second degree, the killing must be done '*in a cruel and unusual manner*.'"); People v. Pearce, 2 Edm. Sel. Cas. 76, 77–78 (N.Y. Sup. Ct. 1849) (stating that a killing is manslaughter in the second degree where the death is effected in a cruel and unusual manner; where the defendant struck decedent on the head with a club, knocking him down, and struck him with the club five or six times after he was down, he was guilty of second-degree manslaughter); *cf.* Jacob v. State, 22 Tenn. 493, 508 (Tenn. 1842) (containing the following argument of a lawyer: "What! shall it be said that a man is indictable for beating his horse in a cruel and unusual manner in the street, and yet that he may lawfully and with impunity beat his slave, a human being . . . ? . . . . Thanks to the enlightened, humanized and Christianized age in which we live, that is not the law."); *In re* Kottman, 20 S.C.L. (2 Hill) 236, 363 (S.C. 1834) (referencing the argument of a lawyer that "the father had beaten" his son "in a cruel and unusual manner without any just cause").

[594] *E.g.*, People v. Gallagher, 1 Edm. Sel. Cas. 578, 578 (N.Y. Sup. Ct. 1848) ("The prisoner was convicted of manslaughter in the second degree, for having caused the death of his mother, in a cruel and unusual manner, by kicking her, and wounded her womb, where she was afflicted with *prolapsus uteri*."); McWhirt v. Com., 44 Va. (3 Gratt.) 594, 604–05 (Va. 1846) ("[W]here, upon a sudden provocation, one beats another in a cruel and unusual matter, 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, he genuine sense of *malitia*."); United States v. Travers, 28 F. Cas. 204, 210 (C.C.D. Mass. 1814) (Story, J., charging jury) ("If, therefore, upon a sudden provocation of a slight nature one beat another in a cruel and unusual manner so that he dies, though he did not intend to kill him, it is murder by express malice."); 12 ENCYCLOPÆDIA BRITANNICA 451 (1797) ("[I]f 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.").

[595] 300 U.S. 617 (1937).

[596] *Id.* at 626–27.

[597] *Id.* at 626. In that case, the Supreme Court examined the history of legislative enactments, noting:

Constitution might evolve, just as the public's views about punishments naturally evolve.[598]

The law sometimes changes slowly, often painfully so, but if an examination of the law since America's founding reveals anything, it is that it does change—often substantially.[599] Punishments that were once lawful have become unlawful, punishments that were once usual have become unusual, and practices such as slavery have been outlawed and given way to legal prohibitions against discrimination.[600] Certainly, the late eighteenth-century Eighth Amendment, which forbade "cruel and unusual punishments"

> At least sixteen statutes, passed prior to the time of the American Revolution by the Colonies, or shortly after by the newly created states, authorized the summary punishment of petty offenses by imprisonment for three months or more. And at least eight others were punishable by imprisonment for six months.

Id. The Supreme Court further stated in that case:

> In the face of this history, we find it impossible to say that a ninety-day penalty for a petty offense, meted out upon a trial without a jury, does not conform to standards which prevailed when the Constitution was adopted, or was not then contemplated as appropriate notwithstanding the constitutional guarantee of a jury trial.

Id. at 626–27.

[598] As the Court stated, articulating its view in 1937:

> We are aware that those standards of action and of policy which finds expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted.

Id. at 627.

[599] OPINIONS OF THE NEW YORK STATE COMPTROLLER 3012 (1982) ("If there is one constant that permeates the field of law, that constant is change. Statutes change, decisional law changes, local law changes and even regulations change."); CHRISTOPHER BERRY GRAY, ED., THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 127 (2012) (noting that "the common law changes and develops primarily as a consequence of judicial decisions"). As James Madison, writing as "Publius" in *The Federalist No. 14*, himself noted: "Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?" THE FEDERALIST No. 14 (James Madison).

[600] Rainer Nickel, *Widening the Scope: Anti-Discrimination Law, Social Equality, and the Right to Equal Treatment*, *in* RUSSELL A. MILLER & PEER ZUMBANSEN, EDS., ANNUAL OF GERMAN AND EUROPEAN LAW 358 (2004):

> U.S. anti-discrimination law can be taken as a good example for a progressive awareness of the social reality of prejudice and its social costs. Historically, the United States was the avant-garde of an active anti-discrimination policy, with roots reaching back even to the nineteenth century—a history that also reflects the long shadow of slavery and the struggles to overcome the legacy of slavery, racism.

and which was originally directed against federal action alone,[601] must now be read in conjunction with the nineteenth-century Fourteenth Amendment's Due Process and Equal Protection Clauses and considered in its twenty-first century context. "It is the genius of the common law to resist innovation," the American revolutionary Patrick Henry offered in 1788 at a speech to Virginia's ratifying convention for the U.S. Constitution.[602] Yet, the common law—like constitutional and statutory law—has changed through the centuries, and there is no reason to believe—nor should there be—that the law will ever stop evolving to adjust to modern times and contemporary circumstances.

Whereas the English prohibition against cruel and unusual punishments was, history shows, directed at reigning in the arbitrary discretion of courts, the American prohibitions against cruel and unusual punishments constrain the actions of all three branches of government.[603] Whereas the death penalty was once the mandatory punishment for a wide array of felonies, death sentences are now handed out in a highly discretionary and inequitable fashion.[604] The only constant that runs through the history of the American death penalty, one rife with arbitrariness,[605] is that death sentences and executions have always been parsed or meted out in a discriminatory and error-prone manner.[606] And whereas torture, the aggravated form of cruelty, was once thought of as a

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[601] JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 22 (2001) ("It is important to remember that as part of the Bill of the Rights, the Eighth Amendment was originally directed against federal action alone.").

[602] *The Original Meaning of "Unusual", supra* note 24, at 1339 (quoting Patrick Henry, *Speech to the Virginia Ratifying Convention for the United States Constitution* (June 9, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 172 (Jonathan Elliot, ed.)).

[603] TERRY JOHNSON, LEGAL RIGHTS 4 (2005) ("[T]he English Bill of Rights is unlike the American Bill of Rights, which limits the power of all branches of the national government—including the U.S. Congress.").

[604] ROBERT M. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 11 (5th ed. 2017) ("In 1837, Tennessee became the first state to enact a discretionary death penalty statute for murder; Alabama did the same four years later, followed by Louisiana five years after that. All states before then employed mandatory death penalty statutes that required anyone convicted of a designated capital crime to be sentenced to death."); *id.* ("This change from mandatory to discretionary death penalty statutes, which introduced unfettered sentencing discretion into the capital-sentencing process, was considered at the time a great reform in the administration of capital punishment.").

[605] EVAN J. MANDERY, CAPITAL PUNISHMENT IN AMERICA: A BALANCED EXAMINATION 131 (2d ed. 2012):

> The death penalty is arbitrary in many different ways: It is geographically arbitrary—defendants in states without the death penalty are treated differently from how defendants in states that do have the death penalty are treated. It is economically arbitrary—rich people have access to better representation. The death penalty is arbitrary by gender because the death penalty is rarely sought and imposed against women. It is arbitrary by race—people who kill whites are more likely to receive the death penalty than are those who murder blacks. Finally, the death penalty is arbitrary in the most basic sense—it is ultimately within the jury's discretion to impose the death penalty or not, and the jurors need not explain the basis of their decision.

[606] *See, e.g.*, Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 45 (1984) ("[T]here is a considerable body of published research on racial patterns in capital punishment, and most of it indicates that racial

practice that operated principally *on the body*, it is now clear from the modern-day definition of torture found in the Convention Against Torture and other similar legal instruments that both physical *and* mental torture are strictly prohibited.[607] Consequently, even if death sentences and executions could be imposed or carried out in a *physically* pain-free way, they should still be categorized under the rubric of torture. Death sentences and executions—the record shows—inflict cruel and inhuman torment and, in a particularly unusual manner, what modern-day jurists should classify, at the very least, as *psychological* torture.[608]

factors have been influential in determining who has been sentenced to die and who has been executed."); *see generally* Bessler, *supra* note 391 (discussing the long history of racial discrimination in capital cases).

[607] MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 1 (2009), https://fas.org/sgp/crs/intel/RL32438.pdf; THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS 108 (2017).

[608] John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7, 33–35 (2018); *see also* People v. Anderson, 493 P.2d 880, 894 (Cal. 1972):

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.