

**WHEN THE FEDERAL DEATH PENALTY IS “CRUEL AND UNUSUAL”\***

by

**Michael J. Zydney Mannheimer\*\***

*Recent changes to the way the U.S. Department of Justice decides whether to pursue capital charges have made it more likely that the federal death penalty will be sought in cases in which the criminal conduct occurred within States that do not authorize capital punishment for any crime. As a result, since 2002, five people have been sentenced to death in federal court for conduct that occurred in States that do not authorize the death penalty. This state of affairs is in serious tension with the Eighth Amendment’s proscription against “cruel and unusual punishments.” A complete understanding of the Bill of Rights can be achieved only by placing primary emphasis on the views of the Anti-Federalists, who conditioned ratification of the Constitution on the inclusion of such a Bill. Such an account of the Bill of Rights recognizes that, with respect to most if not all of its provisions, “structural” and “individual rights” concerns are intertwined. That is, these provisions tie the protection of individual rights to the preservation of State sovereignty from the danger of federal encroachment. In particular, recent scholarship suggests that the criminal procedure protections of the Bill were in large part motivated by a desire on the part of the Anti-Federalists to make it more difficult for the federal government to investigate, prosecute, convict, and punish for crime, traditionally a prerogative of the States. It follows from this that the Eighth Amendment prohibition on “cruel and unusual punishments” was designed primarily to restrain the federal power to punish in a way that conflicts with the norms of an individual State. Thus, the imposition of the death penalty by the federal government in any State that does not impose that mode of punishment constitutes “cruel and unusual punishment” in violation of the Eighth Amendment.*

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The death sentence imposed on Gary Sampson on January 29, 2004 in Massachusetts<sup>1</sup> must have come as quite a surprise to many people in that State. After all, the State had not had a death penalty statute on the books since 1984,<sup>2</sup> and no one had been executed there in nearly six decades.<sup>3</sup> Nevertheless, Sampson was eligible for, and ultimately received, a sentence of death because he was tried, convicted, and sentenced in federal court, and the federal death penalty statutes make no distinction between defendants tried in districts located in States that have the death penalty and those tried in districts located in States that do not. Such a distinction has been largely unnecessary because, until recently, local federal prosecutors, when deciding whether to seek the death penalty, heavily weighed the local feelings about the death penalty, and generally did not seek the ultimate sanction where the State had no provision for the death penalty. Recently, however, the Attorney General has decided to overrule such decisions in a number of cases in an effort to make the death penalty more uniform throughout the nation. As a result, five federal defendants since 2002 have been sentenced to die in federal court for crimes committed within States that do not authorize capital punishment for any crime.

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<sup>1</sup> See [http://www.boston.com/news/local/massachusetts/articles/2004/01/29/sampson\\_receives\\_states\\_first\\_federal\\_death\\_sentence/](http://www.boston.com/news/local/massachusetts/articles/2004/01/29/sampson_receives_states_first_federal_death_sentence/) (last viewed June 8, 2005).

<sup>2</sup> See *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 128 (Mass. 1984) (striking down state’s death penalty law).

<sup>3</sup> The last execution in Massachusetts occurred on May 9, 1947, when Philip Bellino and Edward Gertson were executed for murder. See Brian Hauck et al., *Capital Punishment Legislation in Massachusetts*, 36 *Harv. J. on Legis.* 479, 482 & n.24 (1999).

This Article argues that such efforts by the Attorney General to achieve national uniformity are not only misguided but are also unconstitutional. Specifically, it argues that the Eighth Amendment’s proscription of “cruel and unusual punishments” prohibits the federal government from imposing a sentence of death in any State that does not itself impose that punishment. While certainly novel, this proposition is faithful to the vision of the Anti-Federalist proponents of the Bill of Rights, by imposing an important constraint on the central government and reposing ultimate authority in the people of the several States to decide whether a particular mode of punishment is acceptable within their respective borders. Moreover, this proposed rule relies on two well accepted principles of Eighth Amendment jurisprudence. First, this rule is addressed to the constitutionality of a mode of punishment, and while the current Justices on the Supreme Court are in wide disagreement over whether and to what extent the Eight Amendment forbids disproportionate punishments, all agree that it does address whether particular modes of punishment pass constitutional muster. And, second, the proposed rule relies solely on objective and readily ascertainable evidence regarding the acceptability of the death penalty – whether the people of a State have indeed accepted it – and while some Justices believe that the Court is required to go beyond the objective evidence in determining whether a punishment is “cruel and unusual,” all agree that such objective evidence must be given first priority.

Part I of this Article looks at the federal death penalty and its recent application to defendants who committed crimes in States that do not authorize capital punishment. Part II reviews the Supreme Court’s Eighth and Fourteenth Amendment jurisprudence on “cruel and unusual punishments,” distilling four main principles from that jurisprudence: that those Amendments prohibit punishments not authorized by law; that they forbid certain modes of punishment; that they prohibit non-capital punishments that are grossly disproportionate to the crime; and that they

categorically bar certain classes of offenses and offenders from receiving capital punishment. Part III looks at the Eighth Amendment from an Anti-Federalist point of view. This Part advances the view of the criminal procedure protections of the Bill of Rights, not as assuring the general fairness and reliability of the federal criminal process, but as creating obstacles to the investigation, prosecution, conviction, and punishment of persons for federal crimes. This view treats the protection of criminal defendants at the federal level as intimately intertwined with the protection of state prerogatives in addressing crime, and treats the Eighth Amendment as a particular embodiment of this interconnectedness of individual and collective rights.

Part IV recovers the original Eighth Amendment from the alloy that has been produced by mixing it with the Fourteenth in the crucible of incorporation. This Part re-examines the principles of current Eighth Amendment jurisprudence in light of the Anti-Federalist approach to the Bill of Rights and distills the key principle of the Eighth Amendment in its pure form, unmediated by the demands of the Fourteenth: the prohibition of particular modes of punishment, as informed by the use of inter-jurisdictional comparisons of punishments for identical or similar crimes. This Part then proposes that the Eighth Amendment be read as restraining the federal power to utilize a particular mode of punishment, including the death penalty, when that power conflicts with the norms of an individual State. Finally, this Part discusses possible objections to this approach.

## **I. THE FEDERAL DEATH PENALTY**

The federal government has always exacted death as the price for the most serious crimes. Only recently, however, as a result of the process of federalization of crime, has the federal death penalty covered so many crimes that traditionally were left to the States to punish. Even more recently, the Department of Justice has instituted policies to increase national uniformity in the imposition of the death penalty. The result of the confluence of these two trends is that five current

prisoners on federal death row committed their crimes in States that do not authorize capital punishment.

**A. History and Scope of the Federal Death Penalty**

Shortly after the First Congress approved the Bill of Rights, it drafted a federal crime bill that attached the penalty of death by hanging to several of the crimes it created.<sup>4</sup> Among the capital crimes created were treason, murder on federal land, forgery, uttering forged securities, counterfeiting, and various offenses, including piracy, committed on the high seas.<sup>5</sup> In 1897, Congress reduced the number of capital crimes to five.<sup>6</sup> Although the death penalty was expanded over the next several decades, only thirty-four people were executed by the federal government from 1927 through 1963.<sup>7</sup>

The federal government was effectively without a death penalty for 16 years after the U.S. Supreme Court's 1972 decision in Furman v. Georgia<sup>8</sup> ushered in a new era of death penalty jurisprudence.<sup>9</sup> While several pre-Furman statutes continued to authorize the death penalty for some

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<sup>4</sup> See Christopher Q. Cutler, Death Resurrected: The Reimplementation of the Federal Death Penalty, 23 Seattle U.L. Rev. 1189, 1193 (2000); Rory K. Little, The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role, 26 Fordham Urb. L.J. 347, 349, 360, 365 (1999) [hereinafter Little, History]; Rory K. Little, The Future of the Federal Death Penalty, 26 Ohio N.U. L. Rev. 529, 538 (2000) [hereinafter Little, Future].

<sup>5</sup> See Cutler, supra note 4, at 1193; Little, History, supra note 4, at 362-63; Little, Future, supra note 4, at 538.

<sup>6</sup> See Cutler, supra note 4, at 1195; Little, History, supra note 4, at 367; Little, Future, supra note 4, at 538.

<sup>7</sup> See Cutler, supra note 4, at 1193; George Kannar, Federalizing Death, 44 Buff. L. Rev. 325, 329 (1996); Little, History, supra note 4, at 370; Little, Future, supra note 4, at 539.

<sup>8</sup> 408 U.S. 232 (1972).

<sup>9</sup> See Little, History, supra note 4, at 349.

federal crimes, these statutes were likely unconstitutional because they did not provide for procedures the Supreme Court had announced were required by the Eighth Amendment.<sup>10</sup>

However, the federal government re-introduced the death penalty with the Anti-Drug Abuse and Death Penalty Act of 1988, also known informally as the Drug Kingpin Act,<sup>11</sup> which “added the death penalty for a very narrow realm of cases in which murder resulted from a drug related offense.”<sup>12</sup> The federal government greatly expanded the scope of the death penalty in 1994 with the Federal Death Penalty Act (“FDPA”),<sup>13</sup> “a revolution for federal capital punishment.”<sup>14</sup> The “FDPA substantially increased the availability of the death penalty for federal offenders” by: creating several new death-eligible crimes; authorizing the death penalty for several pre-existing federal crimes; and detailing the procedures to be employed for pre-existing statutes that already provided for the death penalty but that were likely unconstitutional after Furman.<sup>15</sup> Although the number of new death-eligible federal offenses is “open to interpretation,”<sup>16</sup> by most counts the FDPA created sixty capital crimes.<sup>17</sup> Moreover, other than “treason against the federal government

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<sup>10</sup> See Sandra D. Jordan, Death for Drug Related Killings: Revival of the Federal Death Penalty, 67 Chi.-Kent L. Rev. 79, 86 & n.26 (1992); Little, History, supra note 4, at 349 n.5, 373-76.

<sup>11</sup> See John P. Cunningham, Comment, Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994, 32 U. Rich. L. Rev. 939, 950 (1998).

<sup>12</sup> Charles C. Boettcher, Comment, Testing the Federal Death Penalty Act of 1994, 29 Tex. Tech. L. Rev. 1043, 1054 (1998).

<sup>13</sup> See John Brigham, Unusual Punishment: The Federal Death Penalty in the United States, 16 Wash. U. J.L. & Pol’y 195, 210-11 (2004); Little, History, supra note 4, at 381-88; Little, Future, supra note 4, at 539.

<sup>14</sup> Boettcher, supra note 12, at 1057.

<sup>15</sup> See Little, History, supra note 4, at 388-91.

<sup>16</sup> See Little, History, supra note 4, at 391 (quoting Charles Kenneth Eldred, Recent Developments, The New Federal Death Penalties, 22 Am. J. Crim. L. 293, 297 n.21 (1994)).

<sup>17</sup> See Boettcher, supra note 12, at 1057; Brigham, supra note 13, at 211; Cunningham, supra note 11, at 952; Cutler, supra note 4, at 1209-10 & n.150; Eldred, supra note 16, at 293 n.2; Kannar, supra note 7, at 328.



[and] offenses committed exclusively on federal territory,”<sup>18</sup> every crime covered by the Kingpin Act and the FDPA is also punishable pursuant to the laws of the several States.<sup>19</sup> Indeed, every single one of the 40 current federal death row prisoners might have been tried, convicted, and sentenced for murder in State court.<sup>20</sup>

## **B. The Federal Death Penalty in States Without Capital Punishment**

As of this writing, capital punishment is unauthorized by twelve States: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.<sup>21</sup> Yet the federal death penalty applies nationwide, even in those States

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<sup>18</sup> Little, Future, supra note 4, at 542.

<sup>19</sup> See Boettcher, supra note 12, at 1054-55, 1058-59; Cunningham, supra note 11, at 954-55; Eldred, supra note 16, at 296-97; Little, History, supra note 4, at 388-91 & nn.232, 237, 238; Little, Future, supra note 4, at 541; Sean M. Morton, Comment, Death Isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment, 64 Alb. L. Rev. 1435, 1440 (2001); Brian Serr, Of Crime and Punishment, Kingpins and Footsoldiers, Life and Death: The Drug War and the Federal Death Penalty Provision – Problems of Interpretation and Constitutionality, 25 Ariz. St. L.J. 895, 906 18 (1993); Peggy M. Tobolowsky, Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murders, 18 J. Contemp. L. 47, 69 (1992).

<sup>20</sup> See Little, Future, supra note 4, at 532-33 (“[O]f the twenty-six federal defendants that have been sentenced to death since 1988 [as of 2000], all were convicted of criminal conduct duplicative of capital murder conduct as defined by the states in which the murders occurred.”). See also Rory K. Little, Why a Federal Death Penalty Moratorium?, 33 Conn. L. Rev. 791, 802-07 (2001). For an update to Little’s work, see <http://www.deathpenaltyinfo.org/article.php?scid=29&did=193> (last viewed Aug. 12, 2005). Despite the fact that some of these crimes occurred on federal property, the defendants’ “conduct plainly violated state murder statutes,” Little, Future, supra note 4, at 533 n.17, and “there is no theoretical reason that states could not be given authority to prosecute crimes committed on federal property within their borders.” For a helpful chart demonstrating the state crimes for which these federal prisoners could have been prosecuted, see id. at 543-44.

<sup>21</sup> See *Roper v. Simmons*, 125 S.Ct. 1183, 1201 (2005). Although Kansas has a death penalty statute, it was invalidated in *State v. Marsh*, 102 P.3d 445 (Kan. 2004). However, the U.S. Supreme Court recently agreed to hear the case. See *Kansas v. Marsh*, 73 USLW 3539 (U.S. Kan. May 31, 2005) (NO. 04-1170). New York also has a death penalty statute that recently was invalidated in *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). The state did not petition the U.S. Supreme Court for a writ of certiorari, see e-mail correspondence from Barbara Zolot, Supervising Attorney, Center for Appellate Litigation, New York, N.Y., dated June 8, 2005 (on file with author), and its time for doing so has expired. Prospects in New York for reinstatement of the death penalty appear dim. See Patrick D. Healy, “Death Penalty Seems Unlikely to be Revived,” N.Y. Times, Feb. 11, 2005. Thus, the number of non-death penalty jurisdictions may soon rise to thirteen or fourteen.

that do not authorize capital punishment for any crime.<sup>22</sup> Indeed, the FDPA expressly contemplates this, for it provides that if the conviction takes place in a State that does not authorize capital punishment, the court must designate another State where the sentence may be executed.<sup>23</sup>

Moreover, “although the new federal statutes do not demand national uniformity in administration of the federal death penalty, such a legislative policy is strongly implied.”<sup>24</sup>

The Department of Justice (“DOJ”) also has expressed a goal of avoiding geographical disparity in the imposition of the federal death penalty.<sup>25</sup> To achieve this end, DOJ has centralized federal death penalty prosecutions by instituting formal Capital Case Protocols. These Protocols require approval of the Attorney General via a Death Penalty Evaluation form before the death penalty is sought in any federal case.<sup>26</sup> In addition, even in cases where the local U.S. Attorney

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<sup>22</sup> See Jordan, *supra* note 10, at 85 (observing that the 1988 Act “imposes the death penalty in states that have not enacted legislation to execute their citizens, even for the most heinous crimes”); Little, History, *supra* note 4, at 472 (“Congress has written a federal death penalty statute which is applicable nationally and contains no express suggestions or endorsement of regional disparities in its implementation.”); Morton, *supra* note 19, at 1436 (“[T]he absence of a state capital punishment regime in a given state would not bar a federal capital prosecution in that state . . . .”); Michael M. O’Hear, National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities, 87 Iowa L. Rev. 721, 731 (2002) (“[M]ost striking [in terms of federal/state sentencing disparity] are the federal death penalty cases in states that do not authorize capital punishment.”); see also Brigham, *supra* note 13, at 216 (“[N]o jurisdiction ‘will be able to declare itself a death penalty free zone.’”) (quoting Eric Goldscheider, “Fed’s Death Penalty Net Casts Ever Wider,” Boston Globe, June 11, 2000, at E1).

<sup>23</sup> See Little, History, *supra* note 4, at 404; see also Brigham, *supra* note 13, at 225 n.133; Cunningham, *supra* note 11, at 957; Cutler, *supra* note 4, at 1214; Jordan, *supra* note 10, at 91; Kannar, *supra* note 7, at 331; Morton, *supra* note 19, at 1444.

<sup>24</sup> Little, History, *supra* note 4, at 431-32. Little notes that that “one goal” of the Sentencing Reform Act of 1984 “was to eliminate ‘unwarranted sentencing disparities’ among similar cases and defendants across the country.” *Id.* at 436 (quoting 28 U.S.C. § 991(b)(1)(B)); see also *id.* at 472 (similar); *id.* at 356 (asserting that Congress “has stated a general sentencing policy that regional ‘disparities’ should be avoided.”).

<sup>25</sup> See Little, History, *supra* note 4, at 439 (“[I]t appears to be current DOJ policy that, as best as humanly possible, the federal death penalty be administered uniformly across the nation.”); John Gleeson, Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty, 89 Va. L. Rev. 1697, 1699 (2003) (stating that DOJ has attempted “to achieve national uniformity in the imposition of the death penalty”).

<sup>26</sup> See U.S. Dep’t of Justice, United States Attorneys’ Manual §§ 9-10.020, 9-10.040 (updated June 7, 2001) (online at [www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam)) [hereinafter 2001 U.S. Attorneys’ Manual]; accord Little, History, *supra* note 4, at 407; see also *id.* at 424 (“Only the Attorney General can make a final decision regarding the death penalty.”).

could, but does not, request permission from the Attorney General to seek the death penalty, she must still complete such a form.<sup>27</sup>

Three significant changes instituted shortly after President George W. Bush took power have made it more likely that the U.S. government would seek the death penalty at a higher rate than previously in districts within States that do not authorize capital punishment. First, prior to that time, “recommendation[s] . . . against seeking death in a death-eligible case [were] almost always accepted . . . because U.S. Attorneys generally exercise great care in submitting their recommendations and are presumed to know their local communities, jury pools, judges, and the overall strengths and weaknesses of their particular case far better than Main Justice personnel.”<sup>28</sup> By contrast, in more recent cases, the decision to seek the death penalty in several cases was made over the contrary recommendations of the local U.S. Attorneys.<sup>29</sup>

Second, prior to 2001, a local U.S. Attorney was required to submit a Death Penalty Evaluation form when a “defendant [was] ‘charge[d] . . . with an offense subject to the death penalty.’”<sup>30</sup> The DOJ, under the leadership of newly appointed Attorney General John Ashcroft, amended the Protocols in June 2001, to require submission of the form whenever the local U.S. Attorney has charged a defendant with “an offense that is punishable by death or conduct that could be charged as an offense punishable by death.”<sup>31</sup> The intent of the change is obvious. Under the prior version of the Protocols, a local U.S. Attorney could evade DOJ review of the decision not to

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<sup>27</sup> See 2001 U.S. Attorneys’ Manual, supra note 26, § 9-10.040; accord Little, History, supra note 4, at 408.

<sup>28</sup> Little, History, supra note 4, at 422; see also Gleeson, supra note 25, at 1715 (“U.S. Attorneys know . . . how the communities they serve and protect perceive crimes and evaluate punishments.”).

<sup>29</sup> See Shelley Murphy, “Death Penalty Foes Rap Ashcroft,” Boston Globe, Sept. 30, 2003 (online at [http://www.boston.com/news/local/articles/2003/09/20/death\\_penalty\\_foes\\_rap\\_ashcroft?mode=PF](http://www.boston.com/news/local/articles/2003/09/20/death_penalty_foes_rap_ashcroft?mode=PF) ).

<sup>30</sup> Little, History, supra note 4, at 409-10 (quoting U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-10.040 (updated Jan. 8, 1999)) [hereinafter 1999 United States Attorneys’ Manual] (alteration in original).

<sup>31</sup> 2001 U.S. Attorneys’ Manual, supra note 26, § 9-10.040 (emphasis added).

seek the death penalty through the simple expedient of declining to charge the defendant with a capital crime but instead charging him with a lesser offense. Thus could a U.S. Attorney in a State with no death penalty adhere to local views on capital punishment and avoid acceding to the otherwise mandatory DOJ review. Under the revised version of the Protocols, the only way for a local U.S. Attorney to evade such review is by declining to obtain an indictment of the defendant at all. Otherwise, the DOJ reviews every case in which a defendant's alleged conduct subjects him to the federal death penalty.

The final change implemented by the Bush administration is the most significant. The Protocols have always “suggest[ed] that a federal indictment should be returned in a potential death penalty case only when the ‘Federal interest in the prosecution is more substantial than the interests of the State or local authorities.’”<sup>32</sup> This instruction suggests a presumption in favor of state rather than federal prosecution.<sup>33</sup> Prior to the revisions, however, “[t]he protocols expressly direct[ed] that . . . penalty-driven decisions to file federal charges are inappropriate: ‘the fact that the maximum Federal penalty is death [where the relevant state’s maximum penalty is not] is insufficient, standing alone, to show a more substantial interest in Federal prosecution.’”<sup>34</sup> This admonition was removed from the June 2001 version of the Protocols.<sup>35</sup> Although the Protocols do not expressly state that the absence of death as a possible punishment in State court is a sufficient reason in and of itself to bring

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<sup>32</sup> Little, History, supra note 4, at 413 (quoting 1999 United States Attorneys’ Manual, supra note 30, § 9-10.070); accord Morton, supra note 19, at 1441..

<sup>33</sup> See Little, History, supra note 4, at 464-65 (“[T]he DOJ’s death penalty protocols seem to suggest a preference for state prosecution in potential federal capital cases . . . .”); cf. O’Hear, supra note 22, at 733-34 n.73 (“The presumption in favor of federal prosecution is not so strong in capital cases.”).

<sup>34</sup> Little, History, supra note 4, at 414 (quoting 1999 United States Attorneys’ Manual, supra note 30, § 9-10.070) (alteration in original); see also id. at 466 (“[T]he death penalty protocols make it clear that the fact that the death sentence might be available if the case were charged federally, where the conduct occurred in a state that does not authorize capital punishment, is not ‘alone’ sufficient to establish a ‘more substantial’ federal interest.”); accord Morton, supra note 19, at 1442 & n.49; O’Hear, supra note 22, at 731 n.57.

<sup>35</sup> See O’Hear, supra note 22, at 731 n.57; see also Murphy, supra note 29.

a federal prosecution, the message to local U.S. Attorneys is unmistakable: it is now “‘fair game’ to pull a state case into federal court in a bid to win a death sentence.”<sup>36</sup>

As a result, five of the 40 current federal death row prisoners were tried, convicted, and sentenced to death for conduct committed within States that do not authorize capital punishment.<sup>37</sup> Marvin Gabrion was sentenced to death on March 16, 2002, for a 1997 murder in Manistee National Forest, located in Michigan.<sup>38</sup> Gary Sampson was convicted of murdering two men during a carjacking in Massachusetts, and he was sentenced to death on January 29, 2004.<sup>39</sup> On October 27, 2004, and June 21, 2005, respectively, federal juries returned verdicts sentencing Dustin Honken and Angela Johnson to death for the murder of two girls in Iowa who were witnesses to the murder of their mother.<sup>40</sup> Most recently, a federal jury in Vermont on July 14, 2005, recommended a sentence of death for Donald Fell, who murdered a woman following a carjacking in that State.<sup>41</sup> Additionally, Alfonso Rodriguez Jr. has been charged with kidnapping a woman in North Dakota

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<sup>36</sup> Murphy, *supra* note 29 (quoting Donald K. Stern, former US attorney for the District of Massachusetts); see also Brigham, *supra* note 13, at 220 (“[F]ederal capital statutes are sometimes turned to where the availability of the death penalty under federal law presents an opportunity to seek harsher punishment where the states do not provide a capital sanction.”).

<sup>37</sup> Cf. Morton, *supra* note 19, at 1465 (presciently predicting in 2001 that “it seems almost inevitable . . . that a [successful] federal capital prosecution will occur in a state that does not . . . provide for . . . the death penalty”); O’Hear, *supra* note 22, at 731 n.57 (making similar prediction in 2002).

<sup>38</sup> See <http://www.deathpenaltyinfo.org/article.php?scid=29&did=193> (last viewed June 8, 2005).

<sup>39</sup> See <http://www.deathpenaltyinfo.org/article.php?scid=29&did=193> (last viewed June 8, 2005); *supra* text accompanying notes 1 to 3.

<sup>40</sup> See <http://www.deathpenaltyinfo.org/article.php?scid=29&did=193> (last viewed Aug. 12, 2005). Although Honken and Johnson have not been formally sentenced as of this writing, the judge is required by the jury’s verdict to impose the death sentence. See 18 U.S.C. § 3594; <http://www.deathpenaltyinfo.org/article.php?scid=29&did=193> (last viewed Aug. 12, 2005). It appears that, as of this writing, post-trial motions are still pending in that case. See *U.S. v. Johnson*, 362 F. Supp. 2d 1043, 1052 (N.D. Iowa 2005).

<sup>41</sup> See <http://www.deathpenaltyinfo.org/article.php?scid=29&did=193> (last viewed Aug. 12, 2005).

and murdering her in Minnesota.<sup>42</sup> His capital trial is scheduled to start March 6, 2006, in U.S. District Court for the District of North Dakota.<sup>43</sup> Each of these defendants could have been prosecuted on state-law murder charges in Michigan,<sup>44</sup> Massachusetts,<sup>45</sup> Iowa,<sup>46</sup> Vermont,<sup>47</sup> or North Dakota,<sup>48</sup> respectively. However, none of these states authorizes the punishment of death for murder or any other crime.<sup>49</sup>

Of course, the Supremacy Clause of the Constitution, provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>50</sup> Thus, it appears at first blush that the authorization by Congress of the death penalty in federal cases trumps the policy decision of an individual State to eschew capital punishment. But, of course, the U.S. Constitution also contains a later-enacted provision limiting the

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<sup>42</sup> See “Dru Sjodin Case: Rodriguez Trial Jury Pool Will Come From Southeastern North Dakota,” Grand Fork Herald, Dec. 16, 2004 (online at <http://www.grandforks.com/mld/grandforks/news/local/10427569.htm>).

<sup>43</sup> See *id.*

<sup>44</sup> See Mich. Cons. Laws § 750.316(a) (“A person who commits . . . [m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing . . . is guilty of first degree murder . . .”). Though Gabrion’s crime occurred on federal land, Michigan has retained concurrent criminal jurisdiction over national forest lands in the State. See Mich. Cons. Laws § 3.401.

<sup>45</sup> See Mass. Gen. Laws 265 § 1 (“Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree.”).

<sup>46</sup> See Iowa Code Ann. § 707.2(1) (“A person commits murder in the first degree when the person . . . willfully, deliberately, and with premeditation kills another person.”).

<sup>47</sup> See Vt. Stat. Ann. § 2301 (“Murder . . . committed in perpetrating . . . robbery . . . shall be murder in the first degree.”).

<sup>48</sup> See N.D. Cent. Code § 12.1-16-01(1)(c) (“A person is guilty of murder . . . if the person . . . commits . . . robbery [or] kidnapping . . . and, in the course of and in furtherance of such crime or of immediate flight therefrom, the person or any other participant in the crime causes the death of any person.”).

<sup>49</sup> See *supra* text accompanying note 21.

<sup>50</sup> U.S. Const., art. VI, cl. 2.

federal government's power to punish. Does the Eighth Amendment's ban on "cruel and unusual punishments"<sup>51</sup> have any impact on the ability of the federal government to impose the death penalty within the boundaries of a State that chooses not to do so?<sup>52</sup> It is to this question that this Article now turns.

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<sup>51</sup> "[C]ruel and unusual punishments [shall not] be inflicted." U.S. Const., amend VIII.

<sup>52</sup> This question has not been addressed in any systematic fashion. Professor Rory K. Little has acknowledged that "the federalism issues raised by applying a national death penalty law in states that do not accept that penalty raise vital questions that go deep into our theories of government as well as criminal punishment." Little, *Future*, supra note 4, at 573-74. He allows that "[o]n an issue so sensitive, so irrevocable, and so morally defined for many, perhaps recognition of state preferences is not unreasonable." *Id.* at 566. Yet Little indicates his belief that any exemptions for whole states from the federal death penalty "runs counter to the overwhelming number of federal criminal sentencing provisions" that stress national uniformity and seek to avoid geographic disparities. *Id.* at 565. Ultimately, Little leaves the issue for another day. See *id.* at 566.

A provision of the Innocence Protection Act of 2000 ("IPA"), introduced in the U.S. Senate, see S. 2073, 106<sup>th</sup> Cong., § 401 (2000), would have generally prohibited the federal government from "seek[ing] the death penalty in any case initially brought before a district court of the United States that sits in a State that does not prescribe, authorize, or permit the imposition of such penalty for the alleged conduct." See Brigham, supra note 13, at 219; Little, *Future*, supra note 4, at 564. However, the Senate sponsors' belief that they were merely exercising legislative grace, rather than acting pursuant to constitutional mandate, is demonstrated by the fact that the exemption could have been overridden upon appropriate certification by the Attorney General. See S. 2073, 106<sup>th</sup> Cong., § 401 (2000); Little, *Future*, supra note 4, at 564-65. In any event, when the IPA became law in 2004, this provision was not included. See Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Larger Reforms*, 29 *Champion* 28, 29 (2005).

Professor John Brigham, quoting an e-mail communication from former Oregon Supreme Court Justice Hans Linde, has suggested that "[t]he death penalty no longer is unusual in Texas or Florida, but is highly unusual, and arguably regarded as unacceptably cruel, among the people of Massachusetts." Brigham, supra note 13, at 214 n.90. Brigham has endorsed Linde's suggestion of "a 'state-based, relativist interpretation to [sic] the Eighth Amendment's ban against 'cruel and unusual' punishments.'" *Id.* (emphasis omitted). However, he has not supported this position with any textual, historical, or structural analysis of the Eighth Amendment.

Finally, student commentator Sean Morton has argued that the notion of "cruel and unusual punishments" under the Eighth Amendment should be defined according to local values expressed by individual states through fundamental state law." Morton, supra note 19, at 1437-38 (footnote omitted). However, he apparently would limit application of this principle in two ways. First, it would apply only to those States whose constitutions forbid the death penalty. See *id.* at 1463 ("[A] serious difficulty arises when the federal government attempts to exercise its criminal jurisdiction within a State that affirmatively prohibits the death penalty via that state's constitution.") (emphasis added). Second, it would apply only to States that reject "the death penalty as an impermissible cruel and unusual punishment," see *id.* at 1437, rather than merely undesirable or ineffective. Additionally, like Brigham, Morton does not engage in any sustained textual, historical, or structural analysis of the Cruel and Unusual Punishments Clause.

## II. THEORIES OF THE EIGHTH AMENDMENT

What is known as the Supreme Court’s “Eighth Amendment” jurisprudence is really an amalgam of jurisprudence of the Eighth and Fourteenth Amendments, since most of the decisional law has come from the States.<sup>53</sup> To understand the jurisprudence in this area, we must first take a brief look at the Eighth Amendment’s text and its history.

### A. A Word (or Two) About the Text

Our starting point, of course, is the text of the Cruel and Unusual Punishments Clause. As Justice Scalia has noted, for a punishment to violate the Clause, it must be both “cruel and unusual.”<sup>54</sup> After all, at the time the Eighth Amendment was ratified, “five State Constitutions prohibited ‘cruel or unusual punishments,’ and two prohibited ‘cruel’ punishments.”<sup>55</sup> Had the framers and ratifiers of the Eighth Amendment meant it to prohibit anything less than punishments that were both cruel and unusual, they knew how to do so. Yet cruelty is not a difficult threshold to meet. At the time the Clause’s direct ancestor, the English Bill of Rights,<sup>56</sup> was written, “the word ‘cruel’ . . . simply meant severe or hard.”<sup>57</sup> Thus, a sentence of death or of a lengthy term of imprisonment at hard labor might be cruel but, as Tom Jones might say, it’s not unusual.<sup>58</sup>

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<sup>53</sup> See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 162 (2001) (“[M]ost of what we know or think we know about the Bill of Rights guarantees has been produced by cases in which the Court is interpreting the Fourteenth Amendment.”).

<sup>54</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (plurality) (“[A] disproportionate punishment can perhaps always be considered ‘cruel,’ but it will not always be (as the text also requires) ‘unusual.’”).

<sup>55</sup> *Id.* at 966 (plurality) (emphasis added). See also *id.* at 984-85 (distinguishing *State v. Becker*, 51 N.W. 1018, 1022 (S.D. 1892), on ground that state constitutional provision there prohibited punishments “that were merely ‘cruel’”). But see John L. Bowers, Jr., & J.L. Boren, Jr., *The Constitutional Prohibition Against Cruel and Unusual Punishment – Its Present Significance*, 4 Vand. L. Rev. 680, 681 n.1 (1951) (“Apparently, no significance attaches to these variations; cruel is the key word in all.”).

<sup>56</sup> See *infra* text accompanying notes 62 to 63.

<sup>57</sup> Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 Cal. L. Rev. 839, 860 (1969).



But it is not enough that a punishment be both unusual and severe (cruel). For example, granted that death is a severe, and therefore cruel, punishment, a novel method of execution, never before attempted, and therefore unusual, might on that account be considered both “cruel” and “unusual.” However, the Supreme Court rejected this very argument, albeit in dicta, in In re Kemmler, writing that the electric chair, though unusual in 1890 because novel, did not render death by electrocution cruel and unusual, because the method of execution was adopted to make the process more, not less, humane.<sup>59</sup> Rather, “[u]nusual’ is probably best thought of as adverbially modifying ‘cruel.’”<sup>60</sup> That is, the Clause forbids extreme distinctness of punishment in the direction of greater, but not lesser, cruelty.<sup>61</sup>

But the text of the Amendment can take us only thus far. History must be our next guide.

## **B. Origins of the Eighth Amendment**

It is widely accepted that the Cruel and Unusual Punishments Clause derives directly from section 9 of the 1776 Virginia Declaration of Rights, which in turn was derived from the 1689 English Bill of Rights.<sup>62</sup> Indeed, except for the fact that the Cruel and Unusual Punishments Clause

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<sup>58</sup> See Tom Jones, “It’s Not Unusual,” on Along Came Jones (Decca Records 1965).

<sup>59</sup> 136 U.S. 436, 447 (1890); see Note, The Cruel and Unusual Punishments Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 637 (1966) (“[T]he novelty of a punishment – the mere fact that it is ‘unusual,’ without any excessive cruelty – does not suffice to prohibit it constitutionally.”).

<sup>60</sup> Note, *supra* note 59, at 638 n.16.

<sup>61</sup> See Laurence Claus, The Antidiscrimination Eighth Amendment, 28 Harv. J. L. & Pub. Pol’y 119, 149 (2004) (defining “cruel and unusual” as “depart[ure] from precedent without morally sufficient reason in the direction of greater severity”).

<sup>62</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (plurality); *Solem v. Helm*, 463 U.S. 277, 286 n.10 (1983); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977); see also Chris Baniszewski, Comment, Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment’s Proportionality Requirement, 25 Ariz. St. L.J. 930 (1993); Granucci, *supra* note 57, at 852-53; William Hughes Mulligan, Cruel and Unusual Punishment: The Proportionality Rule, 47 Fordham L. Rev. 639, 640 (1979); Note, *supra* note 59, at 636; Malcolm E. Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 Stan. L. Rev. 838, 839 (1972).

contains the mandatory “shall” rather than the precatory “ought,” it is a verbatim replica of the same clause in the English Bill.<sup>63</sup> Thus, it is universally recognized that the history surrounding the enactment of the English Bill is relevant to a complete understanding of our own Eighth Amendment.<sup>64</sup>

It is generally believed that the “cruel and unusual punishments” provision of the English Bill was prompted by one or both of two episodes in English history, both involving Lord Chief Justice Jeffreys who served on the King’s Bench during the reign of James II, the last of the Stuart kings.<sup>65</sup> First, following an unsuccessful rebellion by the Duke of Monmouth in 1685, “a special commission led by Jeffreys tried, convicted, and executed hundreds of suspected insurgents.”<sup>66</sup> The commission practiced the traditional method of execution for traitors: drawing the condemned man to the gallows on a cart; hanging by the neck; cutting down the prisoner before death ensues; disemboweling the prisoner while still alive and burning his entrails; beheading; and quartering the

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<sup>63</sup> See Harmelin, 501 U.S. at 966 (plurality); Bowers & Boren, *supra* note 55, at 682; Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 617 (1997); Granucci, *supra* note 57, at 853; Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 *J.Crim. L. & Criminology* 378, 378 (1980); Deborah A. Schwartz & Jay Wishingrad, *Comment, the Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 *Buff. L. Rev.* 783, 788 n.11 (1974).

<sup>64</sup> See Harmelin, 501 U.S. at 967 (plurality).

<sup>65</sup> See *id.*; *Ingraham v. Wright*, 430 U.S. 651, 664 (1977); Note, *What is Cruel and Unusual Punishment?*, 24 *Harv. L. Rev.* 54, 55 (1910).

<sup>66</sup> Harmelin, 501 U.S. at 968 (plurality); see Baniszewski, *supra* note 62, at 931; Granucci, *supra* note 57, at 853; Schwartz, *supra* note 63, at 378.

body.<sup>67</sup> Female traitors were burned at the stake.<sup>68</sup> The proceedings came to be known as the “Bloody Assizes.”<sup>69</sup>

The second episode involved Titus Oates, a Protestant cleric. In 1679, Oates testified against a number of “prominent Catholics for allegedly organizing a ‘Popish Plot’ to overthrow King Charles II.”<sup>70</sup> The defendants were convicted and executed.<sup>71</sup> It was later discovered that Oates was an inveterate liar who had perjured himself, leading to the execution of at least fifteen innocent men.<sup>72</sup> Oates was tried for perjury and convicted in 1685.<sup>73</sup> At sentencing, Jeffreys deemed it unfortunate that the death penalty could no longer be imposed for perjury,<sup>74</sup> but asserted that “crimes of this nature are left to be punished according to the discretion of the court, so far as that the judgment extend not to life or member.”<sup>75</sup> The court sentenced Oates to pay a fine of 2,000 marks, to be defrocked, to be pilloried four times annually, to be whipped ““from Aldgate to Newgate”” on

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<sup>67</sup> See Harmelin, 501 U.S. at 968 (plurality); Baniszewski, supra note 62, at 931; Granucci, supra note 57, at 854; Mulligan, supra note 62, at 640; Schwartz, supra note 63, at 378.

<sup>68</sup> See Harmelin, 501 U.S. at 968 (plurality); Granucci, supra note 57, at 853.

<sup>69</sup> See Harmelin, 501 U.S. at 968 (plurality); Baniszewski, supra note 62, at 931; Granucci, supra note 57, at 853; Mulligan, supra note 62, at 640; Schwartz, supra note 63, at 378.

<sup>70</sup> Harmelin, 501 U.S. at 969 (plurality); see Baniszewski, supra note 62, at 932; Claus, supra note 61, at 136; Granucci, supra note 57, at 856-57; Mulligan, supra note 62, at 640-41; Schwartz, supra note 63, at 379.

<sup>71</sup> See Harmelin, 501 U.S. at 969 (plurality); Baniszewski, supra note 62, at 932; Claus, supra note 61, at 136; Granucci, supra note 57, at 857; Mulligan, supra note 62, at 641.

<sup>72</sup> See Harmelin, 501 U.S. at 969 (plurality); Baniszewski, supra note 62, at 932; Claus, supra note 61, at 136; Granucci, supra note 57, at 857; Mulligan, supra note 62, at 641; Schwartz, supra note 63, at 379.

<sup>73</sup> See Harmelin, 501 U.S. at 969 (plurality); Baniszewski, supra note 62, at 932; Granucci, supra note 57, at 857; Mulligan, supra note 62, at 640-41.

<sup>74</sup> See Harmelin, 501 U.S. at 970 (plurality); Baniszewski, supra note 62, at 933; Claus, supra note 61, at 137; Granucci, supra note 57, at 857-58.

<sup>75</sup> Claus, supra note 61, at 137.

May 20, to be whipped ““from Newgate to Tyburn”” on May 22, and to life imprisonment.<sup>76</sup>

Apparently, Jeffreys believed this to be the equivalent of a death sentence, for he did not expect Oates to survive the whipping.<sup>77</sup>

He was wrong. After the enactment of the English Bill of Rights in 1689, Oates asked the Parliament to set aside his sentence as contrary to the provisions of the Bill.<sup>78</sup> Although the Lords refused to disturb the sentence,<sup>79</sup> a minority dissented and issued a statement opining that Oates’ punishment was contrary to the “cruel and unusual punishments” clause of the Bill.<sup>80</sup> Oates then persuaded the House of Commons to pass a bill annulling the sentence, but the Commons was unsuccessful in getting the Lords to change their position.<sup>81</sup> However, the Commons issued a report echoing the sentiments of the dissenting Lords, explaining why the Oates punishment was “cruel and unusual” in violation of the English Bill.<sup>82</sup>

Of course, the most important evidence regarding the term “cruel and unusual punishment” must come from those who framed and ratified the Eighth Amendment.<sup>83</sup> Unfortunately, the history surrounding the adoption of the Amendment is sparse. It appears that Congressional debate on the Cruel and Unusual Punishments Clause was limited to one relatively

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<sup>76</sup> See Harmelin, 501 U.S. at 970 (plurality); see Baniszewski, *supra* note 62, at 933; Claus, *supra* note 61, at 137; Granucci, *supra* note 57, at 858; Schwartz, *supra* note 63, at 379.

<sup>77</sup> See Harmelin, 501 U.S. at 970 (plurality).

<sup>78</sup> See *id.*; Baniszewski, *supra* note 62, at 933; Claus, *supra* note 61, at 139; Schwartz, *supra* note 63, at 379.

<sup>79</sup> See Baniszewski, *supra* note 62, at 933; Claus, *supra* note 61, at 140.

<sup>80</sup> See Harmelin, 501 U.S. at 971 (plurality); Baniszewski, *supra* note 62, at 933-34; Claus, *supra* note 61, at 140-41; Granucci, *supra* note 57, at 858; Schwartz, *supra* note 63, at 379.

<sup>81</sup> See Harmelin, 501 U.S. at 971 (plurality); Claus, *supra* note 61, at 139; Schwartz, *supra* note 63, at 379.

<sup>82</sup> See Harmelin, 501 U.S. at 972 (plurality); Claus, *supra* note 61, at 142-43 n.107.

<sup>83</sup> See Harmelin, 501 U.S. at 975 (plurality) (“[T]he ultimate question is not what ‘cruell and unusuall punishments’ meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment.”).

unenlightening exchange.<sup>84</sup> To find any helpful discussion of the concept of cruel and unusual punishments, one must go back to two State ratifying conventions held to debate the ratification of the Constitution. In Massachusetts, delegate Abraham Holmes complained:

Congress [would be] possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the Inquisition:

What gives an additional glare of horror to these gloomy circumstances is . . . that Congress [is] nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.<sup>85</sup>

In Virginia, contrasting the Constitution with the State's own Bill of Rights, delegate George Mason noted that "torture was included in the prohibition" of the "clause of the [Virginia] bill of rights provid[ing] that no cruel or unusual punishments shall be inflicted."<sup>86</sup> The next day, delegate Patrick Henry expressed his trust in the Nation's officials in defining crimes but not in prescribing the punishments for them:

Congress, from their general powers, may fully go into the business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence – petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtues of representatives. . . .

In this business of legislation, your members of Congress will lose the restriction of not . . . inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? – That they would not admit of tortures or cruel and barbarous punishment. But

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<sup>84</sup> See Cogan, *supra* note 63, at 618; see also *Ingraham v. Wright*, 430 U.S. 651, 666 (1977); *Weems v. United States*, 217 U.S. 349, 369 (1910); Claus, *supra* note 61, at 128; Granucci, *supra* note 57, at 842; Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 705 (2005).

<sup>85</sup> 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 111 (2d ed. 1881); see also Claus, *supra* note 61, at 130; Granucci, *supra* note 57, at 841.

<sup>86</sup> 3 J. Elliot, *supra* note 85, at 451-52; see also Claus, *supra* note 61, at 131; Granucci, *supra* note 57, at 841-42.

Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany – of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confessions by torture, in order to punish with still more relentless severity.<sup>87</sup>

Running through these American and British pre-enactment statements are several themes that have re-appeared in the U.S. Supreme Court’s Eighth Amendment jurisprudence.

### **C. Cruel and Unusual Punishments Under the Eighth and Fourteenth Amendments**

A number of substantive<sup>88</sup> principles can be drawn from the Eighth Amendment case law. First, the Cruel and Unusual Punishments Clause prohibits judges from imposing punishments that are not authorized by statute. Second, it prohibits the legislature from authorizing certain modes of punishment. Third, the Eighth Amendment prohibits the imposition of punishments that are grossly disproportionate to the crime committed. And, finally, the Eighth Amendment categorically bars the death penalty for certain classes of offenses and offenders.<sup>89</sup>

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<sup>87</sup> 3 J. Elliot, *supra* note 85, at 447-48) ; see also Claus, *supra* note 61, at 131; Granucci, *supra* note 57, at 841 n.10.

<sup>88</sup> I say “substantive” to distinguish these principles from the specialized procedural guidelines the Court has established in death penalty cases beginning with *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Gregg*’s companion cases. See Lee, *supra* note 84, at 725 (distinguishing Court’s “substantive” from “procedural” death penalty jurisprudence). In the simplest of terms, those specialized procedures are designed to further the twin (and some say irreconcilable) goals of (1) eliminating arbitrariness in capital sentencing and (2) ensuring individualized treatment of the capital defendant. See Linda E. Carter & Ellen Kreitzberg, *Understanding Capital Punishment Law* § 13.06, at 178-81 (2004). Arguably, these two lines of cases, given that they address procedural requirements, are not Eighth Amendment cases at all but are pure “due process” cases that prescribe the process that is due when life – the predominant value in the “life, liberty, or property” hierarchy – is on the line. See generally Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143 (1980).

<sup>89</sup> The Court has also held that “the Cruel and Unusual Punishments Clause imposes substantive limits on what can be made criminal and punished as such.” *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). The Court has applied this limitation in only a single case, *Robinson v. California*, 370 U.S. 660, 667 (1962), in which the Court held that it violated the Cruel and Unusual Punishments Clause, as incorporated through the Fourteenth Amendment, for California to make narcotics addiction a criminal offense. The Court made clear that it was not the possible sentence – 90 days in jail – that was unconstitutional but the fact that the State had made such a status criminal at all: “Even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold.” *Id.*

## 1. Prohibitions on Severe Punishment Not Authorized by Law

The core, uncontroversial protection provided by the Eighth Amendment is that severe punishments that are unauthorized by law are forbidden. Referring to Lord Chief Justice Jeffreys' role in both the Bloody Assizes and the Titus Oates affair, Justice Scalia wrote for a plurality in Harmelin v. Michigan that "Jeffreys was widely accused of 'inventing' special penalties for the King's enemies . . . that were not authorized by common-law precedent or by statute."<sup>90</sup> Justice Scalia also relied on many of the statements from the House of Commons report and the dissenters in the House of Lords regarding the Titus Oates case to shore up this conclusion. The Commons report had noted, for example, that "there [was] no express Law to warrant" life imprisonment for Oates, and that Jeffreys and his colleagues had made a "Pretence to a discretionary Power" that did not exist in the law.<sup>91</sup> For their part, the dissenting Lords had noted that for King's Bench to defrock

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Accord *id.* at 676 (Douglas, J., concurring) ("Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.").

However, as Herbert Packer recognized shortly after Robinson was decided – and surprisingly few have acknowledged since – Robinson is not really an Eighth Amendment decision at all but one that sounds purely in due process:

Robinson v. California may have established in the eighth amendment a basis for invalidating legislation that is thought inappropriately to invoke the criminal sanction, despite an entire lack of precedent for the idea that a punishment may be deemed cruel not because of its mode or even its proportion but because the conduct for which it is imposed should not be subjected to the criminal sanction.

Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 *Harv. L. Rev.* 1071, 1071 (1964) (footnote omitted). See also Mulligan, *supra* note 62, at 644 ("[W]hether a certain act should be a crime and whether the punishment should fit the crime are entirely separate inquiries."); Schwartz & Wishingrad, *supra* note 63, at 802 ("It is questionable whether Robinson really presented an eighth amendment issue. [T]he application of the eighth amendment to the nature of the conduct made criminal, instead of the method or kind of punishment, represented a unique use of the amendment's protections.").

<sup>90</sup> 501 U.S. 957, 968 (1991) (plurality).

<sup>91</sup> *Id.* at 973 (plurality).

Oates was “wholly out of their Power, belonging to the Ecclesiastical Courts only,” and that the sentence was “contrary to Law and ancient Practice.”<sup>92</sup>

Justice Scalia deduced from this that the “requirement that punishment not be ‘unusual’ . . . was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition.”<sup>93</sup> However, “[d]epartures from the common law were lawful . . . if authorized by statute.”<sup>94</sup> In short, he concluded, “a punishment is ‘cruel and unusual’ if it is illegal because not sanctioned by common law or statute.”<sup>95</sup>

Justice Scalia recognized, however, that the Clause could not be wrenched from its British roots and simply re-planted in American soil. Merely limiting judges to the imposition of punishments authorized by statute or common law made sense in Great Britain, with its notion of legislative supremacy. The Eighth Amendment, however, was meant also, even primarily, as a check upon the Legislature.<sup>96</sup> Therefore, the Clause must mean something more.

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<sup>92</sup> Id.

<sup>93</sup> Id. at 974 (plurality); accord *Claus*, supra note 61, at 121 (“In adopting the 1689 Bill of Rights, the English Parliament sought to condemn punishments that were illegal because they were contrary to the common law . . . in the direction of greater severity.”).

<sup>94</sup> Harmelin, 501 U.S. at 974 (plurality).

<sup>95</sup> Id. at 984 n.10 (plurality); see also *Claus*, supra note 61, at 136 (asserting that the “core concern” of those who drafted the English cruel and unusual punishments clause “was illegality, that is, violation of the common law or existing statutes”); *Granucci*, supra note 57, at 859 (“In the context of Oates’ case, ‘cruel and unusual’ seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose.”); *Wheeler*, supra note 62, at 855 (“[O]ne of the two recognized purposes of the original language of [the English Bill] was to prevent the judiciary from exceeding its authority in punishing criminals.”).

<sup>96</sup> Harmelin, 501 U.S. at 975-76 (plurality); see also *Ingraham v. Wright*, 430 U.S. 651, 665 (1977) (“Americans . . . feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured. Indeed, the principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments.”); *Claus*, supra note 61, at 146 (“The American founders adopted the ‘punishments’ prohibition of the English Bill of Rights as a limitation on the power of the new federal government, without specifying to which branch or branches of that government the limitations applied.”); *Mulligan*, supra note 62, at 639 (“The . . . restriction binds both the legislative and judicial branches of the federal government . . .”).



## 2. Prohibitions on Unduly Severe Modes of Punishment

The second uncontroversial proposition in Eighth Amendment jurisprudence is that the Cruel and Unusual Punishments Clause prohibits the imposition of certain modes of punishment. Justice Scalia set forth this interpretation in his plurality opinion in Harmelin v. Michigan.<sup>97</sup> Since, in the context of American constitutionalism, “unusual” could not mean only unauthorized by positive law, it must be given its other typical meaning: “[s]uch as [does not] occur in ordinary practice.”<sup>98</sup> Accordingly, “the Clause disables the Legislature from authorizing particular forms or ‘modes’ of punishment – specifically, cruel methods of punishment that are not regularly or customarily employed.”<sup>99</sup>

This view is supported by the statements of those who voiced support for the addition of a cruel and unusual punishments clause to the Constitution.<sup>100</sup> George Mason observed that the Virginia version of the Clause prohibited “torture.”<sup>101</sup> Abraham Holmes feared that without such a clause, Congress could introduce the “rack[] and [the] gibbet[].”<sup>102</sup> And Patrick Henry warned that

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<sup>97</sup> 501 U.S. 957 (1991) (plurality).

<sup>98</sup> Id. at 976 (plurality) (quoting Webster’s American Dictionary (1828)) (alterations in original).

<sup>99</sup> Id.; accord Trop v. Dulles, 356 U.S. 85, 100 n.32 (1958) (plurality) (“If the word ‘unusual’ is to have any meaning apart from the word ‘cruel’ . . . the meaning should be the ordinary one, signifying something different from that which is generally done.”); see also Ingraham v. Wright, 430 U.S. 651, 667 (1977) (“[T]he Cruel and Unusual Punishments Clause . . . limits the kinds of punishment that can be imposed on those convicted of crimes . . . .”); Claus, *supra* note 61, at 123 (arguing that the Clause “condemn[s] punishments unknown to the common law for the offense of conviction”); Lee, *supra* note 84, at 705 (“[T]here has been no disagreement on the proposition that the Eighth Amendment prohibits [certain modes of punishment].”); Note, *supra* note 59, at 637 (“[T]he word ‘unusual’ . . . at least normally suggests that the provision is not intended to prohibit punishments that have been commonly authorized or imposed.”).

<sup>100</sup> See Harmelin, 501 U.S. at 979-80 (plurality); Schwartz, *supra* note 63, at 382 (“[W]hat little evidence there is clearly centers around a concern to prevent the national government from initiating barbarous methods of punishment.”).

<sup>101</sup> See *supra* text accompanying note 86.

<sup>102</sup> See *supra* text accompanying note 85;

without an express prohibition, Congress could establish “tortures or cruel and barbarous punishment” such as that practiced by “the civil law” regimes in “France, Spain, and Germany.”<sup>103</sup>

This interpretation of the Cruel and Unusual Punishments Clause has manifested itself in two ways. First, the Clause “forbids the infliction of unnecessary pain in the execution of [a] death sentence.”<sup>104</sup> Thus, the Court has continually upheld the death penalty against the charge that it is cruel and unusual, and has noted that “something more than the mere extinguishment of life,” such as “torture or a lingering death,” must be present to render execution cruel and unusual.<sup>105</sup> Though the Court has not had occasion to rule that various methods of execution violate the Clause, it has written in dicta that the traditional English punishment for treason<sup>106</sup> is forbidden,<sup>107</sup> as are “burning at the stake, crucifixion, breaking on the wheel, [and] the like.”<sup>108</sup>

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<sup>103</sup> See supra text accompanying note 87. Granucci, supra note 57, at 860 -65, argues that this view by Henry, Holmes, and Mason was based on the erroneous belief that the cruel and unusual punishments clause of the English Bill also prohibited certain modes of punishment. Granucci’s argument that the English Bill did not proscribe particular modes of punishment is persuasive. First, the gruesome methods of execution of female and male traitors utilized by the Bloody Assizes continued in use until 1790 and 1814, respectively, more than a century after the Bill was enacted. See id. at 855-56. In addition, each of the methods of punishment used against Titus Oates also was continued in use for some times afterward – whipping until 1948. See id. at 859. It is also noteworthy that neither the report of the House of Commons nor the statement of the dissenters in the House of Lords intimates that Oates’ punishment was illegal because of the methods used. But see Note, supra note 59, at 637 (asserting that “it was the unusual cruelty in the method of punishment that was condemned” by the English Bill). Nonetheless, it seems immaterial whether the framers’ intended use of the words “cruel and unusual” in the Eighth Amendment conformed to a correct or an erroneous interpretation of the same words in another document; all that matters is the meaning they intended. See Schwartz, supra note 63, at 380 (“[S]ince Granucci admits that the American framers originally intended to prohibit cruel methods of punishment, one must question the relevance of his two proposed English meanings, even assuming they are correct.”).

<sup>104</sup> Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) (plurality)

<sup>105</sup> In re Kemmler, 136 U.S. 436, 447 (1890) (dicta).

<sup>106</sup> See supra text accompanying note 67.

<sup>107</sup> See Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (dicta) (“[P]unishments of torture . . . and all others in the same line of unnecessary cruelty [as were practiced by the Stuart Kings] are forbidden by [the Eighth] [A]mendment.”).

<sup>108</sup> Kemmler, 136 U.S. at 446 (dicta); accord Bowers & Boren, supra note 55, at 685 (observing that the Clause prohibits “torturous and barbarous punishments [such] as drawing and quartering, disemboweling, stretching on the rack, breaking on the wheel, and burning alive”).

Second, certain types of non-capital punishments are forbidden. For example, in Weems v. United States, the defendant was convicted of making a false entry in a public document with intent to defraud the government.<sup>109</sup> He was sentenced to: (1) 15 years of cadena temporal, a form of punishment encompassing “hard and painful labor” while “carry[ing] a chain at the ankle, hanging from the wrist”; (2) civil interdiction, depriving him “of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, [and] the right to dispose of his own property by acts inter vivos”; (3) “perpetual absolute disqualification” from voting or holding public office; and (4) lifetime surveillance by the authorities, including the inability to move his domicile without permission and the requirement that he make himself and his home available for inspection.<sup>110</sup> The Court held this sentence to violate the Cruel and Unusual Punishments Clause.<sup>111</sup>

Weems is extraordinarily significant, for at least two reasons. First, the Court rejected the idea that the Cruel and Unusual Punishments Clause was static, instead adopting a dynamic view of the Clause: “[G]eneral language should not . . . be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”<sup>112</sup> Second, the Weems Court introduced the notion of “intra-jurisdictional analysis,” i.e., a comparison of the punishment for the crime in question with punishments for other crimes within the

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<sup>109</sup> 217 U.S. 349, 357 (1910).

<sup>110</sup> Id. at 363-65.

<sup>111</sup> See id. at 377.

<sup>112</sup> Id. at 373; see also Ford v. Wainwright, 477 U.S. 399, 406 (1986) (“[T]he Eighth Amendment’s proscriptions are not limited to those practices condemned by the common law in 1789.”); Mulligan, *supra* note 62, at 644 (noting that Weems stands for the proposition “that the eighth amendment prohibition is evolutionary in nature”).

same jurisdiction.<sup>113</sup> In Weems, the Court concluded that the punishment was too severe because, first, more serious crimes were punished just as severely,<sup>114</sup> and, second, comparable crimes were treated less severely.<sup>115</sup>

Likewise, in Trop v. Dulles, a plurality of the Court determined that loss of citizenship for a native-born citizen was cruel and unusual punishment for the crime of wartime desertion.<sup>116</sup> Trop reaffirmed both significant aspects of the Weems methodology. First, the Court reiterated that the meaning of the Eighth Amendment was not frozen in time in 1791, but that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>117</sup> Second, the Court performed a type of comparative analysis, this one inter-jurisdictional in nature, noting that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime,” and that “only . . . the Philippines and Turkey[] impose denationalization as a penalty for desertion.”<sup>118</sup>

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<sup>113</sup> See Schwartz & Wishingrad, *supra* note 63, at 799.

<sup>114</sup> Weems, 217 U.S. at 380-81 (noting that punishment was same for “forgery of or counterfeiting the obligations or securities of the United States[,] a crime which may cause the loss of many thousands of dollars”); see also *id.* at 380 (noting that several “degrees of homicide, . . . misprision of treason, inciting rebellion, conspiracy to destroy the government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, [and] larceny” were each punished less severely).

<sup>115</sup> See *id.* (noting that embezzlement, which was “similar[] to the offense for which Weems was convicted,” was punishable only by two years imprisonment, with none of the “accessories” of the *cadena temporal*).

<sup>116</sup> 356 U.S. 86, 101 (1958) (plurality). Justice Brennan concurred on the ground that denationalization for wartime desertion was “beyond the power of Congress” because there was no rational relation between Congress’ power to wage war and a blanket rule stripping the citizenship of any and all wartime deserters. See *id.* at 113-14 (Brennan, J., concurring). Rather, the motive seemed to him to be “naked vengeance,” an improper legislative purpose. See *id.* at 112 (Brennan, J., concurring).

<sup>117</sup> *Id.* at 101 (plurality).

<sup>118</sup> *Id.* at 102-03 (plurality).

### 3. Prohibitions on Disproportionate Punishment

The Court has also recognized another, more controversial proposition: that the Eighth Amendment prohibits punishments that are “grossly disproportionate” to the crime. The currently operative exposition of this principle appears in Justice Kennedy’s opinion in Harmelin v. Michigan.<sup>119</sup> The analysis proceeds in two parts. First, a court must ask whether “a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”<sup>120</sup> If such an inference is raised, then the court undertakes “intra-judicial and inter-judicial analyses,” *i.e.*, “a comparative analysis between [the] sentence [at issue] and sentences imposed for other crimes in [the same jurisdiction] and sentences imposed for the same crime in other jurisdictions.”<sup>121</sup> These last two steps purport to “circumscribe federal judicial subjectivity by relying on objective data from the state legislatures.”<sup>122</sup>

For example, in Solem v. Helm, the defendant was sentenced to the mandatory prison term of life without parole for attempting to use a \$100 check drawn on a non-existent account, after

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<sup>119</sup> 501 U.S. 957, 1001-05 (1991) (Kennedy, J., concurring in part and concurring in the judgment). Because Justice Kennedy concurred in the result on the narrowest grounds in Harmelin, his separate opinion has been treated as controlling. See Ewing v. California, 538 U.S. 11, 23-24 (2003) (plurality); Lee, *supra* note 84, at 693 (noting that Justice Kennedy’s “opinion . . . eventually came to assume the status of law”).

<sup>120</sup> Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment); see also Ewing, 538 U.S. at 28 (plurality); Solem v. Helm, 463 U.S. 277, 290-91 (1983); Lee, *supra* note 84, at 693-94.

<sup>121</sup> Harmelin, 501 U.S. at 1004 (Kennedy, J., concurring in part and concurring in the judgment); see also Ewing, 538 U.S. at 30 (plurality); Solem, 463 U.S. at 291; O’Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting) (noting that defendant received heavier prison term for selling liquor than he could have received for “burglary or highway robbery”); Lee, *supra* note 84, at 693-94, 731. Cf. In re Kemmler, 136 U.S. 436, 449 (1890) (opining that Equal Protection Clause “requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses”). When the Court initially established this standard in Solem, 463 U.S. at 292, it set forth these three factors as a non-exhaustive list of “objective criteria” for courts to consider. Justice Kennedy altered this standard in Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment), by declaring that “intra-judicial and inter-judicial analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”

<sup>122</sup> Thomas E. Baker & Fletcher N. Baldwin, Jr., Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court “From Precedent to Precedent,” 27 *Ariz. L. Rev.* 25, 56 (1985).

having previously been convicted of six non-violent felonies.<sup>123</sup> The Court determined that Helm's punishment, at first glance, seemed disproportionate to his crime.<sup>124</sup> The Court then performed an intrajurisdictional analysis and found both that "Helm ha[d] been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes," and that it appeared that Helm was the only individual South Dakota had punished as severely for comparable crimes.<sup>125</sup> Finally, the Court found "that Helm was treated more severely than he would have been in any other State": only Nevada provided for a comparable sentence for Helm's crime, but even there, such a sentence was merely authorized, not mandated, and it appeared that no one similar to Helm in material respects had ever received such a sentence.<sup>126</sup> The Court concluded that Helm's sentence was constitutionally disproportionate to his crime.<sup>127</sup>

The notion that the Eighth Amendment contains a proscription against disproportionate punishments has engendered much controversy, both on and off the Court. Aside from textual and historical arguments,<sup>128</sup> detractors of this theory have substantial pragmatic grounds to dispute it. They argue that the standards established by the Court to determine whether a punishment is

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<sup>123</sup> 463 U.S. 277, 279-80 (1983).

<sup>124</sup> See *id.* at 296-97.

<sup>125</sup> *Id.* at 299.

<sup>126</sup> *Id.* at 299-300.

<sup>127</sup> See *id.* at 303.

<sup>128</sup> See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 977 (1991) (plurality) ("[T]o use the phrase 'cruel and unusual punishments' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly."); *id.* at 978 n.9 (plurality) ("If 'cruel and unusual punishments' included disproportionate punishments, the separate prohibition of disproportionate fines (which are certainly punishments) would have been entirely superfluous."); *id.* at 979 (plurality) (pointing out that all of the statements made surrounding adoption of Eighth Amendment discuss only forbidden modes of punishment and none indicates an intention to proscribe disproportionate punishments); see also Schwartz, *supra* note 63, at 378-82 (same). Because the rule espoused by this Article ultimately does not depend on an Eighth Amendment disproportionality principle, a more complete analysis of these textual and historical arguments is beyond the Article's scope.

disproportionate to the offense “seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.”<sup>129</sup> Regarding the threshold issue, the gravity of the crime, there simply is no objective way to measure “gravity.”<sup>130</sup> It is true that some general objective principles regarding the relative gravity of offenses can be formulated.<sup>131</sup> For example, the magnitude of different degrees of the exact same type of harm can be reliably measured; intentional conduct is universally recognized as more serious than negligent conduct; lesser included offenses are generally less serious than the greater offense; and “attempts are less serious than completed crimes.”<sup>132</sup> However, beyond these few guideposts, judges are largely at sea in evaluating the relative gravity of crimes. Is intentionally selling cocaine worse than intentionally embezzling a million dollars? And how should we treat a lesser mental state attendant to a greater harm as compared with the reverse? That is, is intentionally cutting off another person’s pinky toe worse than recklessly blinding her or negligently killing her? Moreover, the state might emphasize deterrence, which depends not just on the severity of the punishment but also, among other things, on its certainty.<sup>133</sup> Depending on the particular crimes at issue, the perpetrator of the intuitively

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<sup>129</sup> Harmelin, 501 U.S. at 986 (plurality); see also Baniszewski, *supra* note 62, at 958-59 (“[T]he Helm test gives judges too much discretion to impose their subjective values into sentencing.”).

<sup>130</sup> See Harmelin, 501 U.S. at 987-88 (plurality); Baker & Baldwin, *supra* note 122, at 69 (“Ascertaining the gravity of the offense is very problematical.”); Baniszewski, *supra* note 62, at 959 (“[A] ‘threshold comparison’ of the crime with the punishment . . . gives judges too much discretion in determining the gravity of the offense and harshness of the penalty.”); Pamela S. Karlan, “Pricking the Lines”: The Due Process Clause, Punitive Damages, and Criminal Punishment, 88 Minn. L. Rev. 880, 888 (2004); (“Surely the seriousness of an offense is not a universal, timeless fact.”); Mulligan, *supra* note 62, at 646 (“The first prong of the test requires the court to make a judgment as to the seriousness of the crime charged and this of course invites the substitution of the subjective views of the judge for those of the legislature.”).

<sup>131</sup> See also *Rummel v. Estelle*, 445 U.S. 263, 304 (1980) (Powell, J., dissenting) (“[I]n this case, we can identify and apply objective criteria that reflect constitutional standards of punishment and minimize the risk of judicial subjectivity.”).

<sup>132</sup> *Solem v. Helm*, 463 U.S. 277, 293 (1983).

<sup>133</sup> See Harmelin, 501 U.S. 989 (plurality) (“[D]eterrent effect depends not only upon the amount of the penalty but upon its certainty.”); Lee, *supra* note 84, at 738 (“[T]he less certain the punishment is, the more severe it needs to be to sufficiently deter potential criminals.”).

“lesser” crime might be so likely to escape capture that those who are brought to justice must be dealt with more severely than those who commit the intuitively “greater” crime in order for the punishment to have the desired deterrent effect,<sup>134</sup> even assuming we can objectively differentiate the lesser from the greater in the first place. Intra-jurisdictional analysis, comparison of punishments for different crimes within the same jurisdiction, suffers from the same problem: “One cannot compare the sentences imposed by the jurisdiction for ‘similarly grave’ offenses if there is no objective standard of gravity.”<sup>135</sup>

At the same time, difficulties in applying a proportionality principle cannot justify the courts’ failure to enforce such a principle, assuming its existence is a justifiable conclusion from text and history.<sup>136</sup> Yet those who insist that the Eighth Amendment does contain a proportionality principle find it difficult if not impossible to articulate a truly objective methodology for translating that principle into law.<sup>137</sup> The choice, then, seems to be between the courts’ abdication of their responsibility to enforce the Eighth Amendment or their imposition of their own subjective views.<sup>138</sup>

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<sup>134</sup> See Harmelin, 501 U.S. at 989 (plurality) (“[C]rimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties.”); Karlan, *supra* note 130, at 895 (similar); Wheeler, *supra* note 62, at 851-52 (“Some crimes cause little mischief but are more difficult to detect than more mischievous ones. . . . It could therefore be argued that a severe penalty must be imposed for those few who are caught doing the proscribed act . . .”).

<sup>135</sup> Harmelin, 501 U.S. at 988 (plurality); see also Rummel, 445 U.S. at 282 n.27 (“Other crimes . . . implicate other societal interests, making any such comparison inherently speculative.”); Mulligan, *supra* note 62, at 647 (“The problem of determining the gravity of a particular crime is difficult enough without having to make judgments about other crimes.”).

<sup>136</sup> See Hutto v. Davis, 454 U.S. 370, 383 (1982) (Brennan, J., dissenting) (“[A] general principle of deference surely cannot justify the complete abdication of our responsibility to enforce the Eighth Amendment.”); Lee, *supra* note 84, at 745 (“[T]he truism that legislatures get to decide amounts of punishment is no reason for the Court to evade its responsibility to enforce the Eighth Amendment.”).

<sup>137</sup> See Baker & Baldwin, *supra* note 122, at 59 (“The . . . demand for complete objectivity cannot be satisfied.”).

<sup>138</sup> See Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 Colum. L. Rev. 1119, 1136 (1979); see also Baniszewski, *supra* note 62, at 951 (“[T]he Court has not been able to develop an objective approach or to strike a proper balance between the courts’ power of review and the legislatures’ initial power to determine prison sentences.”).



Although using only the inter-jurisdictional analysis is one potential solution,<sup>139</sup> that analysis has pitfalls of its own, as will be demonstrated in the next section. As a result, the compromise reached by Justice Kennedy in Harmelin, and currently the law, recognizes a proportionality principle in the Eighth Amendment but one which it is nearly impossible for the state not to satisfy.

#### **4. Categorical Bars to the Death Penalty**

The final principle of Eighth Amendment jurisprudence that has been recognized by the Supreme Court is that the death penalty cannot be imposed on certain types of offenders or for certain classes of crimes. Though similar to the proportionality principle, the objective line between death and all other punishments has allowed the Court to treat this area as a self-contained sphere of jurisprudence.<sup>140</sup> Pursuant to this line of jurisprudence, the death penalty cannot be imposed for most offenses not resulting in death,<sup>141</sup> or for felony murder where the defendant does not himself kill, and does not at least display reckless disregard for human life and play a major role in the

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<sup>139</sup> See Gilchrist, *supra* note 138, at 1136 (opining that courts “must look to the judgments of many legislatures for an approximation of current norms of proportional punishment for the crime in question”).

<sup>140</sup> See Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (plurality) (“[T]his line of authority [i]s an aspect of [the Court’s] death penalty jurisprudence, rather than as a generalizable aspect of Eighth Amendment law.”); Hutto, 454 U.S. at 373 (“[W]e distinguish[] between punishments – such as the death penalty – which by their very nature differ from all other forms of punishment, and punishments which differ from others only in duration.”); Rummel v. Estelle, 445 U.S. 263, 272 (1980) (“Because a sentence of death differs in kind from any sentence of imprisonment . . . our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance . . .”).

<sup>141</sup> See Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality); *id.* at 600 (Brennan, J., concurring in the judgment) (opining that death penalty is always “cruel and unusual”); *id.* (Marshall, J., concurring in the judgment) (same); see also Lee, *supra* note 84, at 721. A broad reading of Coker leads to the conclusion that the death penalty is barred for any crime unless death results, while, pursuant to a narrower reading, the death penalty is still permissible for some non-homicidal conduct. See, e.g., State v. Wilson, 685 So. 2d 1063, 1066 (La. 1996) (“The [Coker] plurality took great pains in referring only to the rape of adult women throughout their opinion, leaving open the question of the rape of a child.”) (footnote and emphasis omitted).

underlying crime.<sup>142</sup> In addition, the death penalty cannot be imposed on the mentally retarded<sup>143</sup> or on those who killed before reaching the age of eighteen years.<sup>144</sup>

The methodology used in these “categorical bar” cases is similar to that used in the non-capital disproportionality cases.<sup>145</sup> Again, the Court has developed a two-part test. First, the Court looks to objective evidence,<sup>146</sup> by conducting an inter-jurisdictional analysis looking primarily<sup>147</sup> to how many jurisdictions authorize capital punishment to one in the offender’s position,<sup>148</sup> and

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<sup>142</sup> See *Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Enmund v. Florida*, 458 U.S. 782, 787-88 (1982); see also *Lee*, supra note 84, at 721.

<sup>143</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); see also *Lee*, supra note 84, at 721..

<sup>144</sup> See *Roper v. Simmons*, 125 S.Ct. 1183, (2005); see also *Lee*, supra note 84, at 721. In addition, the Court has held that the Constitution forbids execution of the insane. See *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). This differs somewhat from the “categorical bar” cases, for each of those addresses constraints on the ability of governments to impose the sentence, while *Ford* constrains only their ability to execute the sentence. However, the methodology used by the *Ford* Court to reach this conclusion was consistent with the methodology used in the “categorical bar” cases.

<sup>145</sup> See *Baker & Baldwin*, supra note 122, at 58-59 (noting similarity between the two tests).

<sup>146</sup> See *Atkins*, 536 U.S. at 312 (“Proportionality review . . . should be informed by objective factors to the maximum extent possible.”) (internal quotation marks omitted); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“[W]e have looked to objective evidence of how our society views a particular punishment today.”); *Ford*, 477 U.S. at 406 (“[T]his Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the [Eighth] Amendment protects.”).

<sup>147</sup> See *Roper*, 125 S.Ct. at 1192 (“The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”) (emphasis added); *Penry*, 492 U.S. at 331 (“The clearest and most reliable evidence of contemporary values is the legislation enacted by the country’s legislatures.”); *Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988) (O’Connor, J., concurring in the judgment) (“[T]he decisions of American legislatures . . . about the minimum age at which a juvenile’s crimes may lead to capital punishment . . . should provide the most reliable signs of a society-wide consensus on this issue.”); *Tison v. Arizona*, 481 U.S. 137, 152 (1987) (“[W]e find the state legislatures’ judgment as to proportionality in these circumstances relevant to th[e] constitutional inquiry.”)

<sup>148</sup> See *Roper*, 125 S.Ct. at 1192 (finding that 20 States allow execution for crime committed while under age of eighteen); *Atkins*, 536 U.S. at 314-15 (finding that 20 States allow execution of mentally retarded); *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989) (finding that 25 states permitted execution of seventeen year-old offenders and 22 permitted execution of sixteen year-old offenders); *Penry*, 492 U.S. at 334 (finding that 34 states permitted execution of mentally retarded); *Thompson*, 487 U.S. at 829 (plurality) (finding that of “the 18 States that have expressly established a minimum age in their death-penalty statutes . . . all of them require that the defendant have attained at least the age of 16 at the time of the capital offense”); *Tison*, 481 U.S. at 154 (“[O]nly 11 States authorizing capital punishment forbid imposition of the death penalty even though the defendant’s participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness.”); *Ford*, 477 U.S. at 408 (“[N]o State in the Union permits the execution of the insane.”); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (“[O]nly eighth jurisdictions authorize imposition of the death penalty solely for

secondarily to how often, where authorized, juries impose the punishment under like circumstances.<sup>149</sup> The Court has also performed an intra-jurisdictional analysis in some cases by looking to the judgments of juries within the jurisdiction in question.<sup>150</sup> The objective approach is required in part by the Eighth Amendment’s text, which, again, forbids “only those punishments that are both ‘cruel and unusual,’”<sup>151</sup> and in part by the requirement of deference to legislative judgments in “our federal system.”<sup>152</sup>

Second, the Court uses a more subjective analysis,<sup>153</sup> bringing its “own judgment . . . to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>154</sup>

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participation in a robbery in which another robber takes a life.”); *Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) (plurality) (finding that only one jurisdiction authorized capital punishment for rape of adult woman). Beginning in *Atkins*, 536 U.S. at 315-16, the Court also: looked to “the consistency and direction of change” among jurisdictions in limiting the death penalty to certain offenses and offenders; considered how “overwhelmingly” such limitations have been approved; and took into account “the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.” See also *Roper*, 125 S.Ct. at 1193. In some cases, the inter-jurisdictional analysis has taken into account non-American, and even non-common-law, jurisdictions. See, e.g., *id.* at 1198-1200.

<sup>149</sup> See *Roper*, 125 S.Ct. at 1192 (“[E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.”); *Atkins*, 536 U.S. at 316 (“[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon.”); *Enmund*, 458 U.S. at 795 (finding that only three of 796 then-current death row prisoners “did not participate in the fatal assault on the victim” and neither “hired [n]or solicited someone else to kill the victim [n]or participated in a scheme designed to kill the victim”). The Court in *Stanford*, 492 U.S. at 374, warned that care should be taken in relying too heavily on this factor, since “the very considerations which induce [some] to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed.”

<sup>150</sup> See *Enmund*, 458 U.S. at 795 (finding that, of the “[f]orty-five felony murderers . . . currently on [Florida’s] death row,” only one – petitioner – neither killed nor intended to kill); *Coker*, 433 U.S. at 597 (plurality) (finding that 90% of Georgia juries rejected capital punishment for rapists).

<sup>151</sup> *Stanford*, 492 U.S. at 369-70 (emphasis in *Stanford*); see also *Thompson*, 487 U.S. at 822 n.7 (plurality) (“[C]ontemporary standards, as reflected by the actions of legislatures and juries, provide an important measure of whether the death penalty is ‘cruel and unusual’ [in part because] whether an action is ‘unusual’ depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance.”).

<sup>152</sup> *Stanford*, 492 U.S. at 369-70.

<sup>153</sup> See *Atkins*, 536 U.S. at 312 (“[T]he objective evidence, though of great importance, d[oes] not ‘wholly determine’ the controversy.”) (quoting *Coker*, 433 U.S. at 597 (plurality)).

<sup>154</sup> *Coker*, 433 U.S. at 597 (plurality). Accord *Roper v. Simmons*, 125 S.Ct. 1183, 1192 (2005); *Atkins*, 536 U.S. at 313; *Thompson*, 487 U.S. at 833 (plurality); *Enmund*, 458 U.S. at 797; Lee, *supra* note 84, at 189.

Here, the Court looks at the culpability of the defendant and the harm he has caused, in comparison to the typical first-degree murderer. If the defendant is less culpable or caused less harm than the typical first-degree murderer, then death is a disproportionate punishment because not even all first-degree murderers are deserving of the death penalty.<sup>155</sup> In an overlapping, sometimes indistinguishable, inquiry, the Court asks whether, in light of the defendant's level of culpability, his execution would meaningfully advance – that is, advance by some meaningful increment beyond what would be achieved by imposition of a lesser sentence – either of the accepted goals of capital punishment, retribution and deterrence.<sup>156</sup> If not, then imposition of the death penalty “is nothing more than the purposeless and needless imposition of pain and suffering,” forbidden by the Eighth Amendment.<sup>157</sup>

Like the Court's disproportionality analysis, its categorical bar methodology has its detractors both on and off the Court. The subjective portion of the analysis, predictably, has been dismissed as merely a seat-of-the-pants determination based on nothing more than the personal preferences of a majority of the sitting Justices.<sup>158</sup> Yet even the objective portion of the analysis is subject to criticism. At first blush, the inter-jurisdictional analysis “can be applied with clarity and ease.”<sup>159</sup> However, after the Court has added up the jurisdictions on either side of the ledger, it must

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<sup>155</sup> See Roper, 125 S.Ct. at 1195-96; Penry v. Lynaugh, 492 U.S. 302, 335 (1989); Thompson, 487 U.S. at 833 (plurality); Tison v. Arizona, 481 U.S. 137, 155-58 (1987); Enmund, 458 U.S. at 798; Coker, 433 U.S. at 598 (plurality). Accord Lee, supra note 84, at 689-90.

<sup>156</sup> See Roper, 125 S.Ct. at 1196-97; Atkins, 536 U.S. at 318-20; Penry, 492 U.S. at 335; Thompson, 487 U.S. at 833 (plurality); Enmund, 458 U.S. at 798-801; Lee, supra note 84, at 690. In Atkins, 536 U.S. at 316-17 n.21, the Court also looked to such indicia as: the opinions of professional organizations; the stance of religious groups; and public opinion data.

<sup>157</sup> Coker, 433 U.S. at 592 (plurality); accord Penry, 492 U.S. at 335; Enmund, 458 U.S. at 798.

<sup>158</sup> See, e.g., Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (plurality) (“[T]o mean that . . . it is for us to judge . . . on the basis of what we think ‘proportionate’ and ‘measurably contributory to the acceptable goals of punishment’ . . . is to replace judges of the law with a committee of philosopher-kings.”).

<sup>159</sup> Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (plurality).

then decide how many jurisdictions must eschew capital punishment in a particular context before a national consensus has been reached. Some cases, of course, are easier than others. In Coker v. Georgia, the Court observed that Georgia was the only jurisdiction that authorized execution for the rape of an adult woman.<sup>160</sup> But in two more recent cases, the Court held that there was a national consensus against execution of the mentally retarded and those who committed their crimes as juveniles, even though in each case only 60% of the States, and only 47% of the States with the death penalty, precluded its use in those contexts.<sup>161</sup> This has led even some Justices in the majority in those cases to concede that such objective evidence is truly insufficient to demonstrate a national consensus, and that the subjective aspect of the test was really driving those decisions.<sup>162</sup> In turn, this has opened the Court up to even more criticism that its categorical bar jurisprudence simply reflects the personal preferences of a majority of the Justices.<sup>163</sup>

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<sup>160</sup> 433 U.S. 584, 595-96 (1977) (plurality).

<sup>161</sup> See Roper v. Simmons, 125 S.Ct. 1183, 1192 (2005) (finding that 20 of 38 death penalty States allow execution for crime committed while under age of eighteen); Atkins v. Virginia, 536 U.S. 304, 314-15 (2002) (finding that 20 of 38 death penalty States allow execution of mentally retarded). Roper and Atkins brought to the surface a subsidiary debate within the Court: whether to include non-death penalty States in the denominator when determining whether there is a national consensus. Compare Roper v. Simmons, 125 S.Ct. 1183, 1198 (2005) (“[T]he Stanford Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the death penalty . . . .”) with id. at 1219 (Scalia, J., dissenting) (“None of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely.”) (emphasis omitted).

<sup>162</sup> See, e.g., Roper, 125 S.Ct. at 1212 (O’Connor, J., dissenting) (“[T]he objective evidence of national consensus, standing alone, was insufficient to dictate the Court’s holding in Atkins.”). Justice O’Connor had been in the majority in Atkins, 536 U.S. at 305.

<sup>163</sup> See, e.g., Roper, 125 S.Ct. at 1221 (Scalia, J., dissenting) (“Of course, the real force driving today’s decision is not the actions of [the]state legislatures but the Court’s ‘own judgment’ that murderers younger than 18 can never be as morally culpable as older counterparts.”) (internal quotation marks omitted); Atkins, 536 U.S. at 337 (Scalia, J., dissenting) (“Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”).

### III. THE ANTI-FEDERALISTS' EIGHTH AMENDMENT

All of the applications of the Eighth Amendment discussed above have at least one thing in common: none distinguishes the Eighth Amendment in its pristine form from the Amendment as incorporated through the Fourteenth Amendment. Since 1962, when the Eighth Amendment was held to bind the States,<sup>164</sup> both courts and commentators have assumed that the same Eighth Amendment standards – whatever those might be – apply in an identical fashion to the federal and State governments.<sup>165</sup> Indeed, the two main cases applying the “pure” Eighth Amendment, Weems v. United States<sup>166</sup> and Trop v. Dulles,<sup>167</sup> have greatly influenced the development of “incorporated” Eighth Amendment jurisprudence, through their dynamic rather than static view of the Amendment and their use of comparative analysis among and within jurisdictions. Conventional wisdom thus holds that there is no “pure” Eighth Amendment jurisprudence distinct from the Court’s “incorporated” Eighth Amendment jurisprudence.

However, recent research reveals that the criminal procedure protections of the Bill of Rights were adopted primarily to make it more difficult for the federal government to investigate, prosecute, convict, and punish people for crime, regardless of the guilt or innocence of the accused. This function contrasts sharply with the reliability-enhancing rationale ascribed to the Fourteenth Amendment’s Due Process Clause. This distinction suggests that the Bill of Rights applies more stringently to the federal government than it does to the States, a notion that makes perfect sense in light of the communitarian ideology of the Anti-Federalists, who insisted on the inclusion in the Constitution of the Bill of Rights. After all, there is no more fundamental way in which citizens can

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<sup>164</sup> See Robinson v. California, 370 U.S. 660, 667 (1962).

<sup>165</sup> But see Packer, *supra* note 89, at 1074 n.11 (briefly suggesting that different standards might apply).

<sup>166</sup> 217 U.S. 349 (1910).

<sup>167</sup> 356 U.S. 86 (1958) (plurality).

be excluded from their communities, literally or figuratively, than by subjecting them to the criminal sanction. It is this potential power to exclude by the new central government that was among the most feared by the Anti-Federalists. The Anti-Federalists' desire to hobble the federal government's power to re-shape local communities through federal criminal law extended naturally to the federal power to punish, for punishment, even upon a properly-obtained federal conviction, dictates the nature, length, and extent of a citizen's exclusion from his community.

#### **A. The Anti-Federalists and the Bill of Rights**

We tend to think of the Bill of Rights as a charter of freedom that puts a thumb on the scale on the side of “the individual” against that abstraction known as “the state.”<sup>168</sup> In this paradigm, it matters not whether “the state” is the local or the national government. Both are equally capable of arbitrarily or maliciously taking our freedom, of reducing citizens to the status of mere subjects. Indeed, for moderns, living in the aftermath of Jim Crow and the modern civil rights movement, it is near gospel that we have more to fear from local government than from the national government.<sup>169</sup>

But what is orthodoxy now was heterodoxy in 1791. The Anti-Federalists of that period “saw state legislatures and state courts as the protectors of citizens and not as threats.”<sup>170</sup> What they feared was the newly created central government. George C. Thomas, III invites us back into time:

Return to the 1790s. The States eye the central government, to which they have just ceded much of their sovereignty, as a potential bully or, worse, a tyrant. The

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<sup>168</sup> See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 34 (1998) (“[T]he conventional assumption [is] that virtually all the provisions of the Bill of Rights . . . were essentially designed to protect individual rights.”).

<sup>169</sup> See *id.* at 4 (“[M]any lawyers embrace a tradition that views state governments as the quintessential threat to individual and minority rights, and federal officials – especially federal courts – as the special guardians of those rights”).

<sup>170</sup> Thomas, *supra* note 53, at 180.

States look upon the freshly minted central government as it looms above them, and it reminds them of King George III and Parliament.<sup>171</sup>

It is well known that the Constitution was ratified by many states on the implicit condition that a Bill of Rights be added shortly thereafter to assuage these fears.<sup>172</sup> The underlying premises of the Anti-Federalists, then, are critical to an understanding of the Bill of Rights, for without their assent, the Constitution might never have been ratified.<sup>173</sup>

Close scrutiny of the Anti-Federalists' Bill of Rights reveals it to be profoundly concerned with preserving state sovereignty as a means of furthering liberty. Though framed in terms of protecting the rights of individuals, the Bill of Rights was viewed in 1791 as a barrier between the States and the national government.<sup>174</sup> While to moderns, the Bill of Rights is counter-majoritarian,<sup>175</sup> to the ancients, exactly the opposite was true: the Bill of Rights, as originally

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<sup>171</sup> Id. at 149. See also Calvin Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 Wis. L. Rev. 1229, 1231 (asserting that the Bill of Rights is "a constitutional antidote to the potential excesses of national power so feared by the Anti-Federalists").

<sup>172</sup> See Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 Nw. U. L. Rev. 39, 66 (1989) ("[R]atification of the Constitution was only secured because Federalists agreed to consider subsequent amendments recommended by Anti-Federalists in various state conventions."); Massey, *supra* note 171, at 1236 ("[T]he Anti-Federalist opposition [to the Constitution] shifted 'to a reluctant acceptance of the instrument provided that appropriate constitutional restraints were placed upon the powers of the federal government.'") (quoting Wilmarth, *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 Am. Crim. L. Rev. 1261, 1276 (1989)); Thomas, *supra* note 53, at 157 (observing that Bill of Rights was added "to satisfy the anti-Federalists").

<sup>173</sup> See Cornell, *supra* note 172, at 67 ("Anti-Federalist intentions are relevant to understanding the Constitution; without their acquiescence ratification might never have been secured. \* \* \* In particular, Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights."). This is not to imply that Anti-Federalist theory was monolithic. See Herbert J. Storing, *What the Anti-Federalists Were For*, reprinted in 1 Herbert J. Storing, *The Complete Anti-Federalist* 5 (1981) ("It would be difficult to find a single point about which all of the Anti-Federalists agreed."). It is only to say that certain themes were heavily emphasized in Anti-Federalist thought.

<sup>174</sup> See Thomas, *supra* note 53, at 149. See also Massey, *supra* note 171, at 1231 (contending that the "'Anti-Federalist constitution' [is] concerned with preserving the states as autonomous units of government and as structural bulwarks of human liberty").

<sup>175</sup> See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1203 (1991) ("Today, the very phrase 'Bill of Rights' is virtually synonymous with a compilation of counter-majoritarian personal rights.").



conceived, was a stridently majoritarian document.<sup>176</sup> The Bill was primarily concerned with lowering what Akhil Amar has dubbed the “agency costs” of representative democracy.<sup>177</sup> The Anti-Federalists knew that because the number of the people’s representatives in the nation’s capital would be relatively small, only the aristocratic few, “with reputations over wide geographic areas,” would be well known enough to be elected.<sup>178</sup> The Anti-Federalists feared that these aristocratic “representatives” would be truly un-representative, given their distance, both physical and psychic, from the “middling classes” that made up the mass of the people.<sup>179</sup> The danger was that the people’s national representatives, far removed from the concerns of the communities they purported to represent, would be motivated more by self-interest than by civic virtue.<sup>180</sup> State legislators, by contrast, because they would be drawn from smaller geographic regions, would be more familiar to

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<sup>176</sup> See *id.* at 1202 (“[T]he world view underlying the Bill of Rights was not dominated by the idea of individualistic, countermajoritarian rights.”); Amar, *supra* note 168, at xii (“The genius of the Bill was . . . not to impede popular majorities but to empower them.”); see also Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 520 (“[Anti-federalists were ‘localists,’ fearful of distant governmental, even representational, authority for very significant political and social reasons that in the final analysis must be called democratic.”).

<sup>177</sup> See Amar, *supra* note 168, at xiii.

<sup>178</sup> *Id.* at 11; see also Wilson Carey McWilliams, *The Anti-Federalists, Representation, and Party*, 84 *Nw. U. L. Rev.* 12, 30 (1989) (“The Anti-Federalists . . . believed [that] a large republic with a fragmented and dispersed citizenry gave decisive advantages to organized elites – specifically, government officials, the wealthy, and men of commerce.”); Letter from the Federal Farmer (Jan. 4, 1788), reprinted in 2 Storing, *supra* note 173, at 276 (“[T]he best practical representation, even in a small state, must be several degrees more aristocratical than the body of the people.”); Speech by Melancton Smith (June 21, 1788), reprinted in 6 Storing, *supra* note 173, at 157 (“[T]his Government is so constituted, that the representatives will generally be composed of . . . the natural aristocracy of the country.”).

<sup>179</sup> Amar, *supra* note 168, at 11; see also McWilliams, *supra* note 178, at 25 (“The Anti-Federalists . . . argued that . . . in large states, rulers could know their people only as so many abstractions.”); Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 *Nw. U. L. Rev.* 74, 90 (1989) (noting the Anti-Federalists’ fear that their “so-called representatives, ignorant of their constituents’ needs, and both literally and psychically distant from their constituents, would pass laws that were unsuited to the different parts of the republic”); Speech by Melancton Smith (June 21, 1788), reprinted in 6 Storing, *supra* note 173, at 157 (“[R]epresentatives [should] resemble those they represent; they should be a true picture of the people; possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests.”); 3 Elliot, *supra* note 85, at 322 (statement of Patrick Henry) (“[I]nstead of a confidential connection between the electors and the elected, they will be absolutely unacquainted with each other.”).

<sup>180</sup> See Amar, *supra* note 168, at xiii.

their constituents and more familiar with local conditions, and therefore more trustworthy.<sup>181</sup> The Bill of Rights was proposed and adopted as a method of cutting back on the potential self-dealing on the part of the people’s national representatives by facilitating “the ability of local governments to monitor and deter federal abuse.”<sup>182</sup>

The notion that a responsive and representative local authority could provide a check on the abuses of an unrepresentative central authority was deeply ingrained in the minds of the framers. At the time of the framing, many of the State governments were well into their second century.<sup>183</sup> In the dozen years or so from 1763 until the Revolution began, “colonial governments took the lead in protecting their citizens from perceived Parliamentary abuses. Colonial legislatures kept a close eye on the central government; sounded public alarms whenever they saw oppression in the works; and organized political, economic, and (ultimately) military opposition to perceived British evils.”<sup>184</sup>

The idea here is not that the Bill of Rights was designed to protect collective rights rather than individual rights. To the contrary, the Anti-Federalists saw the two as fairly indistinguishable.<sup>185</sup> The prevailing Anti-Federalist thought at the time viewed individuals as primarily constituent parts of the community.<sup>186</sup> Accordingly, the fortunes of the individual were

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<sup>181</sup> See *id.* at 11; accord Herbert J. Storing, *What the Anti-Federalists Were For*, reprinted in 1 Storing, *supra* note 173, at 17.

<sup>182</sup> Amar, *supra* note 168, at xiii.

<sup>183</sup> See *id.* at 5 (pointing out that the Virginia “House of Burgesses had been meeting since the 1620s”).

<sup>184</sup> *Id.* See also *id.* at 4 (“[The] states’ rights tradition . . . extoll[ed] the ability of local governments to protect citizens against abuses by central authorities.”).

<sup>185</sup> See *id.* at 128 (“[The] point is not that substantive rights are unimportant, but that these rights were intimately intertwined with structural considerations.”).

<sup>186</sup> See McWilliams, *supra* note 178, at 19 noting the Anti-Federalist view that “[i]ndividuality is possible only because political society protects and nurtures our individual strengths and attributes, making it possible for each of us to do what he or she does best”; *id.* at 19-20 (“It was common for Anti-Federalists to argue . . . that political societies, once created, became ‘one body,’ a collective second nature that subsumes and supersedes all or most individual rights.”) (footnote omitted) (quoting Speech by Melancton Smith (June 20, 1788), reprinted in 6 Storing, *supra* note 173, at 149, 153).

intimately intertwined with the fortunes of his fellow citizens as a collective whole.<sup>187</sup> The ultimate goal was preservation of individual liberty and self-determination by protecting the collective rights of “the people,” a phrase that is repeated five times in the Bill.<sup>188</sup> Thus, individual rights and collective rights are often “marbled together” in the provisions of the Bill.<sup>189</sup>

Unfortunately, this original view of the Bill of Rights has been lost to the courts and all but a few scholars. Since most of the modern Supreme Court cases interpreting the Bill of Rights have come from the States, they have really been interpretations of the Fourteenth Amendment. Given the focus of the framers and ratifiers of the Fourteenth Amendment on the protection of former slaves and other minorities – ethnic, religious, and political – from dominant local majorities, that Amendment has a distinctively individual-rights hue.<sup>190</sup> This, in turn, has colored the way we think

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<sup>187</sup> See Amar, *supra* note 168, at 126 (quoting leading Anti-Federalists who expressly conjoined concerns for both individual and states’ rights); see also *id.* at xii (“A close look at the Bill reveals structural ideas tightly interconnected with language of rights . . .”); Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 *Temp. L. Rev.* 95, 113 (1996) (“[B]ecause the anti-federalists felt that individuals are defined primarily by their communities, they stressed the interconnections and interdependencies between individuals and society.”); McWilliams, *supra* note 178, at 24 (observing that Anti-Federalists “link[ed] [individual] well-being with that of the community”); Herbert J. Storing, *What the Anti-Federalists Were For*, reprinted in 1 *Storing*, *supra* note 173, at 15 (“The Anti-Federalists’ defense of federalism and of the primacy of the states rested on their belief that there was an inherent connection between the states and the preservation of individual liberty, which is the end of any legitimate government.”).

<sup>188</sup> See U.S. Const., amend I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . .”); *id.* amend. II (“[T]he right of the people to keep and bear Arms, shall not be infringed.”); *id.* amend. IV (“The right of the people to be secure in their persons, papers, houses, and effects, against unreasonable searches and seizures, shall not be violated . . .”); *id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>189</sup> Amar, *supra* note 168, at 222. It must be conceded that even some Anti-Federalists admitted to a more modern understanding of the Bill of Rights as a means of “secur[ing] the minority against the usurpation and tyranny of the majority.” Letter of Agrippa to the Massachusetts Convention (Feb. 5, 1788), reprinted in 4 *Storing*, *supra* note 173, at 111. See also Essay by a Farmer (Feb. 15, 1788), reprinted in 5 *Storing*, *supra* note 173, at 15 (“[T]he rights of individuals are frequently opposed to the apparent interests of the majority – For this reason the greater the portion of political freedom in a form of government the greater the necessity of a bill of rights . . .”). However, these sentiments were rarely expressed by the Anti-Federalists.

<sup>190</sup> See Amar, *supra* note 168, at 7 (“Through the Fourteenth Amendment . . . the Bill has been pressed into the service of protecting vulnerable minorities from dominant social majorities. Given the core concerns of the

about the provisions of the Bill of Rights itself, since, through the fiction of incorporation, we pretend we are interpreting the first eight Amendments rather than the Fourteenth.<sup>191</sup> Thus, we think of the Bill of Rights as emphasizing individual rights, even though the Bill itself was – and is – far more concerned with federalism, popular sovereignty, and collective rights than we typically acknowledge.<sup>192</sup>

Some have gone so far as to suggest a “two-track” model for at least some of the provisions of the Bill of Rights, proposing different constraints when those provisions are applied to the States than when they are applied to the federal government.<sup>193</sup> After all, while the Fourteenth Amendment arguably incorporates the provisions of the Bill of Rights against the States, it “did not

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Fourteenth Amendment, all this is fitting . . . .”); *id.* at 23 (noting that Fourteenth Amendment “focuses more on overweening majoritarianism than attenuated representation”).

<sup>191</sup> See *id.* at 7 (“Like people with spectacles who often forget that they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.”); see also Amar, *supra* note 175, at 1201 (“[A]doption of the Fourteenth Amendment appears to have transformed the nature of the Bill.”).

<sup>192</sup> See McWilliams, *supra* note 178, at 20 (“In advocating a Bill of Rights, the Anti-Federalists most zealously defended public freedoms and the right to a republican civil life.”); see also Amar, *supra* note 168, at 23 (“[P]opular speech was the paradigm of our First Amendment . . . .”); *id.* at 26 (“The right of the people to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the collective right of We the People to assemble . . . .”) (emphasis omitted); *id.* at 30 (“As with assembly, the core petition right is collective and popular . . . .”); *id.* at 55-56 (“[T]he militia system [protected by the Second Amendment] was carefully designed to protect liberty through localism. [F]reedom and federalism pulled together.”); *id.* at 67-68 (“[T]he Fourth Amendment evinces at least as much concern with the agency problem of protecting the people generally from self-interested government policy as with protecting minorities against majorities of fellow citizens.”); *id.* at 82 (“[M]ost [of the] provisions of Amendments V-VIII were centrally concerned with the agency problem – the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents’ sentiments and liberty.”).

<sup>193</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (“[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government.”); *Walz v. Tax Comm’n*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring) (“It may . . . be that the States, while bound to observe strict neutrality [with regard to religion], should be freer to experiment with involvement – on a neutral basis – than the Federal Government.”); Mannheim, *supra* note 185, at 142-43 (suggesting that a “two-track” model apply to the Establishment Clause). At least three Justices have suggested such a “two-track” model for the Free Speech Clause of the First Amendment. See *Roth v. United States*, 354 U.S. 476, 501, 504 (1957) (Harlan, J., concurring in part and dissenting in part); *Beauharnais v. Illinois*, 343 U.S. 250, 288, 294-95 (Jackson, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). See also Mannheim, *supra* note 185, at 140-42 (discussing merits of this view).

repeal the fundamentally populist philosophy of the original Constitution and Bill of Rights.”<sup>194</sup> Thus, Amar advocates what he calls “refined incorporation,” by which only those provisions of the Bill of Rights that guarantee an individual right, “rather than a right of states or the public at large,” are incorporated by the Fourteenth Amendment.<sup>195</sup> Moreover, even those provisions that are incorporated might apply in different ways to the States than when applied to the federal government.<sup>196</sup> Recent research reveals that the criminal procedure protections of the Bill of Rights are particularly susceptible of such a “two-track” interpretation.

## **B. The Original Purpose of the Criminal Procedure Protections of the Bill of Rights**

While Amar declines to apply a “two-track” model to the criminal procedure protections of the Bill of Rights,<sup>197</sup> George Thomas picks up where Amar leaves off. In a recent work, Thomas shows that these provisions were “not designed with accuracy of outcome as the primary goal.”<sup>198</sup> Rather, “the Framers of the Bill of Rights intended them to be formidable barriers to the successful federal prosecution of criminal defendants, whether guilty or innocent.”<sup>199</sup> Indeed, “the Framers

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<sup>194</sup> Amar, *supra* note 168, at 103.

<sup>195</sup> *Id.* at xiv.

<sup>196</sup> *See id.*

<sup>197</sup> *See generally* Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (1997) (positing unitary theory of criminal procedure protections); *see also* Donald Dripps, Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again,” 74 *N.C. L. Rev.* 1559, 1562 n.19 (1996) (book review) (noting that “Amar’s ‘refined incorporation’ is not invoked” in Amar’s work on criminal procedure); *id.* at 1563 (“[Amar] believes in a single, national set of individual rights against criminal investigation and prosecution . . .”).

<sup>198</sup> Thomas, *supra* note 53, at 152; *see also id.* at 174 (“We have come to believe . . . that the reason to have protections benefiting criminals is that these protections best deliver accurate verdicts . . .”).

<sup>199</sup> *Id.* at 152 (emphasis added). *See also id.* at 156 (“[T]he Bill of Rights . . . sought to impose restrictions on the federal government without regard to the innocence of particular defendants.”); *id.* at 160 (“The principal concern in the Bill of Rights was not to protect innocent defendants. The Framers instead intended to create formidable obstacles to federal investigation and prosecution of crime”); *id.* at 174-75 (“The Framers did not focus

almost surely intended the Bill of Rights to permit guilty defendants to go free.”<sup>200</sup> On this reading, the criminal procedure protections of the Bill of Rights, like the rest of the Bill, are “profoundly antigovernment.”<sup>201</sup> It is only because the Due Process Clause of the Fourteenth Amendment is primarily concerned with protecting the innocent from wrongful conviction and punishment, and because most of our current jurisprudence stems from that Amendment, that we believe the criminal procedure protections of the Bill of Rights themselves to be concerned with the accuracy of trials.<sup>202</sup> Again, we are entranced by the optical illusion of incorporation.

This view largely explains why the Anti-Federalists cared so much about preserving and fortifying the right to trial by jury in criminal cases.<sup>203</sup> Although Article III of the Constitution already guaranteed trial by jury to “be held in the State where the . . . Crimes shall have been committed,”<sup>204</sup> the Anti-Federalists spent much energy advocating for an even stricter rule. This rule, which ultimately found its way into the Sixth Amendment, goes even further, in two respects: first, it guarantees also that the trial take place, not just in the “State” where the crime was committed, but also within the “district”; and second, it guarantees also that the jury come from that

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on separating the guilty from the innocent because they were concerned with curtailing the power of federal prosecutors and judges.”).

<sup>200</sup> Id. at 156.

<sup>201</sup> Id at 175; see also id. at 232 (“[T]he Bill of Rights . . . was fundamentally antigovernment. It was not designed to produce fair outcomes or reasonable accommodations to permit more effective crime control. It was designed to hobble the federal prosecution of crime.”).

<sup>202</sup> See Dripps, *supra* note 197, at 1637 (“[P]reventing punishment outside the criminal process, and ensuring that the criminal process does all it can to prevent unjust convictions, are the core ideas of due process of law.”); id. (“Arbitrary searches and seizures deprive people of liberty without due process, for it is the prospect of a valid prosecution that justifies coercive methods of investigation.”).

<sup>203</sup> See Amar, *supra* note 168, at 83 (“The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.”); Thomas, *supra* note 53, at 176 (“[I]t was correcting the Article III jury right that was the passion of the anti-Federalists.”).

<sup>204</sup> U.S. Const., art. III, § 2, para. 3.

same State and district.<sup>205</sup> The Anti-Federalists believed that the jury, in its role as the voice of the local community,<sup>206</sup> could be counted on to sympathize with a defendant who was being persecuted by the federal government, even if he were guilty.<sup>207</sup> The jury was “interpose[d] between the citizens and the central government as a way to place stringent limitations on the federal government.”<sup>208</sup> This tactic was familiar to the Framers. Prior to the Revolution, when locals disloyal to the Crown were tried for violating such valid but unpopular laws as those prohibiting smuggling, the defendants often could count on local juries to acquit against the evidence.<sup>209</sup> The Anti-Federalists’ focus on these particulars of the jury-trial right strengthens the inference that the Bill of Rights was not primarily intended to protect just the innocent, for their preoccupation would be “an odd historical fact if protecting innocence were uppermost in the minds of the Framers.”<sup>210</sup>

The Anti-Federalists were insistent on throwing the procedural hurdles of the Fourth, Fifth, Sixth, and Eighth Amendments in the paths of federal investigators, prosecutors, and judges, because, just as “the power to tax involves the power to destroy,”<sup>211</sup> the power to prosecute is the power to persecute. “The Framers feared that the powerful federal government would seek to

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<sup>205</sup> “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury of the State and district wherein the crime shall have been committed . . . .” U.S. Const., amend VI.

<sup>206</sup> See Thomas, *supra* note 53, at 177 (“The colonists wanted not truth so much as the voice and the law of the community.”); see also Amar, *supra* note 168, at 88-89 (“[T]he jury would be composed of citizens from the same community, and its actions were expected to be informed by community values.”).

<sup>207</sup> See Amar, *supra* note 168, at 84 (“[T]he jury played a leading role in protecting ordinary individuals against governmental overreaching.”).

<sup>208</sup> Thomas, *supra* note 53, at 177; see also Amar, *supra* note 168, at 87 (“[T]he criminal petit jury could interpose itself on behalf of the people’s rights by refusing to convict when the executive sought to trump up charges against its political critics . . . .”); Thomas, *supra* note 53, at 179 (“[A] jury who knows the defendant’s character will nullify a prosecution that was viewed as overreaching on the part of the federal government, without regard to whether the defendant was factually guilty.”).

<sup>209</sup> See Thomas, *supra* note 53, at 176-77.

<sup>210</sup> *Id.* at 156.

<sup>211</sup> *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

persecute its enemies through the use of federal law.”<sup>212</sup> Again, the Framers had seen this before. After all, “many of the Framers themselves had violated British [criminal] law.”<sup>213</sup> “[F]resh from [their] experience as smugglers, tax evaders, seditionists, and traitors to the regime of George III,”<sup>214</sup> the Framers identified and empathized with those enmeshed in the criminal justice system and guilty of laws that were, to them, unjust.<sup>215</sup> Moreover, just as King George had concentrated his efforts on the colonists, the same power to persecute via unpopular criminal laws might be used by the federal government to target particular sections of the nation.<sup>216</sup> Before the Bill of Rights was ratified, this is what the Anti-Federalists saw:

[A] powerful federal government that wanted to eradicate its enemies. The legislature might enact general search warrants that could be used to sweep buildings, neighborhoods, and whole towns, looking not for evidence of crimes of violence or theft but, instead, for evidence of opposition to the government. [A] grand jury could subpoena those suspected of harboring antigovernment sentiments and force them to answer questions about their activities and their friends under threat of contempt. [P]rosecutors could bring a criminal prosecution in a corner of the State far from where the alleged crime occurred; the defendant would be unknown and without friends and resources to assist in his defense. If the judge set bail impossibly high, the defendant could be held in jail for months or years waiting for the prosecution to proceed. When trial did finally begin, under the supervision of a lax federal judge, it could be done largely by affidavit . . . without a lawyer for the defendant and without access to subpoena power to compel attendance of defense witnesses. And if the defendant somehow escaped with an acquittal, or with a sentence that the prosecutor found too lenient, the prosecutor could prosecute the same offense all over again.<sup>217</sup>

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<sup>212</sup> Thomas, *supra* note 53, at 152; see also O’Hear, *supra* note 22, at

<sup>213</sup> Thomas, *supra* note 53, at 156.

<sup>214</sup> Louis B. Schwartz, On Current Proposals to Legalize Wire Tapping, 103 U. Pa. L. Rev. 157, 158 (1954).

<sup>215</sup> See Thomas, *supra* note 53, at 175 (arguing that early federal laws prohibited “what seemed to [some] little more than antigovernment conduct”).

<sup>216</sup> See O’Hear, *supra* note 22, at 759 (“[F]ederal law enforcement has the ability to concentrate its resources on particular types of offenses in particular geographic areas.”).

<sup>217</sup> Thomas, *supra* note 53, at 158-59; see also Amar, *supra* note 175, at 1183 (“[C]riminal law inspired dread and jealousy.”).



Thus, the Fifth Amendment, save for its final clause, and the entirety of the Sixth and Eighth Amendments, specifically address the procedures to be followed in criminal cases. And although the Fourth Amendment does not, strictly speaking, apply only in the criminal arena, its limits on the powers of investigation in the pre-regulatory state surely had its predominant impact on the criminal process.<sup>218</sup>

Why does the prospect of a government's abuse of the criminal law engender such fear, for us as much as for the Anti-Federalists? Certainly, a tyrannical central government might use the civil courts to persecute and torment its adversaries as well. It might bankrupt its enemies by exacting stiff forfeitures and civil fines for violations of federal law.<sup>219</sup> To be sure, the Anti-Federalists fought for the right to trial by jury in federal civil matters as well as in criminal cases. Yet the provisions of the Bill of Rights pertaining exclusively to civil trials – the Civil Jury Clause,<sup>220</sup> the Reexamination Clause,<sup>221</sup> and the civil application of the Due Process Clause<sup>222</sup> – are duplicative of, and not nearly as extensive as, those occasioning criminal trials. To be sure, the primary check on the central government in criminal cases as well as civil was “the populist and

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<sup>218</sup> See Thomas, *supra* note 53, at 158 (“The Fourth, Fifth, Sixth, and Eighth Amendments mostly have to do with the power of the federal government to identify and punish criminals . . .”).

<sup>219</sup> See *id.* at 179 (noting that Bill of Rights “make[s] it difficult for the federal government . . . to subject anyone to forfeiture, fines, and civil penalties”).

<sup>220</sup> See U.S. Const., amend VII (“In suits at common law, where the value in controversy, shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

<sup>221</sup> See U.S. Const., amend VII (“[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”). In criminal trials, the function of this Clause is largely performed by the Double Jeopardy Clause, *id.* amend V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”). See Amar, *supra* note 168, at 96 (comparing Double Jeopardy and Reexamination Clauses).

<sup>222</sup> See U.S. Const., amend V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

local institution of the jury.”<sup>223</sup> One may ask why, in addition to the jury-trial rights, the Anti-Federalists insisted on all of the other accoutrements of the criminal process contained in the Fourth, Fifth, Sixth, and Eighth Amendments.<sup>224</sup> The answer lies in the recognition of the Anti-Federalists’ deep respect for the value of community participation, and their deep fear of the central government’s potential ability to re shape local communities through the criminal law.

### **C. The Criminal Conviction and Its Impact on Community Participation**

The value of community participation was a central tenet in Anti-Federalist thought.<sup>225</sup> Indeed, the Anti-Federalists valued local autonomy over centralized governance precisely because de-centralized decisionmaking “would enable the people to participate more directly, through debate and dialogue, in the decisions that would affect their lives.”<sup>226</sup> As Hanna Pitkin has summarized this view, “the distinctive promise of political freedom remains the possibility of genuine collective action, an entire community consciously and jointly shaping its policy, its way of life.”<sup>227</sup> Such collective action through widespread participation yields benefits for the polity itself. First, those who actively participate in the political life of the community “have more of a stake in the outcome

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<sup>223</sup> Amar, *supra* note 168, at 83; see *supra* text accompanying notes 203 to 210.

<sup>224</sup> It is on this point that, in my opinion, Amar’s account falls short. While justifiably focusing on the right to jury trials, in both civil and criminal cases, as the Anti-Federalists’ “dominant strategy to keep agents of the central government under control,” Amar, *supra* note 168, at 83, this was not their only strategy. Amar originally characterized the remaining protections of the Sixth Amendment as “nonstructural benefits,” i.e., as purely individual rights. See Amar, *supra* note 175, at 1197. When he later expressed his views in book form, however, Amar removed the word “nonstructural,” see Amar, *supra* note 168, at 106, perhaps indicating a willingness to consider the remaining criminal procedural protections of the Bill of Rights as also having some structural components.

<sup>225</sup> See Mannheimer, *supra* note 185, at 111 (“[T]he concern for widespread participation in community decisionmaking was a crucial strain in anti-federalist thought.”).

<sup>226</sup> *Id.*

<sup>227</sup> Hanna F. Pitkin, *Justice: On Relating Private and Public*, 9 *Pol. Theory* 327, 344 (1981).

for their community and will concern themselves with public, as opposed to private, issues.”<sup>228</sup> In addition, widespread participation in community affairs fosters a sense of legitimacy and confidence regarding the outcomes of the political process. This sense of legitimacy obviates the desire for those who find themselves on the losing side of an issue to resort to extra-legal means to attain their goals.<sup>229</sup> Thus, active participation in the political life of the community by its constituent members is essential for the prosperity and well-being of the community itself.<sup>230</sup>

The Anti-Federalists’ focus on active community participation explains their deep concern with the specter of the new federal government’s using the criminal law as a tool of oppression. The criminal process is unique in its ability to strip people of citizenship, of their right to participate fully in the political life of the community. A citizen who has lost a civil case is bit lighter in the wallet, perhaps, but still a citizen. His vote in local and national elections still counts as much as anyone else’s; he is still eligible to serve on juries and in militias; and his voice still carries the same authority it had had before.

By stark contrast, a criminal conviction has always been treated differently. By dint of a criminal conviction, the lawbreaker is both actually and constructively excluded from the political community. Most obviously, the coercive sanction itself works a permanent or temporary physical exclusion of the outlaw from the community: execution permanently and completely excludes the lawbreaker, while imprisonment and banishment work a complete exclusion of the outlaw from the

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<sup>228</sup> Mannheimer, *supra* note 185, at 114; accord Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. Chi. L. Rev.* 1484, 1510 (1989) (book review) (arguing that those who participate in governance have vested stake in community and that if they are too far removed from governance, their interests turn to private matters); Pitkin, *supra* note 227, at 347 (asserting that those involved in community affairs ultimately concern themselves with “the long-range and large-scale significance of what we want and are doing”).

<sup>229</sup> See Mannheimer, *supra* note 185, at 114 (“[P]articipation in governance fosters confidence in the laws that government produces, leading to a more stable polity.”) (footnote omitted); see also Herbert Storing, *What the Anti-Federalists Were For*, reprinted in 1 Storing, *supra* note 173, at 16-17 (arguing that political participation is essential for respect for law).

<sup>230</sup> See Mannheimer, *supra* note 185, at 113.

community either permanently or temporarily.<sup>231</sup> In addition, those convicted of felonies are typically disenfranchised: they may not hold office, sit on juries, or vote.<sup>232</sup> In some States today, this disenfranchisement is permanent.<sup>233</sup> In nearly all, it lasts at least as long as the felon is serving his sentence.<sup>234</sup> And, critically, most state disenfranchisement laws do not distinguish between state and federal offenders.<sup>235</sup> That is, those convicted of federal felonies are disenfranchised from participating in matters of State governance. Thus it is that the federal government, through use or abuse of the power of the criminal process, could greatly affect the composition of the polity at the State level.

But there is more. Even beyond the literal exclusion from the political community that comes with such punishments as execution, imprisonment, banishment, and disenfranchisement, those convicted of a crime carry another serious disability into the political arena. What truly distinguishes criminal from civil liability is that, in Henry Hart's oft-quoted words, a criminal conviction entails the "formal and solemn pronouncement of the moral condemnation of the community."<sup>236</sup> There is a distinctive expressive component to criminal punishment.<sup>237</sup> The criminal conviction stigmatizes in a way that the civil judgment does not.<sup>238</sup>

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<sup>231</sup> Indeed, the etymological derivation of the word "outlaw" stems from the lawbreaker's status as someone "outside the law" and therefore deprived of the benefits and protections of the community. See Black's Law Dictionary 761 (6<sup>th</sup> ed. abr. 1991).

<sup>232</sup> See Developments in the Law, One Person, No Vote: The Laws of Felon Disenfranchisement, 115 Harv. L. Rev. 1939, 1942-43 (2002) [hereinafter One Person, No Vote]. This was equally true at the time of the founding. See Letter from the Federal Farmer (Dec. 31, 1787), reprinted in 2 Storing, supra note 173, at 267 (observing that those "convicted of crimes . . . are excluded any share in the government.").

<sup>233</sup> See One Person, No Vote, supra note 232, at 1143 (noting that eight States take this position).

<sup>234</sup> See id. at 1142 ("Only two states . . . grant prisoners the franchise.").

<sup>235</sup> See U.S. Dep't of Justice, Civil Disabilities of Convicted Felons: A State-By-State Survey ii (updated Oct., 1996) (online at [http://www.usdoj.gov/pardon/forms/state\\_survey.pdf](http://www.usdoj.gov/pardon/forms/state_survey.pdf)) ("The disabilities imposed upon felons under state law generally are assumed to apply with the same force whether the conviction is a state or federal one; in only a few states have particular disabilities been held not to apply to federal offenders.").

<sup>236</sup> Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 405 (1958).

This stigma can understandably be expected to detract from one’s voice in the political process.<sup>239</sup> After all, political participation potentially consists of more than running for office or casting a vote. Participation includes all “arenas of citizenship in the comparably broad sense in which citizenship encompasses not just formal participation in affairs of state but also respected and self-respecting presence – distinct and audible voice – in public and social life at large.”<sup>240</sup> As Carol Rose cogently observed:

[V]oting may well be a relatively minor aspect of local civic participation. Other versions of voice may be much more important locally: the informal constituent contacts, the PTA meetings, the civic groups’ banging on the door at city hall, the cub reporters’ scandal-mongering, the highly issue-oriented jawboning that is the very stuff of local controversy.<sup>241</sup>

Because all public life involves interactions among citizens, interactions that can potentially shape the social and political views of the participants, all public life is potentially political.<sup>242</sup> Thus can a citizen’s voice be dampened or even muted by the stigma that attaches upon a criminal conviction.

Federal criminal law, then, posed the greatest danger of all to the Anti-Federalists, for nothing gives a sovereign greater power to reshape communities than the power of the criminal law.

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<sup>237</sup> See Lee, *supra* note 84, at 712 (“[T]he institution of punishment has an expressive dimension. When it punishes, it condemns the behavior it punishes as wrong . . .”).

<sup>238</sup> See *Robinson v. California*, 370 U.S. 660, 677 (1962) (Douglas, J., concurring) (“A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well.”). That the framers recognized this is evidenced by the constraint placed on the federal government in the Grand Jury Clause of the Fifth Amendment in its ability to prosecute for “infamous crime[s]”: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .” U.S. Const., amend. V. See Schwartz & Wishingrad, *supra* note 63, at 794.

<sup>239</sup> Cf. Lee, *supra* note 84, at 718 (noting that “the stigma attached to criminals” is one factor detracting from “effective lobbying of behalf of criminal defendants”).

<sup>240</sup> Frank Michelman, *Law’s Republic*, 97 *Yale L.J.* 1493, 1531 (1988).

<sup>241</sup> Rose, *supra* note 179, at 97.

<sup>242</sup> See Mannheimer, *supra* note 185, at 114; Pitkin, *supra* note 227, at 346.

The Anti-Federalists were not so naïve as to believe that citizens were so uniformly virtuous as to render the criminal law unnecessary. To the contrary, “they recognized the need for coercion and constraint” of those disinclined to follow society’s basic norms.<sup>243</sup> Yet, they sought to reserve largely to the States the power to shape the community through the use of the criminal sanction. Just as the Anti-Federalists sought to retain control over the intermediate associations of jury, militia, and church,<sup>244</sup> so, too, they strived to retain control over the criminal process.

#### **D. The Anti-Federalists and the Eighth Amendment**

It remains to be seen why the Anti-Federalists fought to enshrine the Cruel and Unusual Punishments Clause in the Constitution. What really frightened them was the prospect of a distant central government using its power to alter the character of local communities by deciding, remotely, who could and could not be part of those communities. Given this, it would seem that the criminal procedure protections contained in the Fourth, Fifth, and Sixth Amendments were sufficient to the task. Once the hurdles established by these provisions were cleared and a defendant was convicted despite them, it would seem that the jig was up. The stigma traditionally attached to the convict would be indelibly applied, his ability to participate in the life of the community forever altered, and the character of the community changed.

It is true that criminal conviction in and of itself works to exclude the convict from the community. But the punishment attached to the conviction is also critical, for it dictates the nature, the extent, and the length of that exclusion. Non-confinement punishments work no additional exclusion from the community but for the substantial effects of the stigma attaching to the

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<sup>243</sup> McWilliams, *supra* note 178, at 22.

<sup>244</sup> See, e.g., Amar, *supra* note 168, at 45 (“The possibility of national control over [the church,] a powerful intermediate association self-consciously trying to influence citizens’ worldviews, shape their behavior, and cultivate their habits obviously struck fear in the hearts of Anti-Federalists.”).

conviction itself. Such exclusion is merely constructive. Imprisonment, on the other hand, works an actual exclusion from the community, temporarily or for life. And execution, of course, permanently and absolutely removes the lawbreaker from his community.

Moreover, the nature, extent, and length of punishment also determine the level of stigma the community places on a particular offender.<sup>245</sup> Some non-confinement punishments, such as the pillory or ducking stool, were designed almost exclusively to shame the lawbreaker, while others, such as the imposition of a fine, involve little more stigma than that imposed by the criminal conviction itself. Still others, such as whipping and branding, appear designed to inflict both pain and shame on the offender.

Even when comparing two sentences involving the same type of punishment, the amount or degree of punishment imposed sends a strong message about the community's view of the respective crimes. Intuitively, for example, we know that the person who has just served a one-day sentence in county jail is likely not quite as deserving of our scorn as the person who has just served twenty-five years in the state penitentiary, even without knowing that the latter offender was convicted of rape or murder while the former offender's transgression was spitting on the sidewalk. "[W]hen the state punishes, how one's punishment stands in relation to punishments for other crimes supplies a crucial piece of information as to how wrong the behavior punished is viewed by the society."<sup>246</sup>

The Anti-Federalists wanted largely to reserve to the States the power, not only to investigate, prosecute, and convict people for crimes, but to determine what kind of punishment, and how much, each type of transgression would merit. They did not wish to leave to the new federal

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<sup>245</sup> See Lee, *supra* note 84, at 712 ("[T]he degree to which . . . behavior is condemned is expressed by varying the amount of punishment.").

<sup>246</sup> *Id.*

government the power to do so, for such authority was part and parcel of the power to re-shape communities that the Anti-Federalists so feared would fall into the hands of the central government:

[T]he effects of sentencing tend to be localized: the sense of vindication felt by victims and the community; the deterrence of future crimes in the community; the defendant's loss of liberty; and the disruption of relationships between the defendant and his or her family and friends. [W]hen federal courts impose nationally determined sentences . . . they inappropriately undermine the integrity of localized responses.<sup>247</sup>

Concern over the dramatic "effect[s] of harsh sentences on families, communities, and the offender's capacity for rehabilitation,"<sup>248</sup> explains why, today as in 1791, States might wish to impose more lenient punishment on lawbreakers than does the federal government:

When federal incarceration results in the disintegration of a family, state and local agencies must pick up the pieces. When federal incarceration results in the removal of young males from a community en masse, the costs are felt primarily at a state and local level. When federal inmates are returned years later with poor job prospects and high risks of recidivism, the localized community suffers again.<sup>249</sup>

Likewise, "the removal of large numbers of working-age males to prison may cause substantial social and economic instability, including 'churning' in local labor markets that may make the communities unattractive to businesses."<sup>250</sup>

As in many other ways, in reserving to the States the power to define for themselves the outer limits of the criminal sanction, the Anti-Federalists intertwined notions of individual rights and state autonomy. Thus, leading Anti-Federalist George Mason expressly invoked both State power

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<sup>247</sup> O'Hear, *supra* note 22, at 755.

<sup>248</sup> *Id.* at 760.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 760 n.237.



and individual rights as potential casualties of Congress' feared power, pursuant to the Necessary and Proper Clause,<sup>251</sup> to devise criminal punishments:

Under their own Construction of the general Clause at the End of the enumerated powers the Congress may grant Monopolies in Trade and Commerce, constitute new Crimes, inflict unusual and severe Punishments, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.<sup>252</sup>

This statement is a striking example of the Anti-Federalist concept of the intimate interconnections between individual and collective rights. The “Powers” of “the State Legislatures” and the “Rights” of “the People” are thought to be aligned one with the other against the central government. Moreover, the concern over Congress' supposed power to “grant Monopolies” – surely, a concern sounding more in structure than in individual rights – is lumped together with its purported power to “inflict unusual and severe Punishments.” Though the latter sounds to modern ears as a purely individual-rights matter, it is not so easily disentangled from structural concerns.

Finally, the Anti-Federalists' goal, through the Eighth Amendment, of limiting the federal power to punish fits nicely with a dominant theme in Anti-Federalist thought: minimization of the use of force by government against citizen. The Anti-Federalists adhered to the notion that, in an ideal polity, persuasion would be the rule and force the exception. As one prominent Anti-Federalist wrote: “Our true object is . . . to arm persuasion on every side, and to render force as little necessary as possible.”<sup>253</sup> A government that relied primarily on force of arms to keep order could not truly call itself republican. Thus, coercion and force would be essential in some instances, but Anti-

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<sup>251</sup> See U.S. Const., art. I, § 8, cl. 18 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .”).

<sup>252</sup> George Mason, *Objections to the Constitution of Government formed by the Convention (1787)*, reprinted in 2 *Storing*, supra note 173, at 11.

<sup>253</sup> Letter from the Federal Farmer (Dec. 31, 1787), reprinted in 2 *Storing*, supra note 173, at 264.

Federalist doctrine called for use of force only in such amounts as would be necessary. The Cruel and Unusual Punishments Clause can be explained as a measure designed to keep criminal punishments from going beyond what was necessary to deter and punish criminals.

#### **IV. THE EIGHTH AMENDMENT AND THE FEDERAL DEATH PENALTY**

The problem with all prevailing theories of the Eighth Amendment's Cruel and Unusual Punishments Clause is that each addresses a potential type of overreaching by government against citizen in general terms. None takes into account the unique concerns that drove the Anti-Federalists to limit the new federal government's prospective venture into the world of criminal justice. The goal of a distinctively "pure" Eighth Amendment jurisprudence is to find a theory that achieves maximum coherence with both the Amendment's Anti-Federalist underpinnings and the well developed, and generally well informed, jurisprudence that has grown up around the Eighth and Fourteenth Amendments. In order to formulate a distinctive jurisprudence for the "pure" Eighth Amendment, then, it is necessary to re-examine current doctrine and determine how it should be translated into language the Anti-Federalists would understand.

By taking the principles that have emerged from traditional theories of the Eighth Amendment, and by distilling these principles through the Anti-Federalist filter of federalism, popular sovereignty, and collective rights, we can devise at least one principle of Eighth Amendment jurisprudence that applies only in "pure" Eighth Amendment cases. That principle is easy to apply, commonsensical, and follows almost inexorably from the Anti-Federalist underpinnings of the Bill of Rights: the federal government may not impose a mode of punishment, including death, within the bounds of any State in which that mode of punishment is unauthorized by law. Happily, this principle also coheres with much of contemporary Eighth Amendment jurisprudence while avoiding some of its pitfalls.

**A. Re(dis)covering the Eighth Amendment: Abiding the Will of “The People” in Abjuring “Cruel and Unusual” Modes of Punishment**

Again, the basic theme running through the Bill of Rights is the protection of individual rights through the retention of popular sovereignty and local control.<sup>254</sup> Against this backdrop, consider again the statements of Abraham Holmes and Patrick Henry. The paradigmatic “unusual” punishments they discussed were those practiced during the Spanish Inquisition and by the major Continental governments (“France, Spain, and Germany”) more generally.<sup>255</sup> The overarching concern was to prevent the new federal government from devising modes of punishment practiced on the Continent but unknown to English-speaking peoples, and the newly minted Americans in particular. Holmes’ and Henry’s statements bespeak a design to allow Congress to use only those modes of punishment known to English law and, by extension, the laws of the States. That is, State norms constituted the benchmark for whether a federal punishment was “cruel and unusual.”

An Anti-Federalist view of the Eighth Amendment’s prohibition on certain modes of punishment might thus embrace one of several different, increasingly broad propositions. Most narrowly, one might argue that Congress is prohibited only from implementing modes of punishment not practiced in the States in 1791. More broadly, one might argue that Congress is additionally prohibited from implementing modes of punishment practiced generally in the States in 1791 but which have been later rejected by a national consensus of the States. Finally, one might argue that Congress is also prohibited from implementing within a particular State modes of punishment not practiced within that State. It is this last and broadest proposition that is most coherent with both Anti-Federalist thought and current Eighth Amendment jurisprudence.

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<sup>254</sup> See supra Part III.A.

<sup>255</sup> See supra text accompanying notes 85, 87.

## 1. Option #1: A Prohibition on Imposing Modes of Punishments Not Imposed in 1791

An Eighth Amendment doctrine that prohibits Congress from imposing only those punishments not generally imposed in 1791 in the States would be consistent, at least superficially, with an originalist view of the Eighth Amendment. It would not, however, be consistent with current Eighth Amendment doctrine. At least since Weems v. United States,<sup>256</sup> the Court has embraced a dynamic rather than a static view of the Cruel and Unusual Punishments Clause. The Court has reiterated many times the plurality's conclusion in Trop v. Dulles that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>257</sup> While Justices Scalia and Thomas have advocated the view that the Clause's meaning was frozen in time in 1791,<sup>258</sup> a majority of the Court has never accepted this view. "It is now beyond serious dispute that the Eighth Amendment's prohibition of 'cruel and unusual punishments' is not a static command."<sup>259</sup> Moreover, even Justices Scalia and Thomas have grudgingly accepted "evolving standards of decency" as the touchstone.<sup>260</sup>

In addition, the "evolving standards of decency" standard is probably more coherent with the true intentions of the framers and ratifiers of the Eighth Amendment than is the Scalia/Thomas brand of modern originalism.<sup>261</sup> The framers and ratifiers of the Eighth Amendment foresaw that

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<sup>256</sup> 217 U.S. 349 (1910). See supra notes 109 to 115 and accompanying text.

<sup>257</sup> 356 U.S. 86, 101 (1958) (plurality). See supra text accompanying note 117.

<sup>258</sup> Roper v. Simmons, 125 S.Ct. 1183, 1217 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). (contending that the Court's "modern . . . jurisprudence" of using "modern 'standards of decency' as the touchstone is "mistaken").

<sup>259</sup> Roper, 125 S.Ct. at 1206 (O'Connor, J., dissenting).

<sup>260</sup> See, e.g., Atkins v. Virginia, 536 U.S. 304, 339-40 (2002) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

<sup>261</sup> See H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 948 (1985) (asserting that "original intent" initially "referred to the 'intentions' of the sovereign parties to the constitutional

views on criminal punishments would evolve over time, and it is reasonable to think that they anticipated that the limitations on Congress would increase accordingly. Take the example of Pennsylvania. In 1776, that State adopted a new constitution hailed as establishing “the most democratic of the early state constitutions.”<sup>262</sup> One of its distinctive features was its progressive view on punishments, which was heavily influenced by the reformist views on criminal punishment of such Enlightenment figures as Montesquieu.<sup>263</sup> Section 38 of the new constitution provided: “The penal laws, as heretofore used, shall be reformed by the future Legislature of this State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.”<sup>264</sup> True to form, in 1786, Pennsylvania “abolished the death penalty for robbery, burglary, sodomy and buggery.”<sup>265</sup> Then, in 1794, scarcely three years after the Bill of Rights was ratified, Pennsylvania took the extraordinary step of eliminating the death penalty for all crimes but first-degree murder.<sup>266</sup>

A similar movement occurred in Virginia. In 1778, Thomas Jefferson drafted a bill that would have reserved the death penalty for only the most heinous offenses.<sup>267</sup> The Virginia legislature, following Pennsylvania’s lead, adopted it in 1796.<sup>268</sup> Jefferson later pondered the

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compact [the States], as evidenced in the Constitution’s language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else”).

<sup>262</sup> Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 759, 766 (1949).

<sup>263</sup> See *id.* at 767.

<sup>264</sup> *Id.* at 766-67, n.66 (quoting Pa. Const. §§ 38, 39 (1776)); see also Schwartz & Wishingrad, *supra* note 63, at 821.

<sup>265</sup> Keedy, *supra* note 262, at 767; see also Schwartz & Wishingrad, *supra* note 63, at 822.

<sup>266</sup> See Keedy, *supra* note 262, at 772-73.

<sup>267</sup> See Schwartz & Wishingrad, *supra* note 63, at 818.

<sup>268</sup> See *id.*

“‘ripening’” of public opinion in Virginia that was necessary before law reform took root, “‘by time, by reflection, and by the example of Pennsylvania.’”<sup>269</sup>

Thus, movements were afoot in Pennsylvania and Virginia—two of the three most populous States in 1790<sup>270</sup> – to reform criminal punishments, straddling the period during which the Constitution and Bill of Rights were framed, debated, and ratified. In and of itself, this is powerful evidence that the framers and ratifiers of the Eighth Amendment knew that the States’ views on punishment were sure to change over time.<sup>271</sup> What is more, however, is that Jefferson, lead proponent of reform in Virginia, while not a full-blown Anti-Federalist (because he favored ratification of the Constitution), certainly shared many Anti-Federalist sentiments regarding state sovereignty, federalism, and a limited national government.<sup>272</sup> He later, of course, became the hero of the Democratic-Republicans, the direct ideological descendents of the Anti-Federalists,<sup>273</sup> running for President on that line in 1796, 1800, and 1804, winning the latter two races.

Meanwhile, in Pennsylvania, the Constitutionalists, the leading defenders of the progressive 1776 constitution, were later to become known by another moniker: Anti-Federalists.<sup>274</sup> Indeed, Judge George Bryan played a pivotal role in the drafting of the constitution.<sup>275</sup> Bryan was

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<sup>269</sup> Id. at 818-19 (quoting 1 The Writings of Thomas Jefferson 67 (1903)).

<sup>270</sup> See Return of the Whole Number of Persons Within the Several Districts of the United States 3 (1793) (available at <http://www2.census.gov/prod2/decennial/documents/1790a-02.pdf>) (last viewed Aug. 3, 2005).

<sup>271</sup> See O’Hear, *supra* note 22, at 758 (“[M]ost of the major penological reform movements in the nation’s history evolved at the state and local level . . .”).

<sup>272</sup> See, e.g., Jeff Powell, The Compleat Jeffersonian: Justice Rehnquist and Federalism, 91 Yale L.J. 1317, 1363-64 (1982).

<sup>273</sup> See John E. Nowak, Chasing the Cannon: A Tail’s View of, and Requests to, the Dog, 17 Const. Comment. 375, 379 n.7 (2000) (“The Democratic-Republicans espoused a modified version of the Anti-Federalist philosophy; they mirrored the Anti-Federalists in their opposition to the Federalists’ political philosophy.”).

<sup>274</sup> See 3 Storing, *supra* note 173, at 3.

<sup>275</sup> Keedy, *supra* note 262, at 766, writes that the constitution was drafted primarily by James Cannon, “with the advice and help of Judge Bryan.” One contemporary writer gave the majority of the credit to Bryan, writing that

also “the principal leader of the Anti-Federalists in [Pennsylvania],”<sup>276</sup> probable author of the classic Anti-Federalist essay, “Address of the Minority of the Pennsylvania House of Representatives,”<sup>277</sup> and father of, and close collaborator with, Samuel Bryan, who, under the name Centinel, was “[t]he most prolific and one of the best known of the Anti-Federalist essayists.”<sup>278</sup> Accordingly, leading Anti-Federalists were not only well aware that the penal law was undergoing reform at the time the Cruel and Unusual Punishments Clause was adopted, but some even paved the way for this reform.<sup>279</sup>

Given this, is it possible that the Anti-Federalist framers and ratifiers of the Cruel and Unusual Punishments Clause intended that Congress would be limited only to the extent that the common law limited punishments in 1791? Suppose, for example, that the day after the Bill of Rights had been adopted, each of the States decided to do away with whipping as a form of punishment. Assuming agreement that whipping is “cruel” – that is, severe<sup>280</sup> – can it really be argued that Congress would have still been permitted, notwithstanding the Cruel and Unusual Punishments Clause, to impose whipping for federal crimes though the practice had been rendered “unusual” by dint of its elimination in every single State? To ask the question is to answer it. Accordingly, a broader conception of a distinctively “pure” Eighth Amendment is necessary.

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the Constitution ““ was understood to have been principally the work of Mr. George Bryan, in conjunction with a Mr. Cannon, a schoolmaster.”” *Id.* (quoting Alexander Graydon, *Memoirs of a Life* 266 (1811)).

<sup>276</sup> 2 Storing, *supra* note 173, at 130. Accord 1 Storing, *supra* note 173, at 9; 3 Storing, *supra* note 173, at 5.

<sup>277</sup> See 3 Storing, *supra* note 173, at 11.

<sup>278</sup> 2 Storing, *supra* note 173, at 130.

<sup>279</sup> This is not to ignore the important roles of Federalists William Bradford, Thomas Mifflin, Benjamin Rush, and James Wilson with regard to the 1794 legal reform in Pennsylvania. See Keedy, *supra* note 262, at 768-71. It is only to note the role of a key Pennsylvania Anti-Federalist in the drafting of the extraordinarily progressive 1776 Pennsylvania Constitution, without which the 1794 legislative reform would not have been possible.

<sup>280</sup> See *supra* text accompanying note 57.

## 2. Option #2: A Prohibition on Imposing Modes of Punishments Abandoned by a National Consensus Since 1791

Another possible view is that the Eighth Amendment prohibits Congress from imposing, not only those punishments not generally imposed in 1791 in the States, but also those that were imposed in 1791 but which have since fallen out of favor according to a national consensus of the States. This is a more attractive theory, given that it is more consistent with current Eighth Amendment jurisprudence, which has adopted the notion of “evolving standards of decency” and which looks largely to whether a national consensus has developed against a particular punishment in order to determine what those standards are.<sup>281</sup> Nevertheless, this conception must be rejected as insufficiently broad to be reflective of the Anti-Federalist underpinnings of the Eighth Amendment.

The Anti-Federalists did not see any significance in “national consensus.” Indeed, if they had, they would have been ardent supporters of the new Constitution. Rather, they “desire[d] a continuance of each distinct sovereignty.”<sup>282</sup> The Anti-Federalists recognized the diversity among the States, and favored “the preservation of the individual states.”<sup>283</sup> As Brutus wrote:

The United States includes a variety of climates. The productions of the different parts of the union are very variant, and their interests, of consequence, are diverse. Their habits and manners differ as much as their climates and productions; and their sentiments are by no means coincident. The laws and customs of the several states are, in many respects, very diverse, and in some opposite . . . .<sup>284</sup>

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<sup>281</sup> See supra text accompanying notes 121, 146 to 152.

<sup>282</sup> Essay by the Impartial Examiner, Virginia Independent Chronicle (May 28, 1788), reprinted in 5 Storing, supra note 173, at 191 (emphasis added).

<sup>283</sup> Letter from Robert Yates & John Lansing, Jr., to George Clinton, Gov. of New York (Dec. 21, 1787), reprinted in 2 Storing, supra note 173, at 17 (emphasis added).

<sup>284</sup> Essay of Brutus to the Citizens of the State of New York (Oct. 18, 1787), reprinted in 2 Storing, supra note 173, at 369-70.



While this was part of an argument against conjoining those diverse areas, some Anti-Federalists celebrated the diversity among the States, though strictly for instrumentalist reasons. John Francis Mercer wrote: “A diversity of State-interests, prejudices and parties . . . acting without uniformity and frequently counteracting each other, leaves the great majority of the Component Members sound and cool to repress the agitation of a part.”<sup>285</sup>

The Anti-Federalists’ recognition, if not celebration, of diversity among the States was most clearly manifested in the Establishment Clause of the First Amendment.<sup>286</sup> While each State might have preferred having its own majority sect established as the national religion, the Anti-Federalists settled on everyone’s second choice: no federal involvement in religion at all while each State was free to continue its own established church.<sup>287</sup> Again, diversity among the States was seen by some as instrumental in preserving liberty. As John Francis Mercer again put it: “Parties in politics, like sects in Religion, can only be divested of their danger by multiplying their number and diversifying their objects.”<sup>288</sup>

The Anti-Federalists must have well understood that different States would have different views of criminal punishment as well. Indeed, the Virginia and Pennsylvania experiences demonstrate this. Although penal reform occurred at about the same time in those States,<sup>289</sup> others lagged behind, in a pattern that continues to this day: “[V]iews regarding sentencing policy follow

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<sup>285</sup> Letter from John Francis Mercer to Thomas Jefferson (Oct. 27, 1804), reprinted in 5 Storing, supra note 173, at 31 n.35. See also Letter of Agrippa (Dec. 25, 1787), reprinted in 4 Storing, supra note 173, at 84 (“A diversity of produce, wants and interests, produces commerce, and commerce, where there is a common, equal and moderate authority to preside, produces friendship.”).

<sup>286</sup> “Congress shall make no law respecting an establishment of religion . . . .” U.S. Const., amend. I.

<sup>287</sup> See Mannheimer, supra note 185, at 104-05.

<sup>288</sup> Letter from John Francis Mercer to Thomas Jefferson (Oct. 27, 1804), reprinted in 5 Storing, supra note 173, at 36 n.40. Of course, this mirrors the classic Federalist defense of union contained in The Federalist No. 10 (James Madison).

<sup>289</sup> See supra notes 262 to 279 and accompanying text.

‘strong and consistent’ regional patterns, with residents of New England demonstrating the greatest tendency to be lenient and residents of central southern states displaying the least leniency. \* \* \* These differing viewpoints express themselves in disparate state sentencing laws.”<sup>290</sup> Not only must the Anti-Federalists have recognized that the States’ views on criminal punishment were evolving, they also must have foreseen that this evolution would take place at different speeds in different States.<sup>291</sup>

Moreover, an interpretation of the Eighth Amendment that allowed a national consensus to govern what Congress could do would not lead us to a distinctively “pure” Eighth Amendment doctrine. Instead, it would merely replicate the existing “incorporated” Eighth Amendment doctrine. Under current law, a particular mode of punishment is forbidden to the States when a national consensus against the practice has emerged.<sup>292</sup> Presumably, the same would be true if Congress attempted to impose a punishment that had been rejected by a national consensus. And there is no reason to think that less of a national consensus would be necessary to show that a punishment is “unusual” in the latter case than in the former. Indeed, after Atkins v. Virginia<sup>293</sup> and Roper v. Simmons,<sup>294</sup> that hardly seems possible.

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<sup>290</sup> O’Hear, supra note 22, at 755-56.

<sup>291</sup> See Morton, supra note 19, at 1464 (“States, as independent sovereigns, ‘evolve’ at different rates, and a state that has chosen to recognize the death penalty as inherently cruel should not be forced to languish behind, waiting for its sister states to reach the same conclusion.”).

<sup>292</sup> See supra text accompanying notes 109 to 118, 146 to 152.

<sup>293</sup> 536 U.S. 304, 314-15 (2002) (finding national consensus against execution of mentally retarded where 40% of States, and 53% of States with death penalty, permitted it).

<sup>294</sup> 125 S.Ct. 1183, 1192 (2005) (finding national consensus against execution for crime committed while under age of eighteen where 40% of States, and 53% of States with death penalty, permitted it).

In sum, the Cruel and Unusual Punishments Clause evinces a design to reserve to each State individually, and not to the States generally, the authority to determine its own norms with respect to the criminal punishments to be imposed within its borders

**3. Option #3: A Prohibition on Imposing a Mode of Punishments Within a State That Does Not Impose That Punishment**

What we are left with, then, is a principle coherent with both the Anti-Federalist underpinnings of the Cruel and Unusual Punishments Clause and the Clause's more modern manifestation. That principle dictates that, within the boundaries of a particular State, the federal government may not inflict a mode of punishment – including the death penalty – that is unauthorized in that State.

This principle dovetails nicely with Anti-Federalist doctrine. Again, the primary objective of the Anti-Federalists was the preservation of popular sovereignty through the continued primacy of the States in those spheres carved out by the Bill of Rights.<sup>295</sup> Through the criminal procedure protections, the Anti-Federalists sought to make it harder for the federal government to investigate, prosecute, convict, and punish people for crimes, thereby preserving the States' traditional control over the criminal law. This would allow the States, for the most part, to maintain control of the membership of the political community by giving them primary authority to determine, by use of the criminal sanction, whom would be excluded from the community, in what way, and for how long. Through the Cruel and Unusual Punishments Clause, the Anti-Federalists sought to preserve State prerogatives in setting the outer limits of the severity of the criminal sanction. When placed in this context, the Clause naturally offers up an interpretation that retains for each State the ultimate

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<sup>295</sup> See Massey, *supra* note 171, at 1249 (setting forth view of Ninth Amendment consistent with the desire of the Anti-Federalists “to reserve to the people their rights under local law, and to insulate those rights from federal invasion”).

authority to decide whether a mode of punishment such as the death penalty will be carried out within the borders of that State.

This principle reflects a paradigm of the notion of the “marbl[ing] together” in the Bill of Rights of individual and collective rights. The collective polity’s right to determine the absolute ceiling on the severity of criminal punishments harmonizes perfectly with the individual citizen’s right not to be subjected to a level of punishment exceeding that upper limit. The Cruel and Unusual Punishments Clause encompasses both these rights. In this way, federalism acts, as was originally intended, as an additional layer of protection for the rights of individuals.<sup>296</sup> The Anti-Federalist notion of the intimate interconnection between individual and collective rights is vindicated.

In addition, the principle limiting the federal government to those modes of punishment practiced in each individual State is remarkably coherent with current Eighth Amendment jurisprudence. First, the principle is concerned only with prohibiting certain modes of punishment, which all agree is one of the core meanings of the Cruel and Unusual Punishments Clause. While Justice Scalia has claimed that “[t]he Eighth Amendment is addressed to always-and-everywhere ‘cruel’ punishments, such as the rack and the thumbscrew,”<sup>297</sup> he has failed to support this ipse dixit with any authority. Even if one agrees that the Cruel and Unusual Punishments Clause addresses only modes of punishment, it does not necessarily follow that certain modes of punishment are forbidden “always[and]everywhere,” rather than just sometimes and in some places. The key issue is whether, in the particular context, the punishment is “unusual.” This is the premise underlying the Court’s categorical bar cases.

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<sup>296</sup> See *id.* at 1254 (advocating view of Ninth Amendment that “use[s] the states . . . as structural bulwarks of human liberty”).

<sup>297</sup> Atkins, 536 U.S. at 349 (Scalia, J., dissenting).

Moreover, the principle makes use of inter- and intra-jurisdictional analysis, collapsed into a single inquiry: is the mode of punishment sought by the federal government in a particular geographic area authorized by the State that exercises jurisdiction over that same area? This inquiry avoids the two main pitfalls of the Court's use of inter- and intra-jurisdictional analyses in the disproportionality and categorical bar cases. First, it is purely objective, as the analyses in these other contexts can only purport to be. There is no comparison between levels of seriousness of various crimes, either at the threshold (does a comparison of the punishment to the crime raise an inference of disproportionality?) or in the intra-jurisdictional analysis (are more serious crimes punished as severely, or equally serious crimes punished less severely?) of the disproportionality cases.<sup>298</sup>

Second, the inquiry is easily answerable. While the inter-jurisdictional analysis of the disproportionality and categorical bar cases commences as a purely objective counting up of jurisdictions that do and do not impose the punishment at issue, that is only the beginning of the inquiry. The Court must also somehow divine whether the States on the prohibitionist side of the ledger amount to a national consensus.<sup>299</sup> By stark contrast, in deciding whether the federal government can impose a particular type of punishment, a determination of whether the relevant State authorizes the same type of punishment is both the beginning and the end of the inquiry. If the State does not impose that type of punishment, neither can the federal government within that State. However, if the people of a State have authorized their State agents to impose a mode of punishment

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<sup>298</sup> See supra notes 129 to 138 and accompanying text.

<sup>299</sup> See supra notes 160 to 163 and accompanying text.

when they deem it necessary, the federal government may impose it as well, even if the State does so only rarely.<sup>300</sup>

In short, this principle posits an active role for the courts in protecting Eighth Amendment rights, while leaving virtually no judicial discretion, thus reconciling the otherwise irreconcilable tension in the Court’s current Eighth Amendment jurisprudence.

## **B. Possible Objections to an Anti-Federalist View of the Federal Death Penalty**

A number of objections are possible to this reading of the “pure” Eighth Amendment. First, one might deem it unfair to subject a person in one State to the death penalty for commission of a federal capital offense, while a similarly situated offender in a State without capital punishment will not face execution. Relatedly, one might contend that allowing local values effectively to “reverse preempt” federal law turns the Supremacy Clause on its head. Third, one might argue that the Sixth Amendment’s Jury and Vicinage Clauses are sufficient to inject local values in federal capital trials even in States that reject the death penalty. Finally, one might contend that the proposed principle, if taken to its logical limits, would also prohibit the federal government from punishing any lawbreaker more severely than the State in which the conduct occurred could punish him for the same conduct. None of these objections seriously detracts from the interpretation of the Cruel and Unusual Punishments Clause proposed here.

### **1. National Dis-Uniformity as the Price of Federalism**

One might first point to the obvious fact that the reading of the Eighth Amendment proposed here will lead to different sentences for similarly situated federal offenders, depending on

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<sup>300</sup> See O’Hear, *supra* note 22, at 769 (“The state maximum sentence will be reasonably easy to determine based on a review of state law, but actual state sentencing practices will be far more difficult to establish.”); see also *id.* at 737 (“As a general rule, claims of *de jure* disparity present a stronger case for departure [from the Federal Sentencing Guidelines] than claims of *de facto* disparity because it is more certain that the defendant would have received a different sentence in state court.”).

the State in which the crime occurred.<sup>301</sup> The goal of achieving national uniformity in the administration of the death penalty is precisely the reason the current administration has cited for seeking death in States that do not authorize capital punishment.<sup>302</sup> While that goal is admirable, however, it cannot trump what is the best reading of the Eighth Amendment given its Anti-Federalist underpinnings. The Constitution, and especially the Bill of Rights, contemplates dis-uniformity on a national scale. This dis-uniformity is the price we pay for our federal system.<sup>303</sup> Moreover, while the reading of the Eighth Amendment proposed here breeds national dis-uniformity, it furthers local uniformity: similarly situated offenders within the same State would be treated similarly, irrespective of whether one is charged with a federal crime and the other is charged with a State crime.<sup>304</sup> It is difficult to think of a good reason why national uniformity is more important than local uniformity.<sup>305</sup>

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<sup>301</sup> See, e.g., Little, *Future*, supra note 4, at 565 (expressing concern “that a murderer in one federal district might get the death penalty for a crime that, had it been committed on the other side of the river or road, could not result in a federal death sentence”).

<sup>302</sup> See supra notes 25 to 36 and accompanying text.

<sup>303</sup> See Morton, supra note 19, at 1464 (“Defining cruel and unusual punishment at a local level might lead to disparate results from state to state, but this is hardly a new, or necessarily wrong, outcome.”).

<sup>304</sup> See O’Hear, supra note 22, at 725 (“[T]he local uniformity principle insists that similarly situated defendants within the same locality receive similar sentences, whether prosecuted in state or federal court.”).

<sup>305</sup> See *id.* (“[O]ne of the central objectives of sentencing reform, the minimization of arbitrariness, provides as much support for local as for national uniformity.”). Congress itself has recognized the importance of federal/State parity of sentences, albeit on a lesser scale. See, e.g., 28 U.S.C. § 994(c)(4), (7) (directing Federal Sentencing Commission to consider “the community view of the gravity of the offense” and “the current incidence of the offense in the community” in formulating the Federal Sentencing Guidelines); Assimilative Crimes Act, 18 U.S.C. § 13 (criminalizing “any act or omission” committed on federal land situated within a State which would be criminal pursuant to the laws of that State, and subjecting any person in violation “to a like punishment” as he would receive pursuant to State law); see also S. Rep. No.98-225, at 170 (1983), reprinted in 1984 U.S.C.C.A.N. 3182 (“[C]ommunity norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense.”).

Calvin Massey has compellingly made a similar argument in a related area. He asserts that the Ninth Amendment<sup>306</sup> was designed to allow States to carve out in their own constitutions additional rights to be free from federal encroachment, over and above those granted in the Bill of Rights, which rights are federally enforceable and protected.<sup>307</sup> Massey concedes that, on this reading, the Ninth Amendment could not “be applied uniformly across the country,” and that “some Americans will enjoy more individual liberty than others.”<sup>308</sup> However, he defends this result as both a descriptive and prescriptive matter: “Such a result is the probable intention of the [N]inth [A]mendment, part of the legacy of a system of dual sovereignty, and in any case, a virtue. The citizens of each state would be entitled to define their relationship with all of their governmental agents.”<sup>309</sup> Precisely the same can be said of the Ninth Amendment’s next-door neighbor, the Cruel and Unusual Punishments Clause.

## 2. The Supremacy Clause and “Reverse Preemption”

A related objection would focus on the fact that the principle advocated here seems to turn the Supremacy Clause<sup>310</sup> on its head. It is true that this principle appears to allow a State to, in effect, “reverse preempt” federal legislation. The answer to this must be a resounding: “So what?” On an Anti-Federalist reading of the Bill of Rights, one of its purposes is precisely to carve out

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<sup>306</sup> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const., amend. IX.

<sup>307</sup> See Massey, *supra* note 171, at 1238. My contentions regarding the Eighth Amendment are not precisely coterminous with Massey’s regarding the Ninth. He contends that only those rights enshrined in a state constitution are deserving of recognition in the Ninth Amendment, see *id.* at 1233, while my argument is that so long as a state does not authorize capital punishment, whether by virtue of its constitution, legislation, or mere absence of legislation, that punishment is “unusual” in that State within the meaning of the Eighth Amendment. In this regard, the arguments made by student commentator Sean Morton, see note 52, are similar to Massey’s.

<sup>308</sup> Massey, *supra* note 171, at 1248.

<sup>309</sup> *Id.* See also *id.* (“[N]inth [A]mendment decisional law would develop a richly variegated pattern.”).

<sup>310</sup> U.S. Const., art. VI, cl. 2; see *supra* text accompanying note 50.



certain spheres for State primacy, the Supremacy Clause notwithstanding. To put it another way, the Supremacy Clause makes supreme only those “Laws of the United States . . . made in Pursuance of” the Constitution, but a federal law that purports to impose the death penalty within States that do not authorize capital punishment has not been “made in Pursuance of” the Constitution, but rather in violation of it, at least in those States.<sup>311</sup>

Again, Massey’s parallel arguments regarding the Ninth Amendment are compelling. He notes that the Anti-Federalists feared that the Supremacy Clause would grant the central government “the authority to make its legislation supreme – displacing any contrary state statutory or constitutional law.”<sup>312</sup> Thus, they proposed and ultimately won ratification of the Ninth Amendment to counteract that authority, at least in part.<sup>313</sup> Admitting that his reading of the Ninth Amendment “is radical stuff” because it “amounts to a form of reverse preemption,”<sup>314</sup> Massey contends persuasively that such a reading is compelled by its “text, history, and structural role in the Constitution.”<sup>315</sup> In the same way, the analysis used here demonstrates that a “situational” Eighth Amendment, one that might vary State by State, coheres best with the Amendment’s text and history, the underlying premises of the Anti-Federalists, and existing Eighth Amendment jurisprudence.

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<sup>311</sup> Whether the federal death penalty statutes are unconstitutional on their face for failing to exempt States that do not authorize capital punishment, or whether, to the contrary, under a severability analysis, the statutes are unconstitutional only as applied in such a State, is a question that is beyond the scope of this Article.

<sup>312</sup> Massey, *supra* note 171, at 1236.

<sup>313</sup> See *id.* at 1238 (“[T]he [N]inth [A]mendment was originally intended to allow the people of each state to define unenumerated rights under their own constitutions and laws, free from federal interference.”) (quoting Wilmarth, *supra* note 172, at 1297-98).

<sup>314</sup> *Id.* at 1233.

<sup>315</sup> *Id.* at 1245.

### 3. The Impact of the Sixth Amendment Jury and Vicinage Clauses

One might also observe that, if the injection of local values into the sentencing decision is the goal, then the Jury and Vicinage Clauses are sufficient to the task. Recall that the Anti-Federalists, dissatisfied with the jury-trial right already provided in Article III, spent much of their time, energy, and political capital fighting for an enhanced jury-trial right that would better allow local sympathies to work on behalf of the defendant.<sup>316</sup> If the local community did not believe death was an appropriate sentence, they could decline to impose it. If, on the other hand, the community believed death to be appropriate in a federal case, despite its absence as an option at the State level, the imposition of capital punishment arguably would offend no values of federalism.

One answer to this is that it proves too much, for the same can be said of any of the criminal procedure protections contained in the Fifth and Sixth Amendments. If the Jury and Vicinage Clauses were sufficient to protect the values of federalism in criminal trials, none of these provisions would have been necessary. But the Anti-Federalists were not willing to put all their eggs in the jury box.

The more complete answer is that the argument is anachronistic – it assumes a level of jury involvement during sentencing that did not exist in 1791. At that time, capital crimes uniformly carried with them a mandatory death sentence.<sup>317</sup> There simply was no discretion to be brought to bear on the sentence by the jury’s “voice of the community.”<sup>318</sup> Jury sentencing in capital cases did not take hold until about fifty years later<sup>319</sup> and even today is not constitutionally required.<sup>320</sup> Indeed,

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<sup>316</sup> See supra notes 203 to 210 and accompanying text.

<sup>317</sup> See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976).

<sup>318</sup> See Erik Lillquist, *The Puzzling Return of Jury Sentencing*, 82 N.C. L. Rev. 621, 639-41 (2004) (explaining that juries could control sentence only by deciding which crime, if any, to convict defendant of).

<sup>319</sup> See *Woodson*, 428 U.S. at 291.

it is precisely because sentencing generally takes place without input from the jury that the Eighth Amendment was thought so critical. Just as the Anti-Federalists sought, via the Fourth Amendment's restriction on the issuance of warrants, to hem in federal judges when acting without a jury, so too did they design the Eighth Amendment to constrain those judges when acting alone in other contexts: when setting bail and when sentencing a defendant.<sup>321</sup>

Of course, in a capital case, a jury could always acquit against the evidence to spare the defendant's life, and a constitutional constraint on punishment might therefore be thought unnecessary. But jury nullification is a blunt instrument. Certainly, there might be cases in which the local community would feel that a federal prosecution and conviction of the highest charged offense were justified, but execution was not. Relying solely on the jury-trial right to give voice to the community's sentiments would put the jury in such cases to the difficult choice of sending a man to the gallows despite community feelings to the contrary or sending the (possibly dangerous) defendant back into the community, at least when not offered the alternative of conviction of a lesser offense.

#### **4. Does the Eighth Amendment Prohibit Disproportionate Federal Punishment?**

The most cogent objection to the rule proposed here is based on a "no limiting principle" argument. If the Eighth Amendment forbids the federal government from imposing modes of punishment not imposed in the State where the criminal conduct occurred, then, by virtue of the Amendment's proportionality component,<sup>322</sup> it also forbids the federal government from imposing

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<sup>320</sup> See *Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Spaziano v. Florida*, 468 U.S. 447, 465 (1984).

<sup>321</sup> See Amar, *supra* note 168, at 87 ("[I]n those aspects of a criminal case that might involve a judge acting without a jury – issuing arrest warrants, setting bail, and sentencing – additional restrictions came into play via the Fourth Amendment warrant clause and the Eighth Amendment.").

<sup>322</sup> See *supra* part II.C.3.

sentences of imprisonment greater than those meted out by that State for the same, or a functionally equivalent, crime.<sup>323</sup> Taken to its logical conclusion, the federal government may not even criminalize certain conduct within a State if the conduct is not prohibited by that State, since the State punishment – nothing – will always be less than the federal punishment.

There is no simple answer to this question and this Article does not attempt one. It may be that the proportionality guarantee that the Court has located in the Eighth Amendment does not really exist there. Or it may be that the Eighth Amendment does indeed prohibit federal punishments that exceed State punishments for the same or similar crime committed in the same place. Or, as is most likely, the Eighth Amendment might generally prohibit the federal government from exacting a greater sanction than does the State where the crime occurred, but that other factors, such as a clearly more substantial federal interest or clear evidence of State parochialism, might warrant an exception to the rule. For example, if a State decided not to criminalize treason at all, the federal government should still be able to punish the traitor if his treasonous activities take place within that State, for treason is a quintessentially federal crime. Likewise, if a State decided to punish murder generally with a mandatory term of life imprisonment without parole, but to punish murder of a federal official with five years in prison, the federal government need not be bound by the State's transparently parochial attempt to de-value the lives of federal officers. Aside from these preliminary thoughts, the issue is beyond the scope of this Article and remains an area for further study.

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<sup>323</sup> Steven Clymer and Michael O'Hear have made related arguments. Clymer has argued that because of the disparate and adverse treatment of defendants in federal courts as compared with those in state courts in a number of different areas, including but not limited to sentencing, federal prosecutors are required by equal protection principles to have a rational basis for prosecuting anyone who might be prosecuted in state court. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 652-68 (1997). O'Hear has contended that lack of uniformity between sentences for similar federal and State crimes should generally be a basis for a downward departure under the Federal Sentencing Guidelines. See O'Hear, *supra* note 22, at 725. Neither goes so far as to make the claim that adverse sentencing disparities that inure to the detriment of those prosecuted in federal court are absolutely barred as "unusual" punishments.

Yet this does not detract from the principle set forth here. All agree that prohibitions on modes of punishment are directly contemplated by the Eighth Amendment. Moreover, when a State has ruled out a mode of punishment for even the most serious crimes, there is little danger that it is acting out of parochial self-interest or not properly taking into account a distinctive ly federal interest. Rather, it has decided to tie itself to the mast, to impose on itself a constraint with respect to crime prevention. There can be no surer way to know that a State has rejected a mode of punishment for reasons sufficient to bind the federal government when acting within its borders than that the constraint it seeks to impose on the federal government it also imposes on itself.<sup>324</sup>

## CONCLUSION

Donald Fell. Marvin Gabrion. Dustin Honken. Angela Johnson. Gary Sampson. By all accounts, these are brutal murderers who deserve the harshest sanction allowed by the laws of the States in which they committed their heinous crimes. However, all five face a punishment more severe than those permitted by State law . Each awaits execution on federal death row even though none of the States in which the crimes occurred permits capital punishment. Alfonso Rodriguez Jr. might be next.

It would be difficult to conclude that the Anti-Federalists were foes of harsh punishment. It is unlikely that many of them advocated abolition of the death penalty, or even that they foresaw that nearly one-quarter of the States would eventually choose that path. What is likely is that, were they alive today, most of them would shudder at the specter of Fell, Gabrion, Honken, Johnson, Sampson, and potentially Rodriguez, condemned to die by a powerful central government against the express policy choice of the people of the States of Vermont, Michigan, Iowa, Massachusetts,

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<sup>324</sup> Cf. *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”).

and North Dakota. And it is doubtful that the Anti-Federalists would view a prohibition of the federal death penalty in any State that does not authorize capital punishment as some extreme or extravagant interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause. Instead, they would deem such a prohibition to be at that Amendment's core.