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CONTENTS

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Lost and Found: The Forgotten Origins of the "Cruel and Unusual Punishments" Prohibition

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ABSTRACT

The U.S. Supreme Court and legal scholars have long traced the origins of the Eighth Amendment's prohibition against "cruel and unusual punishments" to the English Declaration of Rights, codified as the English Bill of Rights (1689). The English Declaration of Rights recited that, in King James II's reign, "illegal and cruel punishments" had been "inflicted," with its tenth clause then declaring in hortatory fashion: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The prohibitions against excessive bail and excessive fines and the final phrase—"nor cruel and unusual punishments inflicted"—were later incorporated into the Virginia Declaration of Rights (1776), various state constitutions, and the U.S. Constitution's Eighth Amendment (1791). In 1969, in examining the Eighth Amendment's "original meaning" in an influential law review article, one legal scholar, Anthony Granucci, traced the history of the English Bill of Rights and the Eighth Amendment. He described the English bar on "cruel and unusual punishments" as the product of "chance and sloppy draftsmanship," concluding that American lawmakers, in adopting that prohibition, misinterpreted "the intent of the drafters of the English Bill of Rights." The Eighth Amendment famously reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

As this Article shows, the U.S. Supreme Court and Eighth Amendment scholars have misidentified the English Declaration of Rights as the first appearance of the "cruel and unusual punishments" terminology. For example, in Gregg v. Georgia *(1976), the Supreme Court wrote that the "cruel and unusual punishments" phraseology "first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary." Relying on Anthony Granucci's Eighth Amendment scholarship, Justice Thurgood Marshall had previously observed in his concurrence in* Furman v. Georgia *(1972) that the use of "unusual" in the English Declaration of Rights "appears to be inadvertent." While jurists and legal scholars have long assumed that the "cruel and unusual punishments" terminology originated in the late 1680s as part of the so-called "Glorious Revolution" of 1688–1689 that deposed King James II and brought William and Mary to the throne, this Article demonstrates that the conventional account of the origins of that phraseology—spelled "cruell and unusuall punishments" in some early English sources—is woefully incomplete.*

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The standard account of how that terminology emerged during England's Revolution of 1688–1689, popularly known as the "Glorious Revolution," fails to consider long-forgotten, far earlier uses of it. Those usages stretch back as far as the early 1600s, during the reign of King James I (James VI in Scotland), although they initially appear in non-legal contexts in the early 1610s and, later, in two written remonstrances—or protests—of Irish-Catholics in Ireland in the early 1640s. In particular, the early usages of the cruel and unusual punishments phraseology appear in the index and marginalia of a history of Venice, originally written in French by Thomas de Fougasses, translated from French into English by "W. Shute," and published in London in 1612; in English courtier and poet George Wither's satire, Abuses Stript*, and* Whipt*, first published in the early 1610s, and then reprinted in a later published collection of Wither's poetry,* Juvenilia*; and in two 1642 Irish-Catholic remonstrances—the Ulster Remonstrances—explaining the causes of an Irish rising that began in October 1641. While the relevant references in the Venetian history and Wither's satirical lines of verse both describe barbaric methods of execution, the references in the 1642 Ulster Remonstrances are associated with non-lethal corporal punishments.*

Capital and corporal punishments were once commonly used in England. In addition to horrific methods of execution such as hanging and drawing and quartering and burning at the stake, draconian corporal punishments were inflicted, including on members of the learned professions to chill speech. For example, in the 1630s, at the hands of prerogative courts such as England's now-notorious Court of Star Chamber and Ireland's Court of Castle Chamber, religious dissenters and opponents of Stuart rule were subjected to, or threatened with, non-lethal but painful punishments such as the pillory, branding, whipping, and mutilation. During King Charles I's reign, William Laud, the Archbishop of Canterbury, insisted on strict conformity to Church of England religious practices, and on orders of the Star Chamber, prominent Puritans such as lawyer William Prynne, physician John Bastwick, and clergyman Henry Burton were fined, imprisoned, pilloried, and had their ears cut off for their writings. Adhering to the advice of John Finch, the Chief Justice of England's Court of Common Pleas, William Prynne—already stripped of his Oxford University degree and expelled from Lincoln's Inn, the English Inn of Court that had, two decades earlier, admitted George Wither as a member—was also branded on the cheeks with the letters "S.L." for "seditious libeller." The Court of Star Chamber and its ecclesiastical equivalent, the Court of High Commission, were both abolished by England's Parliament in 1641, in part because of these unpopular punishments and the use by those prerogative courts of an inquisitorial procedure known as the oath ex officio. The oath ex officio required someone to answer any questions on pain of contempt and frequently compelled self-incrimination. In the 1630s, that oath had been used against Puritans, and for refusing to take the oath, John Lilburne—a Puritan who later fought on the side of Parliament in the English Civil War and led the Leveller movement—was punished by the Star Chamber and ended up in the pillory.

This Article details the earliest usages of the cruel and unusual punishments terminology and the historical contexts in which those usages appear. In the case of the Ulster Remonstrances, England had colonized Ireland decades before the 1641 Irish rising, with English and Scottish settlers establishing the Plantation of Ulster in 1609 and, over many decades, systematically dispossessing the native Irish of their ancestral lands. The Court of Castle Chamber in Ireland, like England's Star

Chamber, resorted to excessive fines and inhuman and humiliating punishments such as stigmatizing (i.e., branding of the skin) and the pillory. The two 1642 Ulster Remonstrances of Irish-Catholics—drafted in the wake of earlier written objections of Irish-Catholics to Stuart era abuses, including excessive fines, the use of the pillory, and mutilations—specifically complained about "heavy fines, mulcts, and censures of pillory, stigmatizings, and other like cruel and unusual punishments." That wording resembles language in the Grand Remonstrance passed by England's Parliament in November 1641, although the Grand Remonstrance—shepherded through Parliament by John Pym, an anti-Catholic English politician who risked his own liberty to oppose tyrannical Stuart practices, with Charles I even attempting to arrest him and other members of Parliament—did not contain the "cruel and unusual punishments" terminology.

The Grand Remonstrance, a list of more than 200 grievances presented to Charles I in early December 1641 after a long period of personal rule (1629–1640) in which Charles I reigned without Parliament, preceded and helped precipitate the English Civil War (1642–1651). That civil war followed considerable Puritan migration to the New World due to religious persecution of those opposing Church of England practices, as well as the adoption of the Massachusetts Body of Liberties (1641) drafted by a law-trained Puritan preacher, Nathaniel Ward, who emigrated to the Massachusetts Bay Colony after being removed from his pulpit in England. The English Civil War eventually led to Charles I's treason trial and, ultimately, his execution in 1649. The Massachusetts Body of Liberties was the first legal code in New England, and it referred to both torture and cruel punishments. Clause 45 of the Body of Liberties provided in part: "No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be in some Capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty." "For bodilie punishments," its next provision, Clause 46, read, "we allow amongst us none that are inhumane Barbarous or cruell." Because of the prior appearances of the cruel and unusual punishments terminology as early as the 1610s and in the 1642 Ulster Remonstrances, the use of that terminology in the English Declaration of Rights was almost certainly neither inadvertent nor the product of sloppy drafting.

KEYWORDS

Eighth Amendment, English Bill of Rights, cruel and unusual punishments

CONTENTS

Introduction

In *Harmelin v. Michigan* (1991), Justice Antonin Scalia traced the history of the "cruel and unusual punishments" language as far back as the English Declaration of Rights.[1] "The new Federal Bill of Rights," he emphasized, cognizant of a split in early America between jurisdictions barring *cruel and unusual punishments* and those prohibiting *cruel or unusual punishments*,[2] "tracked Virginia's prohibition of 'cruel *and* unusual punishments,' see Va. Declaration of Rights, § 9 (1776), which most closely followed the English provision."[3] "In fact," Justice Scalia stressed, "the entire text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights, which provided '[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.'"[4] In upholding the death penalty's constitutionality in *Gregg v. Georgia* (1976), the Supreme Court likewise observed that the "cruel and unusual punishments" phraseology "first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary."[5] "The prohibition of 'cruel and unusual punishments' first appeared in 1689, in the English Bill of Rights," Professor John Stinneford, a prominent scholar of the history of the U.S. Constitution's Eighth Amendment, later wrote.[6]

American jurists and scholars, however, have long mistakenly traced the first usage of the "cruel and unusual punishments" terminology to the English

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1 Harmelin v. Michigan, 501 U.S. 957, 966 (1991).

2 *Id.* ("In 1791, five State Constitutions prohibited 'cruel or unusual punishments,' and two prohibited 'cruel' punishments.") (citations omitted); *id.* at 977 ("Both the New Hampshire Constitution, adopted 8 years before ratification of the Eighth Amendment, and the Ohio Constitution, adopted 12 years after, contain, in separate provisions, a prohibition of 'cruel and unusual punishments' ('cruel *or* unusual,' in New Hampshire's case) *and* a requirement that 'all penalties ought to be proportioned to the nature of the offence.'") (italics in original; citing N.H. Bill of Rights, Arts. XVIII, XXXIII (1784); Ohio Const., Art. VIII, §§ 13, 14 (1802)); *id.* at 982 ("During the 19th century several States ratified constitutions that prohibited 'cruel and unusual,' 'cruel or unusual,' or simply 'cruel' punishments *and* required *all* punishments to be proportioned to the offense.") (italics in original; citations omitted).

3 *Harmelin*, 501 U.S. at 966 (italics in original).

4 *Id.*; *see also* Ingraham v. Wright, 430 U.S. 651, 664-65 (1977) ("The history of the Eighth Amendment is well known. The text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689.").

5 Gregg v. Georgia, 428 U.S. 153, 169–70 (1976) (citing Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 Calif. L. Rev. 839, 852–53 (1969)).

6 John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 Wm. & Mary L. Rev. 531, 576 n.214 (2014).

Declaration of Rights[7] and its statutory counterpart.[8] That is so despite a clear awareness of consequential efforts to bar cruel punishments and torture in England and colonial America pre-dating[9] England's so-called "Glorious Revolution" of 1688–1689,[10] the English revolution that produced the English Bill of Rights (1689).[11] That revolution deposed King James II, England's last Catholic monarch,

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7 John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 Wm. & Mary Bill Rts. J. 989, 1009 (2019) ("Under England's seventeenth-century Julian calendar, not abandoned for the Gregorian model until 1751, each new year did not start until March 25th, so the Declaration of Rights was then seen as a product of 1688, not 1689.").

8 *Gregg*, 428 U.S. at 169; *see also* United States v. Aquart, 912 F.3d 1, 62 n.42 (2d Cir. 2018) ("The phrase 'cruel and unusual punishments' first appeared in the English Bill of Rights of 1689, in response to abusive and unprecedented sentencing practices by royal judges under the Stuarts."); State v. Simmons, 947 P.2d 630, 637–38 (Utah 1997) ("Although the notion of proportional punishments is of ancient origin, the first use of the phrase 'cruel and unusual punishments' was in the English Bill of Rights of 1689."); State ex rel. Davis v. Shinn, 874 S.W.2d 403, 406 n.4 (Mo. Ct. App. 1994) (noting that "the phrase 'cruel and unusual punishment' first appeared" in the English Bill of Rights of 1689).

9 *E.g.*, Furman v. Georgia, 408 U.S. 238, 316 (1972) (Marshall, J., concurring):

> In 1583, John Whitgift, Archbishop of Canterbury, turned the High Commission into a permanent ecclesiastical court, and the Commission began to use torture to extract confessions from persons suspected of various offenses. Sir Robert Beale protested that cruel and barbarous torture violated Magna Carta, but his protests were made in vain.

10 Eric M. Freedman, *Habeas Corpus Past and Present*, 59 Fed. Law. 40, 41-42 (2012) (noting that "[t]he Glorious Revolution, long celebrated for constraining royal power by law, was born in the midst of a national security crisis"; that "[i]n December 1688, the Catholic James II of England, having lost all political support, fled the kingdom and was succeeded by William and Mary"; and that "James (who had also been king of Ireland and Scotland, where he retained many supporters) mounted a re-invasion, landing in Ireland in March 1689" but was ultimately "defeated at the Battle of Boyne in Ireland" in 1690). Much religious animosity—between Protestants and Catholics, and between the Church of England and Puritans and Scottish clergymen—as well as many monarchical abuses preceded the Glorious Revolution. *E.g.*, Joseph Bruce Alonso, *International Law and the United States Constitution in Conflict: A Case Study on the Second Amendment*, 26 Hous. J. Int'l L. 1, 8–9 (2003).

11 *See* An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crown, 1 W. & M., c. 2 (1688), *reprinted in* 6 The Statutes of the Realm 143 (London, 1819) (prohibiting "cruell and unusuall Punishments"). America's founders clearly abhorred arbitrary governmental actions, including arbitrary punishments. For example, Alexander Hamilton—in the context of emphasizing the right to "trial by jury in criminal cases, aided by the *habeas corpus* act"—wrote: "Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings." *The Federalist* No. 83, at 562–63 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); Valdez v. Cockrell, 274 F.3d 941, 973 n.87 (5th Cir. 2011) (Dennis, J., dissenting) (quoting *The Federalist* No. 83); *see also* United States v. Booker, 543 U.S. 220, 238–39 (2005) ("The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases.")

and—in February 1689—brought Protestants William and Mary to the throne.[12] "Conditions in the 17th century shifted the balance of power toward Parliament," the U.S. Supreme Court has written, emphasizing that the "power struggle" between the monarchy and Parliament "culminated in the Glorious Revolution, in which Parliament stripped away the remnants of the King's hereditary revenues and thereby secured supremacy in fiscal matters."[13]

The American Revolution took place against the backdrop of English history, including England's Revolution of 1688–1689 that had led to the codification of common-law protections in the English Bill of Rights. America's founders had studied English law, and they were determined to safeguard their own legal rights. For example, the "liberty-loving" framers of the U.S. Bill of Rights and their ancestors, U.S. Supreme Court Justice Hugo Black once emphasized, "detested" the compulsion of "self-incriminatory testimony by court oaths and by the less refined methods of torture," and they "still remembered the hated practices of the Court of Star Chamber, the Court of High Commission, and other inquisitorial agencies which had brought religious and political nonconformists within the penalties of the law by means of their own testimony."[14] Revolutionary era state constitutions and the U.S. Bill of Rights clearly reflected such concerns. "[T]he Framers drafted the Bill of Rights in part in reaction against the old tribunals—the Star Chamber, the High Commission, the Inquisition—of England and continental Europe," one scholar notes, adding that—in those prerogative courts or continental European tribunals—"[i]ndividuals had been called to appear, often in secret, and ordered to abjure heretical beliefs or face torture and other punishment."[15] The Star Chamber—just one of the prerogative courts that became notorious because of

(citing The Federalist No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton)).

12 State of New Jersey v. State of Delaware, 291 U.S. 361, 369 (1934).

13 Consumer Fin. Prot. Bureau v. Community Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 428 (2024).

14 Feldman v. United States, 322 U.S. 487, 499 (1944) (Black, J., dissenting); *see also id.* at 499–500 ("[H]istory supports no argument that the framers of the Fifth Amendment were interested only in forbidding the extraction of an accused's testimony, as distinguished from the use of his extracted testimony. The extraction of testimony is, of course, but a means to the end of its use to punish."); *id.* at 499–500 ("Few persons would seriously object to testifying unless their testimony would subject them to future punishment. The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him. By broadly outlawing the practice of compelling such testimony the Fifth Amendment struck at this evil at its source, seeking to eliminate the possibility that compelled testimony would ever be available for use to punish a defendant.").

15 Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. Rev. 1201, 1282 (1998). The Star Chamber and the High Commission were powerful English tribunals. M. Akram Faizer, *What Everyone Needs to Know About Administrative Law*, 47 J. of the Legal Profession 183, 189–90 ("England developed, under the Tudor and Stuart monarchies, powerful administrative tribunals that were employed to control subordinate officials in their relation to citizens. These tribunals—the Court of Star Chamber and the Court of High Commission, both of which were abolished in 1641—might well have developed into something akin to France's Conseil d'Etat, but the Civil War and Glorious Revolution of 1688, which celebrated the independent judiciary as the primary check on arbitrary executive power, precluded this development.").

its abuses[16]—has been described as "the most prominent . . . prerogative court of general jurisdiction that sat within the King's Privy Council."[17]

Unlike continental European civil law systems,[18] England's common law approach—though once permitting it—renounced torture.[19] Still, English

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[16] English monarchs embraced prerogative courts because of the control they had over them, although they eventually met resistance from Parliament and supporters of the common law. *E.g.*, John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1175–76 (2008) (noting that "[t]he common law was the oldest and most important source of law, dating back to pre-Norman times"; that "because the common law looked to long usage rather than sovereign will for its rules of decision, it was remarkably difficult for kings to subject to royal control"; that "[a]t least partly for this reason, a number of kings established specialized courts that followed the civil law practices of continental Europe rather than the common law," with those courts including the Star Chamber and the ecclesiastical Court of High Commission; that Sir Edward Coke "came to see the imposition of the foreign practices of the civil law as a means of undermining the liberty of English subjects protected by the common law"; and that "according to Coke, the very first act of those who wished to introduce the civil law system to England was to bring an instrument of torture—the 'Rack'—into the Tower of London for use on prisoners").

[17] Note, *Executive Adjudication of State Law*, 133 Harv. L. Rev. 1404, 1416 (2020):

> By the time colonists touched down in Jamestown . . . the Crown was waging a sustained campaign against judicial independence. For one, the Tudors and Stuarts increasingly made use of a system of tribunals outside of the regular common law courts and within the Executive. The Star Chamber was the most prominent—a prerogative court of general jurisdiction that sat within the King's Privy Council. Unlike ordinary common law courts, the Chamber "existed to defend the crown's actions under the royal prerogative" and, critically, because it "existed solely by the King's authority, the common perception was that no method existed by which to challenge the King's actions." As you might expect, this brand of executive branch adjudication quickly became synonymous across the empire with political oppression.

[18] Stephen C. Thaman, Miranda *in Comparative Law*, 45 St. Louis U. L.J. 581, 581 (2001) ("The 'formal rules of evidence' in Continental European inquisitorial systems expressly provided for torture of suspects caught in flagrante or when circumstantial evidence indicated a strong suspicion of guilt."); Peter S. Poland, *A Matter of Life, Death, and Legal Procedure: What Every Texas Lawyer Should Know About the European Witch Hunts*, 77 Tex. B.J. 784, 786 (2014) (noting that "judicial torture frequently was used in early modern Europe to extract confessions," and that "Pope Innocent IV introduced torture into inquisitorial procedure in 1254, and the legal codes of continental Europe later codified its use"); Trace M. Maddox, *The Lawyer, the Witch, and the Witness: Proving Witchcraft in the English Courts*, 35 Yale J.L. & Human. 666, 667 (2024) (noting that "[o]n the continent . . . suspected witches were often 'put to the question' until they confessed their crimes," but that "torture was never legal" in "the common-law courts of England").

[19] *Compare* Johan D. van der Vyver, *Torture as a Crime under International Law*, 67 Alb. L. Rev. 427, 428 (2003) ("In Roman law, it was customary for torture to be applied in order to uncover the commission of a crime."); *id.* at 429 ("Under Roman influence, English common law also permitted torture as a means of eliciting a confession or for obtaining evidence from an uncooperative witness."); Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. Crim. L. & Criminology 402, 421 (1994) ("[A]t one time English common law permitted torture to obtain a confession. In fact, the use of torture to obtain confessions

monarchs, through the Privy Council and using their prerogative powers,[20] nonetheless directed that a number of people be tortured,[21] imprisoned in the Tower

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persisted in treason cases even after it had been banned in general criminal cases."); *and* Wayne T. Westling, *Something Is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. Marshall L. Rev. 537, 543 (2001) ("Many examples of torture exist, dating back to early English common law. The practice of laying on stones in order to force an accused to enter a plea was a judicial application of torture."), *with* A(FC) v. Secretary of State for the Home Dept. [2005] UKHL 71, ¶ 51 (opinion of Lord Bingham) ("[T]he English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention.") (quoted in Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 26 St. Louis U. Pub. L. Rev. 187, 194 (2007)).

[20] Morris Ploscowe, *The Development of Present-Day Criminal Procedure in Europe and America*, 48 Harv. L. Rev. 433, 455 (1935):

> Torture was used not alone in the Star Chamber, but "as a matter of course in all grave accusations, at the mere discretion of the King and the Privy Council, and uncontrolled by any law besides the prerogative of the Sovereign." Although the use of torture was, therefore, an extraordinary proceeding which only the extraordinary power of the Crown could justify, it could only be applied by command of the King or by the King's Council. But no specific quantum of proof was required for it as on the Continent. Nor was there any limitation as in the French law on the number of times torture could be applied. The accused was therefore delivered to the tender mercies of the Crown.

[21] Martin C. Carlson, *The Fourth Amendment: A Philosophical Appreciation, Historic Reflection, Current Assessment and Thoughts on a Path Forward*, 29 Widener Commonwealth L. Rev. 11, 16 (2020) ("[I]n Tudor England, the king's privy council had the power in certain instances to issue torture warrants authorizing the use of physical duress to compel confessions from those suspected of wrongdoing."); *id.* at 16 n.19 ("English scribes identified some 81 instances in which the Privy Council authorized torture warrants in Tudor England.") (citing John H. Langbein, Torture and the Law of Proof: Europe and England in the Ancien Régime 94–123 (2006)); John Alan Cohan, *Torture and the Necessity Doctrine*, 41 Val. U. L. Rev. 1587, 1602 (2007) ("Torture warrants were in frequent use in England during the sixteenth and seventeenth centuries. In his book on legalized torture, *Torture and the Law of Proof*, John Langbein points out that torture was used to obtain evidence necessary to prove the guilt of the accused under the rigorous standards of evidence of the time, which required either the testimony of two eyewitnesses or the confession of the accused; circumstantial evidence was simply inadmissible in those days."); Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 Rutgers L. Rev. 647, 658 (2008) ("Although England investigated crime (mostly treason) through torture for a short period of time, it did so through warrants issued by the Privy Council, rather than the civil courts used in continental Europe.").

of London,[22] or harshly punished in certain cases.[23] While England retained horrific methods of executions such as hanging and drawing and quartering, prerogative courts controlled by England's Privy Council[24] or Church of England bishops also subjected individuals to painful and humiliating corporal punishments.[25] Between

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[22] Over the centuries, the Tower of London was used to confine many opponents of the monarchy and to torture those suspected of crimes. *E.g.*, Comment, Brewster, Gravel, *and Legislative Immunity*, 73 Colum. L. Rev. 125, 126 (1973) ("In England, the conflict concerning the right of legislators to speak freely in Parliament developed in the Sixteenth Century, when the House of Commons began to discuss affairs of state previously thought to be outside of its proper sphere of concern. During the reign of Queen Elizabeth I, members of the House of Commons who attempted to discuss matters in Parliament distasteful to the crown often found themselves confined to the Tower of London."); Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 Ky. L.J. 849, 855 (2004):

> In England the earliest authoritative records regarding the State use of torture appear in the Privy Council registers in the year 1540 and extends, with some gaps in the reports, for a hundred years. The Crown issued less than one hundred official warrants, an amazingly low figure relative to the number of felony investigations in any given year. This low statistic demonstrates that torture was predominantly used for interrogation and not for punishment. The 1597 case of Jesuit priest John Gerard typifies the goal of torture. The Crown's warrant in Gerard's case directed that he be tortured in the Tower of London by means of "the manacles" and other "such torture" as necessary to make Gerard "utter directly and truly his uttermost knowledge" concerning certain traitors to the Crown.

[23] *E.g.*, Thea A. Cohen, Note, *Self-Incrimination and Separation of Powers*, 100 Geo. L.J. 895, 915–16 (2012):

> In English common law courts, statements elicited by torture were inadmissible against criminal defendants. However, the monarchy had the power to assert jurisdiction in his own *executive* courts, most infamously the Star Chamber, which operated as the judicial arm of the Privy Counsel. These courts operated "during the period spanning the reigns of Henry VIII and Charles I" and frequently employed torture to obtain confessions until 1640. The Star Chamber also had the power to administer the *oath ex officio* on those suspected of heresy and other offenses. The object of the oath, which was also forbidden in the common law courts, was to "put the conscience uppon [sic] the racke." Administering the oath forced a religious population to make the choice between swearing in the name of God, which went against religious teachings, and facing the consequences of refusal. In the late sixteenth century, many who refused to take the oath were held in dungeons for years or summarily executed.

[24] *See* Ryan Patrick Alford, *The Star Chamber and the Regulation of the Legal Profession 1570–1640*, 51 Am. J. Legal Hist. 639, 645 (2011) ("The Court of Star Chamber had its origins in a committee (or a function) of the King's Council (from which it would not be formally separate until 1540).").

[25] *E.g.*, 11 The New Encyclopædia Britannica 218 (1994) (noting that the Court of Star Chamber "used the procedures of the king's council"; that "[c]ases began upon petition or information"; that "[d]epositions were taken from witnesses, but no jury was used"; and that "[t]he punishments, which were arbitrary, included imprisonment, fine, the pillory, whipping, branding, and mutilation, but never death"); 1 John Parker Lawson,

1540 and 1640, England's Privy Council issued at least eighty-one torture warrants to investigate crimes.[26]

England's "Glorious Revolution" and the American Revolution are separated by a century of time, yet they both produced written guarantees against excessive governmental action and cruel and unusual punishments. Just as the Star Chamber

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The Life and Times of William Laud, D.D.: Lord Archbishop of Canterbury 515–18 (1829) (noting that "Alexander Leighton, a Scotch Presbyterian minister, and a doctor of divinity, had published a volume, dedicated to the Puritan faction, which he dignified with the title of 'An Appeal to the Parliament, or Zion's Plea against Prelacy'"; that because the book's content, among other things, called prelates "men of blood, enemies to God and the state" and declared the Church of England "to be Antichristian and Satanical," an "information was laid against him in the Star-Chamber, on the 4th of June 1630"; that Leighton was "sentenced to be imprisoned in the Fleet Prison during his life, and pay a fine of £10,000 to the King"; that "[h]e was then, in respect to his ecclesiastical functions, referred to the High Commission, because the other Court could not inflict any corporal punishment on persons while in holy orders; where being degraded from his ministry, he was brought back, and sentenced to be placed in the pillory at Westminster during the sitting of the Court, and there whipped: after his whipping to have one of his ears cut off, his nose slit, his forehead branded with S. S. for *seditious slanderer*, and then conducted to prison"; and that "[a]t another time, he was to be placed in the pillory at Cheapside, his other ear cut off, again whipped, and then conducted to prison, till his Majesty should be pleased to set him at liberty"); Alford, *supra* note 24, at 640–41, 650–51, 664–67, 703 (discussing the Star Chamber's power to punish and oppress lawyers who opposed the royal prerogative, the use of the pillory, and expulsions from the legal profession); *id*. at 725 ("[T]he constitutionalist common lawyers' struggles within the Star Chamber were remembered (and not merely within the legal profession) as arbitrary and repressive prosecutions that were a stain on the court's honour.").

[26] John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1085 n.158 (1994) ("The English authorities used torture in at least 81 cases over the years 1540 to 1640."); Fritz Allhoff, *Torture Warrants, Self-Defense, and Necessity*, 11 Cardozo Pub. L. Pol'y & Ethics J. 421, 429 (2013) ("approximately eighty-one torture warrants were issued in England between the years 1540 and 1640, for which suspicion of sedition of treason was the most common invocation"); Heikki Pihlajamäki, *The Painful Question: The Fate of Judicial Torture in Early Modern Sweden*, 25 Law & Hist. Rev. 557, 560 (2007):

> [I]n the Tudor period judicial torture was adopted for regular use to investigate certain serious crimes. Langbein has located eighty-one torture warrants issued by the Privy Council between 1540 and 1640. Most of the suspected crimes were political or religious, with a quarter of the warrants involving ordinary crimes such as burglary and horse stealing. The immediate purpose of English torture, which reached its zenith in the 1580s and 1590s, was to ward off the perceived threat from political opponents of the Elizabethan state, particularly Roman Catholics. In the 1620s torture practically ceased, probably because of the decline in the political threats against which it had been used.

(1487–1641),[27] the High Commission,[28] and the Inquisition[29] were reviled by early 1640s English parliamentarians[30] and late-eighteenth-century American

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[27] *See, e.g.,* Anne Dennett, Public Law: Directions 32 (2d ed. 2021) (noting that the Court of Star Chamber was created in 1487 and abolished in 1641); Jamieson Knopf, Comment, *The New "Renegade Jurisdiction': How the Fifth Circuit Can Prevent the Extraordinary Writ of Mandamus from Becoming an Extra-Ordinary Remedy*, 30 Geo. Mason L. Rev. 831, 839 (2023) ("During the Tudor Period . . . Parliament passed the Star Chamber Act of 1487, which created an executive tribunal distinct from the common-law courts. The Privy Council, described as 'the upholders of the power of the Executive,' operated 'through the prerogative courts of Star Chamber.'"); Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 661 n.402 (2005) ("The Court of Star Chamber was an English court that operated by mandate of the Crown to specially try—and consequently suppress—individuals who opposed the Crown's policies. Star Chamber tribunals were held secretly with no right of appeal, exacting swift punishment upon any opposition to the Crown.") (citations omitted); Brian Kane, *Idaho's Open Meetings Act: Government's Guarantee of Openness or the Toothless Promise?*, 44 Idaho L. Rev. 135, 141 n.38 (2007) ("The Star Chamber was an English Court of Law. The Chamber was seated at the Palace of Westminster and existed from 1487 to 1641, when it was abolished. The primary purpose of the Star Chamber was to hear treason and political libel cases in an intensely secret manner.").

[28] Documents Illustrative of English Church History 547 (Henry Gee and William John Hardy, eds. 1914) (noting that "[t]he Court of High Commission had been erected by the Supremacy Act of Queen Elizabeth"; that "[f]urther legislation had been passed concerning it in 1583"; that "[i]ts powers had been freely exercised between 1629 and 1640, and had excited much hostility"; that "in June, 1641, a bill was introduced for its abolition, and another for the abolition of the Court of Star Chamber"; that "[t]he king eventually gave his consent to both bills July 5, 1641"; and that "[t]he Court of High Commission was revived for a short time under James II").

[29] "Actually, there were three inquisitions." Thomas W. Simon, *Icongraphy of Torture: Going Beyond the Tortuous Torture Debate*, 43 Denv. J. Int'l L. & Pol'y 45, 56 (2014); *see also id.* at 56–57:

> The first, the Medieval Inquisition (1184), attacked heresies, particularly the dualist beliefs of the Cathars and the Waldensians in southern France. A 1215 papal bull, *Ad Extirpanda*, issued by Pope Innocent IV, outlined the circumstances and methods for the Dominicans to extract confessions through torture. The Spanish Inquisition (1478-1834), initiated by King Ferdinand II of Aragon and Queen Isabella I of Castile, began with a focus primarily on *conversos*, Jews who converted to Catholicism but who had allegedly lapsed back into their former Judaic beliefs and Jewish practices. Finally, the Roman Inquisition, through the Congregation of the Holy Office established by Pope Paul III in 1542, targeted Protestant heretics.

[30] Frank O. Bowman, III, *British Impeachments (1376–1787) and the Preservation of the American Constitutional Order*, 46 Hastings Const. L.Q. 745, 768 (2019) ("The parliamentarians abolished the Courts of Star Chamber and High Commission in 1641 . . . ."); Laura R. Ford, *Prerogative, Nationalized: The Social Formation of Intellectual Property*, 97 J. Pat. & Trademark Off. Soc'y 270, 295–96 (2015) (noting that "[d]uring the 'Long Parliament'—which began in 1640 and formally continued through the 'Interregnum' to 1660—Parliament took over the Prerogative tradition pertaining to printing" and that members of Parliament "substituted themselves, as overseers of the regulatory regime, for the Privy Council and Prerogative Courts (the 'High

revolutionaries alike,[31] the English and American prohibitions against excessive

Commissioners in Causes Ecclesiastical' and the Star Chamber)"); Henry Cohen, Book Review, 51 Fed. Law. 47, 48 (July 2004) ("Important early in the English revolution was the Long Parliament, which convened in 1640 and which Winston Churchill called 'the most memorable Parliament that ever sat in England.' In 1641, it abolished the Star Chamber, High Commission, and other prerogative (*i.e.*, royal) courts, established the right of release on habeas corpus, and declared the common law courts supreme in criminal and civil cases.") (reviewing Harold J. Berman, Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition (2003).

[31] *E.g.*, Ullmann v. United States, 350 U.S. 422, 427–28 (1956) (noting that the U.S. Constitution's Fifth Amendment privilege against self-incrimination sought to prevent "a recurrence of the Inquisition and the Star Chamber"); *id.* at 446 (Douglas, J., dissenting) (noting that the Fifth Amendment privilege against self-incrimination has a "long history"; that "[s]ome of those who came to these shores were Puritans who had known the hated oath ex officio used both by the Star Chamber and the High Commission"; that John Lilburne had "marshalled many arguments against the oath ex officio, one of them being the sanctity of conscience and the dignity of man before God"; that Thomas Cartwright "had refused to take the oath ex officio before the High Commission on the grounds that 'hee thought he was not bound by the lawes of God so to doe'"; and that they had known of the "great rebellion" of Lilburne, Cartwright and others "against those instruments of oppression"); Wadad Barakat, Comment, *A Blind Spot in* Miranda *Rights: Juveniles' Lack of Understanding Regarding* Miranda *Language*, 31 St. Thomas L. Rev. 174, 178 (2019) ("The Fifth Amendment 'was created in reaction to the excesses of the Courts of Star Chamber and High Commission—British courts of equity that regulated from 1487 to 1641.' Once the Courts of Star Chamber and High Commission were abolished, the common law courts of England incorporated the principle of 'nemo tenetur' that no man should be bound to accuse himself."); Elwood Earl Sanders, Jr., *Willful Violations of* Miranda: *Not a Speculative Possibility But an Established Fact*, 4 Fla. Coastal L.J. 29, 62 & n.48 (2002) (noting that "Parliament 'abolished' self-incrimination" in its 1530's act that "repealed the infamous *De Haeretico Comburendo* of 1401, which authorized Spanish Inquisition style tactics against heretics and other enemies of the Medieval Church"; that Queen Mary "revived" the *De Haeretico Comburendo* for her persecutions; that "[o]ne of the Marian laws established what became known as the Court of High Commission, which had authority to exact confessions from suspected heretics 'by the confession of the parties"; that "[t]he oath ex officio was . . . specifically intended 'to examine and compel to answer, and swear, upon the holy evangelists, to declare the truth in all such things whereof they or any of them shall be examined"; and that "it was not until the trial of John Lilburne in 1640 that the English nation was roused to action and revolution."); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 Ohio St. L.J. 101, 112–16 (1992) (noting that "[t]he oath ex officio became an important tool of religious persecution, first of Protestants by Catholics, then of Catholics by Protestants, and finally of Puritans by Anglicans"; that "[i]n 1401, Parliament enacted the statute *De Haeretico Comburendo*" that "gave the Bishops power to arrest and jail anyone 'defamed or evidently suspected' of heresy" and that "put Parliament's imprimatur on the oath ex officio, and mandated burning for '[o]bstinate or relapsed heretics'"; that "[a]n inquisition against early Protestants had begun which lasted for almost a century and a half" and that, "[d]uring that period, thousands of persons were examined by oath ex officio about their religious beliefs and practices"; that "[u]ntil 1532, none refused to answer," but that "[i]n 1532, the Archbishop of Canterbury conducted an inquiry into the suspected heresy of John Lambert" and that "Lambert became the first person on record to claim that the oath was unlawful, saying

bail, excessive fines, and cruel and unusual punishments—though put in place in separate centuries and in different historical circumstances—arose out of serious concerns about abuses of power. Most relevant here, Article 10 of the English Bill of Rights (1689), forbidding "cruel and unusual punishments" (sometimes spelled "cruell and unusuall punishments"), and section 9 of Virginia's Declaration of Rights (1776) and the third and final clause of the U.S. Constitution's Eighth Amendment, ratified in 1791 and containing the same prohibition, are plainly linked from a textual standpoint.

There has, however, been a failure to fully understand how the English prohibition against "cruel and unusual punishments"—the American predecessor—came about in the first place. In fact, for generations, jurists and legal historians have failed to uncover and identify the earliest usages of the cruel and unusual punishments terminology—long-forgotten usages that appear in seventeenth-century poetry, books, and remonstrances (a form of protest).[32] Those earlier

'No man is bound to bewray [accuse] himself,' to which, according to Professor Levy, 'he appended the Latin expression of that maxim, *Nemo tenetur prodere seipsum*'"; that "[a]s the records of the proceeding indicate . . . Lambert's complaint was quite narrow," to wit, "that he could not be made to answer on oath until he had been formally accused and given notice of the charges"; that "[e]ven this narrow claim added a nail to Lambert's coffin, and he was eventually executed for obdurate heresy"; that in 1533 Parliament "enacted a statute that repealed *De Haeretico Comburendo*"; that "[t]he new statute provided that '[a]ny person presented or indicted of any heresy, or duly accused by two lawful witnesses, may be cited, arrested, or taken by an ordinary [a church official who sat in ecclesiastical court], or other of the King's subjects to answer in court"; that "[b]y requiring presentment, indictment, or accusation by two lawful witnesses, the statute responded to contemporary criticism of the oath as a 'fishing' device" and while "[i]t did not abolish the oath," "it provided for formal charge as a precursor to the oath in ecclesiastical courts"; that after Henry VIII "became 'head of both church and state, heresy became identified with treason'" and "'[t]he ex officio oath became the major fact-finding tool of a new group of courts, the [royal] prerogative or 'conciliar' courts [deriving from the King's Council]'"; that "the Court of Star Chamber" was one of those "conciliar courts" that "antedated the Tudors"; that "Henry's successor, Edward VI, was a Protestant who did not pursue his religious enemies with zeal" but that "Edward's reign did contribute a morsel to the evidentiary rule (which developed much later) barring the admissibility of involuntary confessions"; that "[i]n 1547, a statute was enacted repealing earlier laws relating to treason" and that "Section 22 of the statute provided that no person 'shall be indicted, arraigned, condemned or convicted' for treason unless he be 'accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same'"; that "[t]he throne returned to Catholicism when Mary succeeded Edward, and Mary set about to earn her sanguinary sobriquet"; that Queen Mary—who became known as "Bloody Mary"—"disavowed the statute of 1533 and revived *De Haeretico Comburendo*" and "continued the practice of Henry and Edward by constituting a commission to deal with religious matters"; that "in Mary's reign, the commission (which eventually became the Court of High Commission), regularly exercised judicial jurisdiction, and Mary conferred on it the authority to use the oath ex officio and to imprison recalcitrants"; and that "[t]he resulting inquisition produced 'the first widespread attempt' to refuse to answer questions," although "refusals availed naught" and "[t]here was a bloodbath," with "'[s]ome burned on suspicion alone, merely for refusing the oath ex officio'").

[32] *See* Part III (discussing references in *The Generall Historie of the Magnificent State of Venice*), Part IV (discussing references in *Abuses Stript, and Whipt* and *Juvenilia*), and Part V (discussing references in the 1642 Ulster Remonstrances).

usages—first appearing more than 400 years ago—date back to the reign of King James I, and they show up again in King Charles I's reign in the 1642 Ulster Remonstrances before materializing yet again in the English Declaration of Rights. Context is important, and a better understanding of prerogative courts such as England's Star Chamber and Ireland's Court of Castle Chamber (both discussed in this Article) is revealing. "By the late 1620s and 1630s," one scholar, John Lassiter, writes of that long ago era and England's once popular *scandalum magnatum*[33] actions, which had their origins in thirteenth- and fourteenth-century statutes and which were brought in either common law courts or England's Star Chamber by royal figures and aristocrats,[34] "damages and fines in these cases were running high."[35] "By the late 1670s and 1680s, as they became more frequent," Lassiter continues of such *scandalum magnatum* cases, noting how the resulting damage awards, over time, became more and more onerous, escalating from thousands of British pounds to tens of thousands of pounds, "these actions also reflected the growing political disorders which England experienced in the last ten years of the reign of Charles II."[36]

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[33] "[A] medieval Latin expression meaning literally 'the scandal of magnates.'" John C. Lassiter, *Defamation of Peers: The Rise and Decline of the Action for* Scandalum Magnatum, *1497-1773*, 22 Am. J. Leg. Hist. 216, 216 (1978). "By the seventeenth century, protection from *scandalum magnatum* had come to be counted regularly among the small body of legal privileges which set the peerage apart from the rest of English society." *Id.* "Words spoken in derogation of a peer," Sir William Blackstone wrote in explaining the privilege, "though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury." 3 William Blackstone, Commentaries on the Laws of England 123 (1768).

[34] Lassiter, *supra* note 33, at 217.

[35] *Id.* at 221; *see also id.* ("In 1629, Viscount Saye and Sele brought an action of *scandalum magnatum* in the Court of King's Bench against a man called Stephens for denouncing him as a traitor and was awarded £2000 in damages"); *id.* at 221-22 ("In 1637, the Earl of Suffolk recovered £4000 in an action against Sir Richard Grenville in the Star Chamber for calling him a 'base lord' and other words which the councillors declared were 'foule and dishonourable,' touching the 'highest bloud in the kingdome.'"); *id.* at 222 (noting that "the Earl of Marlborough brought an action against Thomas Bennett" in the Star Chamber in 1637 "for claiming to be as good a gentleman as the Earl, for insisting his family was as good as the Earl's, and generally for having 'taxed the Earl with bas[e]ness and base dealing'," and that "[f]or these remarks, Marlborough was awarded £1000 and Bennett fined another £1000"); *id.* (noting that, in 1638, "the Attorney General on behalf of Lord Sherard brought an action in the Star Chamber against Sir Henry Mynne for calling Sherard a 'base lord' and a 'base fellow' and for saying he would 'pluck the feathers off the proud peacock's tail' (apparently a reference to the crest of the recently created Sherard barony, one of many conferred upon or even sold to supposedly undeserving men by Charles I in 1637)" and that Sir Henry Mynne "was fined £1500 for these insulting words").

[36] *Id.* at 225. "Nobles, though always zealous in the preservation of their honor, status, and reputations, were now discovering that the special protection they enjoyed from abusive language could serve political as well as purely personal social ends." *Id.* "The result was a burst of destructive litigation arising out of the party warfare of the late 1670s and the national hysteria occasioned by the Popish plot (1678) and the subsequent attempts to exclude James Duke of York, the King's Catholic brother, from the succession (1679-1681)." *Id.*; *see also id.* at 227 ("Nearly all the best known participants in the battle over

This Article demonstrates that the conventional account of the history and origins of the "cruel and unusual punishments" concept—put in place in the English Bill of Rights after King Charles II's younger brother, James II, was removed from power after inheriting the throne—is woefully incomplete. More specifically, the Article shows that the concept did not in fact originate with the English Declaration of Rights and its statutory counterpart, the English Bill of Rights (1689), as long assumed by the U.S. Supreme Court, lower federal and state courts, and scores of Eighth Amendment scholars.[37] It turns out that Supreme Court justices, other jurists, and legal scholars have totally missed the actual historical contexts and usage milestones of the cruel and unusual punishments phraseology that showed up long before the 1680s—to wit, in a Venetian history's index and marginalia and in an English poet's popular satire, both first published in the 1610s, and in Irish-Catholic remonstrances from Ulster[38] that followed an Irish rising that began in 1641, not long after England's abolition of the Star Chamber and the High Commission that predated the English Civil War that broke out in 1642.[39]

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exclusion became litigants in cases of *scandalum magnatum*."); *id.* at 228 (noting that, in 1681, William Hetherington, was arrested in a *scandalum magnatum* action brought by the Duke of Ormonde, Lord Lieutenant of Ireland and one of Charles II's supports, and that a jury awarded the duke £10,000 in damages).

37 *E.g.*, Tessa M. Gorman, Comment, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 Calif. L. Rev. 441, 460 & n.161 (1997) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) and Anthony Granucci's scholarship for the proposition that "[t]he phrase 'cruel and unusual punishments' first appeared in the English Declaration of Rights of 1689"); *accord* Wesley P. Shields, *Prisoner Health Care: Is It Proper to Charge Inmates for Health Services?*, 32 Hous. L. Rev. 271, 275-76 (1995) (discussing the Eighth Amendment's prohibition of cruel and unusual punishments, the Old Testament's *lex talionis* doctrine, and the Magna Carta, but observing that the phrase *cruel and unusual punishments* "first appeared" in the English Declaration of Rights).

38 *See* Heidi L. Wushinske, Note, *Politicians and Paramilitaries: Is Decommissioning a Requirement of the Belfast Agreement?*, 17 Temp. Int'l & Comp. L.J. 613, 616 n.17 (2003) ("The term Ulster refers to the six-present day counties that make up Northern Ireland, Antrim, Armagh, Down, Fermanagh, Derry, and Tyrone, as well as County Donegal, now one of the twenty-six counties of the Irish Republic."); *id.* at 616 ("After a series of armed conflicts with the Irish in Ulster, the British decided that the best plan would be to establish Protestant settlements in Ulster. These efforts began to take seed during the reign of Elizabeth I, 1558–1603, and were heightened during the rule of James I, 1603–1623. In 1610, the British began distributing the first of 4,000,000 acres of land they had chartered for Protestant plantation settlements."). "Religious differences between Ireland and Great Britain first emerged in the sixteenth century when Henry VIII, seeking a divorce, left the Catholic Church and created a new church for England, The Church of England." *Id.* at 615; *see also id.* at 615–16 ("[T]he Protestant reformation that was sweeping Europe did not reach Ireland, thus the Irish remained predominately Catholic. The British nevertheless set up a Protestant church as the official church of Ireland, The Church of Ireland, and taxed the Irish for its support. However, despite the British having made it unlawful to do so, the native Irish Catholic population continued to practice its religion. Hostilities were intensified by the British efforts to displace the native Irish population with British settlers . . . .").

39 Many lower court judges have also mistakenly reported that English Declaration of Rights contains the first appearance of the cruel and unusual punishments language. *E.g.*, United States v. Moore, 486 F.2d 1139, 1235 n.160 (D.C. Cir. 1973) (Wright, J., dissenting) (citations omitted); Mickle v. Henrichs, 262 F. 687, 689 (D. Nev. 1918).

This Article shows that, contrary to the long-accepted conventional wisdom, the ancient right to be free from cruel and unusual punishments[40] has far earlier literary and historical roots than the English Declaration of Rights. In particular, the cruel and unusual punishments concept appears in (1) the printed marginalia and index of an early seventeenth-century Venetian history, *The Generall Historie of the Magnificent State of Venice* (1612), written by Thomas de Fougasses and translated from French into English by "W. Shute, Gent." and published in London;[41] (2) a popular satire, *Abuses Stript, and Whipt* (1613), written by an English courtier and poet, George Wither, and published in multiple editions and reprinted in *Juvenilia* (1622), a collection of Wither's early verse;[42] and (3) two 1642 remonstrances of Irish Catholics in Ulster[43] following the Irish rising in 1641 that occurred shortly before the outbreak of the English Civil War (1642–1651).[44] Those two Ulster remonstrances post-dated the highly consequential Grand Remonstrance (1641), a long list of grievances passed by England's House of Commons in November 1641 and presented to King Charles I the following month before the onset of the English Civil War.[45]

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40 The framers of the U.S. Bill of Rights, Professor John Stinneford writes, "were particularly concerned about the fact that the federal government would not be bound by the fundamental principles of the common law, and they insisted on a Bill of Rights that would ensure the new government did not transgress these bounds." Stinneford, *Death, Desuetude, and Original Meaning*, *supra* note 6, at 575. "One of the rights included in the Bill of Rights," he notes, "was the prohibition of Cruel and Unusual Punishments, a common law right that had been included in the English Bill of Rights a century before, but that was thought to date back to early English history." *Id.* at 575–76 (citing 10 H.C. Jour. 247 (1689) (noting the "ancient Right of the People of England that they should not be subjected to cruel and unusual Punishments")).

41 *See infra* Part III.

42 *See infra* Part IV.

43 Juliana Van Hoeven, *Counter-Terrorism Measures and International Humanitarian Law: A Case Study of the "Troubles" in Northern Ireland*, 37 U. Pa. J. Int'l L. 1091, 1102-03 (2016) (noting that "[t]he history of tension between the Irish and the English is ancient, going back to before the 12th century"; that "[a]s time progressed, the northeastern province of Ireland known as Ulster was predominantly settled by Scottish and English immigrants"; that "Ulster became economically more viable than the rest of the island, which remained Irish, and therefore the British found Ulster a more desirable foothold"; and that "[i]n 1690, Protestant King William of Orange defeated the deposed Catholic King James II in a fierce and decisive battle outside of Dublin and took control of the country").

44 *See infra* Part V; *see also* Holmes v. Farmer, 475 A.2d 976, 981 n.9 (R.I. 1984):

> The conflict between Charles I, son of James I, and a succession of Puritan-dominated Parliaments in England led to civil war in 1642, during which Charles I was executed by the Parliamentarians. A republican regime, Oliver Cromwell's Commonwealth, lasted from 1649 until the Stuart monarchy was restored in 1660. James II's overt Catholicism and the birth of a Catholic heir united Tories and Whigs in opposition. Seven nobles invited William of Orange and his consort Mary, Protestant daughter of James, to come to England's aid. After the revolution they ruled jointly as William III and Mary II. Their acceptance of the Bill of Rights assured ascendancy of parliamentary authority over royal absolutism.

45 King Charles I, through his actions, made many enemies prior to Parliament's drafting

The Article discusses this long-forgotten history and its implications for the U.S. Supreme Court's existing Eighth Amendment jurisprudence, building on my prior scholarship on the U.S. Constitution's Eighth and Fourteenth Amendments[46] and capital punishment as a torturous,[47] arbitrary and discriminatory, and cruel and unusual punishment.[48] Plainly, the text of the Eighth Amendment, ratified in 1791, was adapted from provisions in the English Bill of Rights (1689)[49] and the Virginia Declaration of Rights (1776),[50] though James Madison chose the stronger

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of the Grand Remonstrance. In 1629, he dissolved Parliament and, for a period of eleven years, ruled as an "absolute monarch." He also used the Court of Star Chamber to punish his enemies, including through enormous fines. With Charles I's support, William Laud—the Archbishop of Canterbury—began "imposing a standard plan of worship upon the clergy," which provoked the ire of the Scottish church and of Puritans (who were punished by the Star Chamber through draconian corporal punishments). In February 1640, Charles called what became known as the "Short Parliament" into session, but that Parliament (which sat from April 13-May 5, 1640) was soon dissolved. After another Parliament was called in November 1640 (which became known as the "Long Parliament"), John Pym—a leader of the House of Commons—made a list of complaints against Charles I that came to be called the Grand Remonstrance. *See* Robert Aitken & Marilyn Aitken, *The King Who Lost His Head: The Trial of Charles I*, 33 Litigation 53, 54–55 (2007).

46 John D. Bessler, Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment (2012); John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 Wash. & Lee L. Rev. Online 487 (2016), https://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/22.

47 John D. Bessler, The Death Penalty's Denial of Fundamental Human Rights: International Law, State Practice, and the Emerging Abolitionist Norm (2023); John D. Bessler, The Death Penalty as Torture: From the Dark Ages to Abolition (2017).

48 *See generally* John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 Nw. J. L. & Soc. Pol'y 307 (2018).

49 Hadix v. Caruso, 461 F. Supp.2d 574, 590 (W.D. Mich. 2006) (citations omitted):

> The turn of phrase "nor cruel and unusual punishments inflicted" was borrowed from the English Bill of Rights of 1689, which meant to prohibit the imposition of punishments which were not statutorily authorized or otherwise clearly excessive. The drafters and adopting states, at the time, were primarily concerned with banning barbarous methods of execution and torture once practiced in England and then practiced in other countries such as France and Spain. Indeed, Patrick Henry objected before the Virginia Assembly to the language of the original Constitution for its failure to contain a torture prohibition.

50 United States v. Moore, 486 F.2d 1139 n.160 (D.C. Cir. 1973) (Wright, J., dissenting):

> The path by which the phrase "cruel and unusual punishment" has come into our law is well known. The principle it represents can be traced to the Magna Carta, and the phrase was first used in the English Declaration of Rights of 1688. In 1776 the phrase formed a part of the Virginia Declaration of Rights, and James Madison included it in the constitutional amendments he drafted in 1789. It was incorporated into the Constitution in 1791 as part of the Eighth Amendment with little debate.

"shall not" instead of the hortatory "ought not" for the lead-in to the Eighth Amendment's "cruel and unusual punishments" prohibition.[51] But there is—as this Article reveals—far more than that to the origin story of the Eighth Amendment's Cruel and Unusual Punishments Clause that broadly prohibits "cruel and unusual punishments" without identifying any specific exceptions.

Part of the story of the "cruel and unusual punishments" prohibition is well-known, but part of it has long been hiding in plain sight, in long-neglected, somewhat obscure sources jurists and scholars have previously failed to dig up. Each usage of words obviously has its own historical context, though how words in constitutions or statutes are to be interpreted must be decided by living, breathing judges. Whereas the English Bill of Rights was the product of the Revolution of 1688–1689,[52] Virginians adopted their Declaration of Rights in the midst of the American Revolution and the Enlightenment.[53] The latter declaration was drafted

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[51] Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1311, 1320 (1993) ("In 1688, James II, last of the Stuart kings, abdicated. Among the rights demanded of the new monarchs, William and Mary, by their disgruntled subjects, was that 'Excessive Bail ought not be required nor Excessive Fines imposed, nor cruel and unusual punishments inflicted.' It is worth noting that Madison changed the wording from 'ought not' to 'shall not.'").

[52] John D. Bessler, "From the Founding to the Present: An Overview of Legal Thought and the Eighth Amendment's Evolution," *in* The Eighth Amendment and Its Future in a New Age of Punishment 12–13 (Meghan J. Ryan & William Berry III, ed. 2020); *see also* Frank O. Bowman, III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. Legis. & Pub. Pol'y 425, 442-43 (2021) (noting that "King James II ascended to the throne of England, Scotland, and Ireland upon the sudden death of" King Charles II; that "[w]ithin three years, James grievously alienated his subjects through bad governance and by failing to assuage fear that his personal Catholicism would in time replace Anglican Protestantism with a restored English Catholic Church"; that "[p]owerful figures in the kingdom sought James's abdication and invited the Protestant Prince William of Orange and his wife Mary (daughter of James II) to assume the throne"; that "[t]he largely bloodless 1688 swap of James II for William and Mary was ever after known as the 'Glorious Revolution'"; that "Parliament conditioned its welcome of the dual monarchs on two basic conditions—recognition of the ultimate sovereignty of the legislature and a guarantee of a Protestant succession"; and that "[t]he particulars of these commitments were embodied first in the Bill of Rights of 1689, and in the later Act of Settlement of 1700").

[53] Bessler, "From the Founding to the Present," *in* The Eighth Amendment and Its Future in a New Age of Punishment, *supra* note 52, at 14; *see also* John D. Bessler, The Birth of American Law: An Italian Philosopher and the American Revolution (2014) (discussing the influence of a host of Enlightenment writers, including Cesare Beccaria, on America's founders); John D. Bessler, The Celebrated Marquis: An Italian Noble and the Making of the Modern World (2018) (same); John D. Bessler, The Baron and the Marquis: Liberty, Tyranny, and the Enlightenment Maxim that Can Remake American Criminal Justice (2019) (documenting the influence of Montesquieu and Beccaria on American lawmakers and tracing the history of the Enlightenment maxim that any punishment that goes beyond necessity is tyrannical).

by plantation owner George Mason,[54] who, like Thomas Jefferson,[55] had carefully studied English history and believed in natural rights[56] but never freed his own slaves.[57] The story of the "cruel and unusual punishments" concept, though, has a much more nuanced and complicated story—one long predating England's Revolution of 1688–1689—than the version repeatedly told and presented by jurists and leading historians (i.e., that the "cruel and unusual punishments" language first sprang to life in the 1680s).

This Article—following a deep dive into historical sources—sheds important new light on the true seventeenth-century origins of the cruel and unusual punishments concept. Among other things, this Article demonstrates that the cruel and unusual punishments phraseology, as originally used in the English language

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[54] Thomas Jefferson's biographer, Dumas Malone, summed up George Mason's contributions to the American Revolution in these words: "He was the author of the Virginia Declaration of Rights, which was adopted three weeks before the national Declaration of Independence; and in this he charted the rights of human beings much more fully than Jefferson did in the immortal but necessarily compressed paragraph in the more famous document." William G. Hyland Jr., George Mason: The Founding Father Who Gave Us the Bill of Rights xiv (2019). Among other things, George Mason was concerned about torture. Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 Tenn. L. Rev. 41, 46–47 (2000); Peter Mathis Spett, *Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in* Harmelin v. Michigan, 24 Colum. Hum. Rts. L. Rev. 203, 205 n.11 (1993).

[55] State v. Carr, 502 P.3d 546, 635 (Kan. 2022) ("The theory of 'natural rights' traces its lineage from the writings of John Locke through the Declaration of Independence, written by Thomas Jefferson, and the Virginia Declaration of Rights of 1776, written by George Mason.").

[56] *E.g.*, Steven G. Calabresi & Sofia Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1314–17 (2015) (discussing George Mason's views on natural rights and the influence of John Locke's *Second Treatise of Civil Government* on those views); Vincent Phillip Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 Notre Dame L. Rev. 1387, 1394 (2016) (noting that George Mason composed the initial draft of the 1776 Virginia Declaration of Rights and that it included this endorsement of natural rights: "That all Men are born equally free and independant, and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety."); Eric Slauter, The State as a Work of Art: The Cultural Origins of the Constitution 263 (2009):

> The Virginia Declaration, as it circulated in draft, had stated "That all men are born equally free and independent, and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. The Virginia Convention, of course, later revised the draft statement so that readers would not think it included slaves: it was only when men "entered into society," which slaves had not done, that their rights had any meaning.

[57] Jeff Broadwater, George Mason: Forgotten Founder 33 (2006).

sources identified above, referred to *both* barbarous methods of execution and a host of *non-lethal* corporal punishments (e.g., branding and the pillory). Because the "cruel and unusual punishments" terminology was used as early as the mid-seventeenth century to refer to *non-lethal* corporal punishments as well as grotesque methods of execution, and because the cruel and unusual punishments concept has common law origins intended to adapt (like other common-law concepts) with the times, the Article concludes that it makes no logical sense whatsoever that a more severe punishment—capital punishment—should be exempted by the U.S. Supreme Court from that legal classification. That is especially so given the fact that, for decades in American law, non-lethal state conduct and corporal punishments—both as identified in statutes and as adjudicated through various judicial rulings—have long routinely qualified as "cruel and unusual" or "cruel or unusual" punishments.[58]

In fact, the U.S. Supreme Court's existing Eighth Amendment jurisprudence is totally unprincipled, in part because of the lack of diligence and logic in discerning the meaning of, and in then applying, the "cruel and unusual punishments" prohibition. Instead of interpreting the meaning of "cruel" and "unusual," the cruel and unusual punishments concept has been treated as an accident or fluke of history.[59] In 1969, one highly influential Eighth Amendment scholar, the late

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[58] *See, e.g.,* Spada v. Houghton, Case No. 1:20-cv-223-SPB-KAP, 2022 WL 4280519, at *2 (W.D. Pa. July 22, 2022) (noting "the longstanding principle that corporal punishment is not a permissible sanction within our constitutional system" and listing as "just two examples" the precedents of *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), outlawing use of flogging in Arkansas, and *Hope v. Pelzer*, 536 U.S. 730 (2002), declaring that it is clearly established law that punishing an inmate by hitching him to a post shirtless in the June sun of Alabama is cruel and unusual), *aff'd in part, vacated in part and remanded on other grounds*, No. 22-2816, 2024 WL 4784382 (3d Cir. Nov. 14, 2024); Campbell v. Grammer, 889 F.2d 797, 802 (8th Cir. 1989) (violation of Eighth Amendment to use fire hoses on three inmates where district court found "there was absolutely no justification for this application of force," and inmates suffered back pain, blurred vision, and pain in ribs and thighs; "[a]lthough the injuries were not especially severe, they were sufficient to support the district court's finding of an Eighth Amendment violation"); Slakan v. Porter, 737 F.2d 386, 373-74 (4th Cir. 1984) (violation of Eighth Amendment to use steady blasts of water from two high-pressure water hoses, tear gas, and use of billy clubs to "savagely" beat inmate, where inmate who had complained about missing his usual morning coffee was confined in one-man cell and posed no direct physical threat to others; supervisors also liable where they had fully supported use of high-pressure hoses in numerous cases, one of which involved spraying a handcuffed prisoner for *25 to 30 minutes*); Kirby v. Blackledge, 530 F.2d 583 (4th Cir. 1976) (reversing summary judgment for prison officials after finding factual disputes remained in regard to whether an Eighth Amendment violation arose from the use of a high pressure water hose on one inmate for *an hour,* and on another inmate for *20 minutes* because he would not give a radio to a guard).

[59] *E.g.*, Robert M. Casale & Johanna S. Katz, *Would Executing Death-Sentenced Prisoners after the Repeal of the Death Penalty Be Unusually Cruel under the Eighth Amendment?*, 86 Conn. B.J. 329, 336 (2012) ("An earlier draft of the English Bill of Rights prohibited 'illegal' punishments, not 'unusual' punishments. The change in the final draft (from illegal to unusual), according to Professor Granucci, 'appears to be inadvertent.'"); *Furman*, 408 U.S. at 331 (Marshall, J., concurring) ("Prior decisions leave open the question of just how much the word 'unusual' adds to the word 'cruel.' I have previously indicated that use of the word 'unusual' in the English Bill of Rights of 1689 was inadvertent, and there is nothing in the history of the Eighth Amendment to

Anthony Granucci (1944–2005),[60] went so far as to describe the "final phraseology" of the English Declaration of Rights as the product of nothing more than "chance and sloppy draftsmanship,"[61] with Justice Thurgood Marshall—discussing English history, citing Granucci's scholarship, and unaware of the material omissions in Granucci's scholarship—declaring in his concurrence in *Furman v. Georgia* (1972) that "the use of the word 'unusual' in the final draft" of the English Declaration of Rights "appears to be inadvertent."[62] Justice Antonin Scalia, in his opinion

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give flesh to its intended meaning.").

60 *Anthony Francis Granucci*, https://www.legacy.com/us/obituaries/sfgate/name/anthony-granucci-obituary?id=26217963 (last visited Nov. 8, 2024).

61 Granucci, *supra* note 5, at 855; *see also* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?*, 87 Wash. U. L. Rev. 567, 577–78 (2010) ("Scholars such as Anthony Granucci have argued that 'illegal' and 'unusual' were used interchangeably in the document, that the use of 'unusual' was merely the product of sloppy drafting, and that the term 'unusual' was used to mean 'illegal' in seventeenth-century England. These scholars buttress this argument with the fact that the subsequent language of the dissenting Lords in response to Oates's petition for release from judgment similarly referred simultaneously to 'cruel, barbarous, and illegal judgments' and 'cruel and unusual punishments.'"). Of the final draft of the English Declaration of Rights that was agreed to in the House of Commons on February 12th (and then enacted into law on December 16, 1689), Anthony Granucci wrote:

> The original draft of February 2 speaks of illegal punishments. The document of February 12 complains of "illegal and cruel punishments" and then continues to prohibit "cruel and unusual punishments." No contemporary account gives any reason for the change in language. Indeed, John Somers, reputed draftsman of the Bill of Rights, wrote later of the "horrible and illegal" punishments used during the Stuart regime. The final phraseology, especially the use of the word "unusual," must be laid simply to chance and sloppy draftsmanship.

Granucci, *supra* note 5, at 855.

62 *Furman*, 408 U.S. at 317-18 (Marshall, J., concurring) (citations omitted):

> The treason trials of 1685—the 'Bloody Assizes'—which followed an abortive rebellion by the Duke of Monmouth, marked the culmination of the parade of horrors, and most historians believe that it was this event that finally spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments. The conduct of Lord Chief Justice Jeffreys at those trials has been described as an 'insane lust for cruelty' which was 'stimulated by orders from the King' (James II). The assizes received wide publicity from Puritan pamphleteers and doubtless had some influence on the adoption of a cruel and unusual punishments clause. But, the legislative history of the English Bill of Rights of 1689 indicates that the assizes may not have been as critical to the adoption of the clause as is widely thought. After William and Mary of Orange crossed the channel to invade England, James II fled. Parliament was summoned into session and a committee was appointed to draft general statements containing 'such things as are absolutely necessary to be considered for the better securing of our religion, laws and liberties.' An initial draft of the Bill of Rights prohibited 'illegal' punishments, but a later

for the Supreme Court in *Harmelin v. Michigan* (1991) and relying on Justice Marshall's concurrence, later equated "illegal" with "cruel" (almost as if there were no difference at all between those two words).[63] But *cruel* and *unusual* are both common words with easily understood meanings to any modern reader or hearer, and those words—like the word *punishment*—were frequently used in the seventeenth and eighteenth centuries, too, by a whole array of English speakers and writers.[64]

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draft referred to the infliction by James II of 'illegal and cruel' punishments, and declared 'cruel and unusual' punishments to be prohibited. The use of the word 'unusual' in the final draft appears to be inadvertent.

63 Harmelin v. Michigan, 501 U.S. 957, 971–94 (1991) (citations omitted):

> [T]he Commons' report of the conference confirms that the "cruell and unusuall Punishments" clause was directed at the Oates case (among others) in particular, and at illegality, rather than disproportionality, of punishment in general.
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> . . . .
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> In all these contemporaneous discussions, as in the prologue of the Declaration, a punishment is not considered objectionable because it is disproportionate, but because it is "out of [the Judges'] Power," "contrary to Law and ancient practice," without "Precedents" or "express Law to warrant," "unusual," "illegal," or imposed by "Pretence to a discretionary Power." Accord, 2 Macaulay 204 (observing that Oates' punishment, while deserved, was unjustified by law). Moreover, the phrase "cruell and unusuall" is treated as interchangeable with "cruel and illegal." In other words, the "illegall and cruell Punishments" of the Declaration's prologue are the same thing as the "cruell and unusuall Punishments" of its body. (Justice MARSHALL's concurrence in *Furman v. Georgia*, 408 U.S., at 318, observes that an earlier draft of the body prohibited "illegal" punishments, and that the change "appears to be inadvertent." See also 1 Chitty 712 (describing Declaration of Rights as prohibiting "cruel and illegal" punishments).) In the legal world of the time, and in the context of restricting punishment determined by the Crown (or the Crown's judges), "illegall" and "unusuall" were identical for practical purposes. Not all punishments were specified by statute; many were determined by the common law. Departures from the common law were lawful only if authorized by statute. See 1 J. Stephen, A History of the Criminal Law of England 489–490 (1883); 1 J. Chitty, Criminal Law 710 (5th Am. ed. 1847). A requirement that punishment not be "unusuall"—that is, not contrary to "usage" (Lat. "usus") or "precedent"—was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition. 1 *id.,* at 710–712; *Ingraham v. Wright*, 430 U.S., at 655 (English provision aimed at "judges acting beyond their lawful authority"); Granucci, 57 Calif. L. Rev., at 859; cf. 4 W. Blackstone, Commentaries *371–*373.

64 The U.S. Supreme Court's failure to identify earlier usages of the "cruel and unusual punishments" terminology—as well as the conclusion that use of "unusual" in the English Bill of Rights was inadvertent—has led to an incomplete and distorted view of the "cruel and unusual punishments" prohibition. *E.g.*, Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 Hous. L. Rev. 493, 496 n.8 (1992) ("The history of this phrase suggests that the word 'unusual' may have no independent meaning. As Justice Marshall explained in *Furman*, the phrase 'cruel and unusual' first appeared in the English Bill of Rights of 1689, and the 'use of the word 'unusual' in the final draft appears to be inadvertent.'") (citing

This Article shows that the choice of the "cruel and unusual punishments" language in the English Bill of Rights was neither inadvertent nor the product of chance or sloppy drafting. Instead, the "cruel and unusual punishments" language had long been used by English speakers in a variety of contexts to describe both barbarous executions and corporal punishments. That language was first used to refer to barbaric methods of executions such as live burials and the ancient "brazen bull" (a hollow metal bull capable of holding a person, with the metal bull then heated by fire to kill that person at the hands of a tyrant). The language—as explained below—was also used in the 1642 Ulster Remonstrances as a catch-all phrase following, and in clear association with, a listing of excessive penalties and painful corporal punishments (i.e., "heavy fines," "mulcts," "censures of pillory," "stigmatizings").[65] To this day, the "cruel and unusual" and "cruel or unusual" language is found in state and federal statutes (e.g., Article 55 of the Uniform Code of Military Justice)[66] to similarly refer to various non-lethal corporal punishments.[67]

In approving the constitutionality of capital punishment since *Gregg v. Georgia*,[68] members of the U.S. Supreme Court have often interpreted the *cruel and unusual punishments* wording in its "constitutional sense" instead of using the standard dictionary definitions of *cruel* and *unusual*.[69] Yet, as this Article

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Furman, 480 U.S. at 318 (Marshall, J., concurring); *see also* Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality opinion of Warren, C.J.) ("[o]n the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn").

65 *See infra* Part V.

66 *E.g*., United States v. Matthews, 16 M.J. 354, 368 (U.S. Ct. Mil. App. 1983):

> Article 55 of the Uniform Code, 10 U.S.C. § 855, provides a servicemember comparable protection against "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment." Indeed, we have held that, in enacting Article 55, Congress "intended to grant protection covering even wider limits" than "that afforded by the Eighth Amendment." *United States v. Wappler*, 2 U.S.C.M.A. 393, 396, 9 C.M.R. 23, 26 (1953).

67 10 U.S.C. § 855 (Article 55 of the Uniform Code of Military Justice, titled "Cruel and unusual punishments prohibited," reads: "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited."). Many states have similar provisions. *Compare* S.C. Code § 25-1-2785 (code section titled "Cruel and unusual punishments prohibited" reads: "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel and unusual punishment, may not be adjudged by any court-martial and inflicted upon any person subject to this code."), *with* 44 Okla. St. Ann. § 855 (Article 55, titled "Cruel and unusual punishments prohibited," reads: "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to the Oklahoma Uniform Code of Military Justice. The use of irons, single or double, except for the purpose of safe custody, is prohibited.").

68 428 U.S. 153 (1976).

69 *E.g*., *Furman*, 408 U.S. at 379 (Burger, C.J., dissenting); *see also id.* at 312 (White, J., concurring) ("The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual

demonstrates, the cruel and unusual punishments wording—and the irony should not be lost on American jurists and constitutional scholars—clearly began its life in *common* vernacular and in *everyday* usages (i.e., in George Wither's poetry, in the 1612 history of Venice to describe hideous Venetian executions, and in the 1642 Irish-Catholic remonstrances complaining about various non-lethal corporal punishments). This Article exposes the hypocrisy of twenty-first-century jurists (1) attempting to justify capital punishment by looking to the Eighth Amendment's "original meaning"[70] when the original usages of the cruel and unusual punishments concept are located, in part, in a book's index and marginalia, in an English courtier's satire, and—as evidenced by the 1642 Ulster Remonstrances—in protests where that language was clearly understood to include non-lethal corporal punishments; (2) giving a totally different ("constitutional sense") meaning to the commonly used words *cruel* and *unusual* than the commonsense and the longstanding dictionary definitions of those words would warrant; and (3) allowing death sentences and state-sanctioned executions when the use of capital punishment is clearly cruel, has become unusual, and bears all the indicia of a torturous practice.[71]

I. "Nor Cruel and Unusual Punishments": The Ratification of the Eighth Amendment and Its English Origins

A. A Primer on English and Irish History

A few points must be recalled as one delves into the history of the "cruel and unusual punishments" prohibition. First, the Tudor and Stuart periods were—

punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve."); *Harmelin*, 501 U.S. at 994–95 ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century."); Baze v. Rees, 553 U.S. 35, 83 (2008) (Stevens, J., concurring in the judgment) ("Justice White was exercising his own judgment in 1972 when he provided the decisive vote in *Furman*, the case that led to a nationwide reexamination of the death penalty. His conclusion that death amounted to 'cruel and unusual punishment in the constitutional sense' as well as the 'dictionary sense,' rested on both an uncontroversial legal premise and on a factual premise that he admittedly could not 'prove' on the basis of objective criteria."); Bucklew v. Precythe, 587 U.S. 119, 142 (2019) ("The Eighth Amendment prohibits States from dredging up archaic cruel punishments or perhaps inventing new ones, but it does not compel a State to adopt 'untried and untested' (and thus unusual in the constitutional sense) methods of execution.").

[70] *Bucklew*, 587 U.S. at 129 ("[W]e first examine the original and historical understanding of the Eighth Amendment . . . ."); id. at 131 (referring to "the Constitution's original understanding" and noting that, in *In re Kemmler*, 136 U.S. 436 (1890), the Supreme Court held that "though electrocution was a new mode of punishment and therefore perhaps could be considered 'unusual,' it was not 'cruel' in the constitutional sense").

[71] *See generally* Bessler, The Death Penalty's Denial of Fundamental Human Rights, *supra* note 47 (discussing the death penalty's cruelty and inherently torturous characteristics, the law of torture, and the law's prohibition of both physical and mental forms of torture in the wake of World War II).

as a general matter—full of harsh and extreme punishments, intense conflict between Catholics and Protestants, and heated disputes between Parliament and monarchs.[72] King Henry VIII famously had two of his own wives executed,[73] and nearly three hundred people were burned at the stake during the reign of Henry VIII's daughter, Queen Mary I, who sought to return the Church of England to Catholicism, infamously becoming known as "Bloody Mary" because of her deadly persecution of Protestants.[74] With respect to the Irish, it was Mary Tudor (1516–1558), Henry VIII's daughter, who "introduced the idea of a 'plantation' in Ireland."[75] "The Londonderry plantation in Ulster presents a particularly striking example of English exploitation of the Irish," one account of the extended conflicts between English Protestants and Irish-Catholics points out, adding: "James (Stuart) of Scotland, who became James I of England (ruled 1603–1625) upon the [d]eath of Elizabeth I in 1603, undertook this endeavor. Under James I, the English were to settle 2 million Irish acres. The entire county of Derry was given to the English, and its name subsequently changed to Londonderry."[76]

Second, the English Declaration of Rights came into existence against the backdrop of centuries of English poetry, literature and history, including the Magna Carta (1215),[77] with an explosion of literary works published in English in the sixteenth and seventeenth centuries. The Tudor and Stuart periods saw the publication of a wide array of books, plays, literature, and poetry,[78] with lexicographers such as Robert Cawdrey, John Bullokar, and Henry Cockeram producing early English

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72 United States v. Johnson, 383 U.S. 169, 178 (1966) (noting the "history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators").

73 Alison Weir, The Six Wives of Henry VIII 4 (1991).

74 The Art of English Poesy v. George Puttenham: A Critical Edition 435 (Frank Whigham & Wayne A. Rebhorn, eds. 2007).

75 Ronald A. Christaldi, Comment, *The Shamrock and the Crown: A Historic Analysis of the Framework Document and Prospects for Peace in Ireland*, 5 J. Transnat'l L. & Pol'y 123, 129 (1995); *see also id.* at 129–30:

> "The project involved driving out the native Celtic population from a particular area and replacing it with loyal 'English' settlers." This effort to Anglicize Ireland was intensified under Mary's successor Elizabeth I. For example, the plantation of Munster was initiated in 1584, when 500,000 acres were confiscated from the native population and redistributed to English settlers.

76 *Id.* at 130.

77 United States v. Bajakajian, 524 U.S. 321, 335 (1998) (noting that the Magna Carta, "which the Stuart judges were accused of subverting," required that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood"); Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1331 (11th Cir. 2021) (Tjoflat, J., concurring in part and dissenting in part) ("Because abuses abounded under the Stuart kings in the seventeenth century, the English Bill of Rights of 1689 picked up on Magna Carta's language and directed that 'excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.'") (quoting 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689)).

78 *See infra* Parts III, IV & V.

dictionaries[79] long before the first printing of Samuel Johnson's *A Dictionary of the English Language* (1755).[80] "Until the very beginning of the seventeenth century, a time when the English language could quite probably number fully a quarter of a million words and phrases," bestselling author Simon Winchester writes, "there was not a single book in existence that attempted to list even a small fraction of them, nor was there any book that would make the slightest attempt to offer up an inventory."[81] William Shakespeare (1564–1616)—the most famous, but just one of many playwrights and poets of the age[82]—himself coined hundreds of English words or phrases,[83] often combining words in new and innovative ways as he pioneered new expressions.[84]

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79 Ronald A. Wells, Dictionaries and the Authoritarian Tradition 17 (1973) ("The first English dictionary is Robert Cawdrey's *A Table Alphabeticall* (1604), followed by John Bullokar's *An English Expositor* (1616), Henry Cockeram's *The English Dictionarie* (1623) and Thomas Blount's *Glossographia* (1656)."). Robert Cawdrey's dictionary contained no entry for either *cruel* or *unusual*. *See* Robert Cawdrey, A Table Alphabeticall of Hard Usual English Words (1604) (Robert A. Peters, ed. 1966) (a facsimile reproduction).

80 1 Samuel Johnson, A Dictionary of the English Language (1755). That dictionary defined *cruel* in its first entry for that word as "[p]leased with hurting others; inhuman, hard-hearted; without pity; without compassion; savage, barbarous; unrelenting." *Id.* (entry for *cruel*). The first edition—and the 1768 and 1773 editions—of Samuel Johnson's famous dictionary defined *unusual* as "Not common; not frequent; rare." Bianchi v. Brown, 111 F.4th 438, 481 (4th Cir. 2024) (Gregory, J., concurring); Kolbe v. Hogan, 813 F.3d 160, 178 (4th Cir. 2016); Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even If We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 Ga. L. Rev. 867, 880 (2007).

81 Simon Winchester, The Meaning of Everything: The Story of the Oxford English Dictionary 18 (2003).

82 *Id.* at 19 ("William Shakespeare . . . had no access to a dictionary during most of his writing career—certainly from 1580, when he first began, it was a quarter of a century before any volume might appear in which he could look something up.").

83 Jeffrey McQuain & Stanley Malless, Coined by Shakespeare: Words and Meanings First Penned by the Bard (1998); *see also* Keith Johnson, Shakespeare's English: A Practical Linguistic Guide 31 (2013) (noting one estimate that "there are around 1,700 words which may be considered as plausible Shakespeare neologisms").

84 Michael Vitiello, *Liberal Bias in the Legal Academy: Overstated and Undervalued*, 77 Miss. L.J. 507, 509 & n.10 (2007) (noting that, in *Hamlet*, Shakespeare coined the phrase "on its own petard," a phrase "meaning 'hangman hanged by his own rope' . . . based on a not-uncommon occurrence in medieval warfare wherein the engineer who lit the petard, a small bomb used to breach fortification walls and gates, was caught up in the rope used to hoist the bomb over the wall and was blown up by the device"); Constance Hale, Sin and Syntax: How to Craft Wicked Good Prose 165 (2013) (noting that Shakespeare coined expressions such as "my salad days," "neither rhyme nor reasons," "it was Greek to me," "play fast and loose," and "pomp and circumstances").

Third, King Charles I's enormously unpopular period of "personal rule" (1629-1640),[85] English-Scottish conflicts known as the Bishops' Wars (1639–1640),[86] the 1641 abolition of the Court of Star Chamber and the Court of High Commission,[87] and the outbreak of an Irish rising (1641–1642)[88] all preceded the English Civil War

[85] *See* Kevin Sharpe, The Personal Rule of Charles I (1992); *see also* John Witte, Jr., *Prophets, Priests, and Kings: John Milton and the Reformation of Rights and Liberties in England*, 57 Emory L.J. 1527, 1532–33 (2008):

> Continuing in his father James I's footsteps, Charles regarded the Parliament not so much as a representative of the people as a functionary of the Crown, to be called or suspended at the Crown's discretion. After 1629, he suspended the Parliament in retaliation for its uncooperativeness and began imposing fiscal and economic policies that traditionally called for Parliamentary involvement, if not consent. These policies were implemented by a series of new royal officers, notably the widely hated Earl Thomas Strafford. Needing money for his unpopular wars and lavish living, Charles levied crushing taxes on the people without their consent. He feigned a national military emergency that strengthened his royal prerogative and allowed him to institute military tribunals to mete out rough justice against rebels and to fabricate a form of national taxation on all people. He fined the gentry for their failure to become knights and for their purported trespasses on the royal forests. He quadrupled inheritance taxes and receipts from wardships. He sold commercial monopolies to the highest bidders, creating oligarchies that inflicted massive abuses on workers and high prices on consumers. He confiscated private properties and compelled farmers and small businessmen to make loans that were never repaid. He forced tradesmen and craftsmen into guilds that were subject to strict controls, heavy bureaucracies, and sundry fees. And to make all these onerous restrictions work, Charles enhanced the power of the royal prerogative courts and administrators—Star Chamber, Admiralty, High Commission, Requests, Privy Council, and more—that enforced royal policies ruthlessly and stripped away many of the procedural protections and conventions maintained by lawyers in the Inns of Court. Charles' royal officers also interfered deeply in city and rural county governments that had governed local affairs for centuries without much royal involvement.

[86] *See* Mark Charles Fissel, The Bishops' Wars: Charles I's Campaigns against Scotland, 1638–1640 (1994).

[87] Adhémar Esmein, A History of Continental Criminal Procedure with Special Reference to France 341 (John Simpson, trans. 1913) (noting that, in 1641, bills were introduced in England's Parliament to abolish the Court of Star Chamber and the Court of High Commission for Ecclesiastical Causes; that both passed in July of that year; and that "in the latter statute was inserted a clause which forever forbade, for any ecclesiastical court, the administration ex officio of any oath requiring answers as to matters penal"); State v. Davis, 256 P.3d 1075, 1080 (Ore. 2011) (en banc) ("In 1641, Parliament sided with the Puritans and abolished the courts of Star Chamber and High Commission and forbade the ecclesiastical courts from employing the *ex officio* oath. The fall of the Star Chamber came to be seen as a triumph of the *nemo tenetur* principle."); *id*. (noting that "the ancient maxim *nemo tenetur prodere seipsum* translates as "no man is obligated to accuse himself").

[88] *See* M. Perceval-Maxwell, The Outbreak of the Irish Rebellion of 1641 (1994); Eamon Darcy, The Irish Rebellion of 1641 and the Wars of the Three Kingdoms (2013).

(1642–1651)[89] that led to Charles I's execution in 1649,[90] the Interregnum (1649–1660) and the rise of Oliver Cromwell's Commonwealth of England, Scotland, and Ireland and his protectorate.[91] The "Long Parliament," which first met in 1640,[92] it has been noted, "erupted in unprecedented fury against two decades of belligerent royal policies that had left the nation in disarray," including with respect to Charles I's religious policies.[93] Only in time did the Restoration of 1660 put Charles I's

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89 See Philip J. Haythornthwaite, The English Civil War, 1642–1651 (1983).

90 *See* The Regicides and the Execution of Charles I (Jason Peacey, ed. 2001).

91 Ira Cohen, *Early History of South Carolina and Its Federal Court (1526–1886)*, 69 Fed. Law. 46, 48 (July/Aug. 2022).

92 Witte, *supra* note 85, at 1533–34:

> When Parliament was finally called into session in 1640, an unlikely assemblage of aristocrats, lawyers, artisans, financiers, and religious dissenters united in seizing power with a vengeance. Whipped up by Calvinist preachers who thundered fire-and-brimstone sermons denouncing the tyranny of the English church and state, Parliament worked hard to dismantle Charles' policies. In a series of acts from 1640 to 1642, Parliament abolished Star Chamber, the Court of High Commission, and other royal prerogative courts, and shifted much civil and criminal jurisdiction to the common law courts. Parliament limited ship money, forced loans, and other hated taxes and claimed exclusive jurisdiction over all future taxation. It removed many of the new encumbrances on the aristocracy and gentry, restored the traditional uses of the royal forests, and removed some of the monopolies and guilds. It truncated severely the temporal power of the Anglican bishops and removed the clergy from the House of Lords. It tried both Strafford and Laud for their belligerence, sending Strafford to the gallows and Laud to prison. And it passed a law that required the King to call Parliament thereafter at least triennially and ideally every year.

93 *Id.* at 1532:

> In 1640, the English "world turned upside down." For the first time in eleven years, King Charles called Parliament into session, and the members erupted in unprecedented fury against two decades of belligerent royal policies that had left the nation in disarray. Some of Parliament's fury was directed at Charles' religious policies. Upon his succession to the throne in 1625, Charles had stepped up his father's already stern Anglican establishment laws and began persecuting Calvinists (often called Puritans) and other religious dissenters with a vengeance, driving them by the boatload to the Netherlands and to America—some 20,000 in 1632 alone. In 1633, he appointed William Laud as Archbishop of Canterbury, who began purging English pulpits of Calvinist sympathizers and packing them with conservative clerics, loyal to the Crown and to the textbooks of established Anglicanism—the Book of Common Prayer, the Thirty-Nine Articles of the Faith, and the Authorized, or King James, Version of the Bible. Charles and Laud strengthened considerably the power and prerogatives of the Anglican bishops and the ecclesiastical courts. They also tried to impose Anglican bishops and establishment laws on Scotland, triggering an expensive and ultimately futile war with the Scottish Presbyterians. English dissenters who criticized these religious policies were pilloried, whipped, and imprisoned, and a few had their ears cut off and were tortured. When the Parliament was finally called in 1640, it let loose a massive torrent of protests, including the famous Root and Branch Petition and The Grand Remonstrance that

son, Charles II, on the throne,[94] though England's Parliament continued to resist abuses from prerogative courts.[95] "The 1637 Star Chamber prosecution of Prynne, Burton and Bastwick," one source observes of the period of Charles I's personal rule, describing the grotesque corporal punishments inflicted upon William Prynne, Henry Burton and John Bastwick, "is one of the *causes célèbres* not only of the 1630s but of seventeenth-century English history."[96]

Fourth, in the late 1670s (a decade before the "Glorious Revolution"), Titus Oates alleged the existence of a conspiracy to kill King Charles II—fabricated charges that implicated many Catholics and Jesuits and that became known as the "Popish Plot."[97] In 1678, Oates, the clergyman with a checkered past, gave a deposition and swore before a well-known magistrate, Sir Edmund Berry Godfrey, that he had overheard Jesuits hatching a plan to kill Charles II.[98] The magistrate's body was later found in a ditch with a sword through his body.[99] "To his contemporaries," one modern commentator notes, "the death of Edmund Godfrey was naturally attributed to Roman Catholics; the 'villainous papists' had murdered the Protestant magistrate as part of a wider Popish Plot and were intent upon other malicious actions if they were given the chance."[100] Although Oates's story was latter called "a tissue of monstrous lies," a panic ensued after the magistrate's murder,[101] and the fabricated "plot" horrifyingly led to fifteen innocent people being convicted and executed, including by the gruesome method of hanging and drawing and quartering.[102]

As described below, the severe punishment of Titus Oates and many others during the Stuart dynasty provided a clear impetus for codifying the bar on "cruel and unusual punishments" in the English Declaration of Rights. The concept of cruel and unusual punishments, though, had far older roots—and the codification of

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called for the abolition of much that was considered sound and sacred in the Church and Commonwealth of England.

94 *See* Tim Harris, Restoration: Charles II and His Kingdoms, 1660–1685 (2006); Robert M. Bliss, Restoration England: Politics and Government 1660–1688 (2005).

95 *E.g.*, Steve Bachmann, *Starting Again with the Mayflower . . . England's Civil War and America's Bill of Rights*, 20 QLR 193, 214 (2000):

> During the Restoration, Parliament firmly resisted the restoration of the High Commission in 1661. James II added one more reason for English people to panic when, in 1688, he created a Court of Commissioners for Ecclesiastical Causes, which was all but indistinguishable from the previously abolished High Commission. Hence, in 1689, the English Bill of Rights included a clause which read: "that the commission for erecting the late court of commissioners for ecclesiastical cause[s] and all other commissions and courts of like nature, are illegal and pernicious."

96 Kevin Sharpe, The Personal Rule of Charles I, at 757-58 (1992).

97 *E.g.*, Ryan, *supra* note 61, at 576-77.

98 C. John Sommerville, The News Revolution in England: Cultural Dynamics of Daily Information 88 (1996).

99 *See generally* Alan Marshall, The Strange Death of Edmund Godfrey: Plots and Politics in Restoration London (1999).

100 *Id.*, intro.

101 M. W. Patterson, A History of the Church of England 364 (1909).

102 *See* Victor Stater, Hoax: The Popish Plot that Never Was (2022); John Kenyon, The Popish Plot (2000).

the English legal prohibition was the culmination of a series of historic events and circumstances, many of which long preceded England's Revolution of 1688–1689. Samuel Johnson's *A Dictionary of the English Language* (1755) later specifically connected English society's conception of punishment with vengeance, defining *punishment* as "[a]ny infliction or pain imposed in vengeance of a crime."[103]

Fifth, the "Glorious Revolution"—guaranteeing that no Catholic would ever sit on the throne—came after a long but unsuccessful battle in England's Parliament, known as the Exclusion Crisis (1679–1681),[104] that sought to exclude King Charles II's brother, James, from the line of succession.[105] The Exclusion Crisis pitted the Earl of Shaftesbury, "an anti-Catholic 'country' politician and the leader of the nascent Whig Party," against King Charles II and his brother James, the Catholic Duke of York.[106] "The major political aim of the early Whigs," one academic explains, "was legislation excluding James—whom they saw as embodying absolutism—from the line of succession."[107] As that academic, William Ortman, writes of Whigs and the pitched political battle that ensued in England: "Their power base was the House of Commons, where they won majorities in three elections held between 1679 and 1681. Charles and James's supporters, who became known as Tories during this period, fended off exclusionary legislation from their stronghold in the House of Lords."[108]

Finally, the Revolution of 1688–1689 that produced the English Bill of Rights followed on the heels of much royal intrigue and societal upheaval. That public intrigue and unrest included what became known as the Rye House Plot (1683),[109] the Duke of Monmouth's ill-fated rebellion (1685)[110] shortly after James became king, and a number of draconian punishments imposed throughout Stuart reign, including in the "Bloody Assizes" and against Titus Oates.[111] The "Glorious

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[103] Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *abrogated on other grounds*, Burton v. Downey, 805 F.3d 776, 785 (7th Cir. 2015); Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles: *Avoiding the "Demise of the Criminal Law" by Attending to "Punishment,"* 98 J. Crim. L. & Criminology 429, 471 n.236 (2008).

[104] Nader Hashemi, Islam, Secularism, and Liberal Democracy: Toward a Democratic Theory for Muslim Societies 109 (2009) (noting that the Exclusion Crisis in England "sought to deny Charles II's Catholic brother James II (Duke of York) the succession to the English throne").

[105] Diarmuid F. O'Scannlain, *Glorious Revolution to American Revolution: The English Origin of the Right to Keep and Bear Arms*, 95 Notre Dame L. Rev. 397, 402-03 (2019) (noting James's conversion to Catholicism in 1673 and Parliament's efforts to exclude James, Charles II's younger brother, from the royal line of succession).

[106] William Ortman, *Probable Cause Revisited*, 68 Stan. L. Rev. 511, 523 (2016).

[107] *Id.*

[108] *Id.*

[109] John H. Langbein, The Origins of Adversary Criminal Trial 75 (2003) ("The treason trials arising from the Rye House Plot (1683) resulted in the conviction and execution, among others, of two leading Whig figures, Lord William Russell, their leader, and the political theorist Algernon Sidney.").

[110] *See* Peter Earle, Monmouth's Rebels: The Road to Sedgemoor, 1685 (1977); Stephen M. Carter, Fighting for Liberty, Argyll & Monmouth's Military Campaigns Against the Government of King James, 1685 (2020).

[111] *See* Bessler, *A Century in the Making*, *supra* note 7, at 1023–25 (noting that "the Earl of Devonshire had been fined £30,000 by the King's Bench for striking a man with a

Revolution"—as the U.S. Supreme Court has observed—"deposed" King James II in 1688; "cut back on the power of the Crown" as Parliament asserted itself; and "stripped away" the king's hereditary powers, leading to Parliament adopting the English Declaration of Rights and its statutory equivalent, the English Bill of Rights (1689).[112]

Among other things, the English Bill of Rights rejected "the pretended Power of Suspending of Laws or the Execution of Laws by Rega[l] Authority without Consent of Parl[i]ament" and "the pretended Power of Dispensing with Laws or the Execution of Laws by Rega[l] Authorit[y] as it ha[s] bee[n] assumed and exercised of late."[113] It was a contest of wills with origins dating back as far as the Magna Carta (1215), or Great Charter, when rebellious English barons forced King John to agree to limits on his power in a muddy field at Runnymede.[114] Among the chapters of the Magna Carta: provisions barring excessive fines.[115] When James II was

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cane, and Samuel Johnson, a clergyman, had not only been fined, but also ordered to be whipped severely for writing and publishing two seditious libels"; that "[t]he Earl of Devonshire had struck Colonel Culpepper at Whitehall on April 24, 1687, for an affront to his honor for which the Earl felt he had not received any satisfaction, and it was for that conduct that the King's Bench had imposed the hefty fine"; that "Samuel Johnson, arraigned on an information for publishing 'two pernicious, scandalous and seditious libels,' had also been ordered 'to stand thrice in the pillory, pay a fine of 500 marks, and to be whipped from Newgate to Tyburn'"; and that "[a]t the urging of the House of Commons, William III granted relief to both the Earl of Devonshire and Mr. Johnson, with Parliament resolving on June 11, 1689, that the judgment against Mr. Johnson was 'cruel and illegal'"); *Timbs*, 586 U.S. at 163–64 (Thomas, J., concurring) ("Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £30,000 fine against the Earl of Devonshire as 'excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land.'") (citing *Case of Earl of Devonshire*, 11 State Trials 1354, 1372 (K.B. 1687)).

112 United States v. Rahimi, 602 U.S. 680, 694 (2024); Consumer Fin. Prot. Bureau v. Community Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 428 (2024); Rogers v. Grewal, 140 S. Ct. 1865, 1870 (2020) (Thomas, J., dissenting); *see also* Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 290 (1989) (O'Connor, J., concurring in part and dissenting in part) ("After James II fled England during the Glorious Revolution at 1688–1689, the House of Commons, in an attempt to end the crisis precipitated by the vacation of the throne, appointed a committee to draft articles concerning essential laws and liberties that would be presented to William of Orange.").

113 United States v. Texas, 599 U.S. 670, 732 (2023) (Alito, J., dissenting).

114 SFF-TIR, LLC v. Stephenson, 262 F. Supp.3d 1165, 1204 (N.D. Okla. 2017). A centerpiece of the Magna Carta was its 39th article, which provided: "No free man shall be taken, imprisoned, deprived of possessions, outlawed, exiled or in any way diminished, nor shall we go against him or send anyone against him except by means of a legal judgment of his peers or by means of a law of the land." In re Green, No. 96-0222, 1996 WL 660949, at *3 (E.D. Pa. Nov. 15, 1996); *see also* William C. Hubbard, *Our Justice System at an Inflection Point*, 2017 Wis. L. Rev. 1, 2-3 ("Clause 39 of the 1215 Magna Carta is the direct antecedent of the Fifth and Fourteenth Amendments—our own country's constitutional guarantees of due process; our country's commitment to equal protection under law; our country's commitment to justice, the guardian of liberty.").

115 People v. Broadie, 332 N.E.2d 338, 351 (N.Y. Ct. App. 1975):

> In a day when many offenses were punished by discretionary amercement, or fining, imposition of these amercements was soon abused in an effort to

overthrown in the Glorious Revolution," the U.S. Supreme Court emphasized in *Timbs v. Indiana*,[116] "the attendant English Bill of Rights reaffirmed Magna Carta's guarantee by providing that 'excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.'"[117] The Magna Carta contained a clause that "a free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity . . . ."[118]

B. The Massachusetts Body of Liberties (1641)

Also, linguistic predecessors related to bail, fines, and punishments—the three components addressed in article 10 of the English Bill of Rights (1689) and the U.S. Constitution's Eighth Amendment (1791)—are found in specific provisions of the Massachusetts Body of Liberties (1641).[119] The first legal code in New England,[120]

> increase royal revenue. Eventually the nobility was compelled to put an end to the ruinous system of discretionary amercement, and in 1215 King John was forced to include in Magna Carta three chapters banning excessive fines (Magna Carta, chs. 20—22). Although perhaps more honored in principle than in practice, the prohibition against excessive punishment became a precept of the English common law . . . .

116 586 U.S. 146 (2019).

117 *Id.* at 152 (quoting 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689)).

118 *See* Alan I. Bigel, *William H. Rehnquist on Capital Punishment*, 17 Ohio N.U. L. Rev. 729, 734–35 (1991); Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 11, 32 (1994).

119 *See* Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 Pepp. L. Rev. 661, 667–68 (2004):

> The origins of the prohibition against cruel and unusual punishment on this continent took root as early as 1641, in the Massachusetts Body of Liberties. Language reminiscent of the Eighth Amendment was first introduced into the laws of Massachusetts by Reverend Nathaniel Ward. Ward, a minister, had also been trained in the law. After being "suspended, excommunicated and deprived of his benefice" in England, Ward came to Massachusetts. While he was there, a period of political unrest ensued. Following some of this upheaval in the Massachusetts colony, a series of committees was established. The purpose of these committees was to develop or "frame a body of grounds of laws, in resemblance to a Magna Charta, which . . . should be received for fundamental laws." Reverend Ward was appointed to one of these committees. In 1641, a proposed code which Reverend Ward drafted was circulated and ultimately enacted "under the title Body of Liberties." This code has been recognized as "the most important as a forerunner of the federal Bill of Rights." The Body of Liberties prohibited "Barbarous and inhumane" torture and "bodilie punishments."

120 Justine K. Collins, Tracing British West Indian Slavery Laws: A Comparative Analysis of Legal Transplants (2022) (describing the Massachusetts Body of Liberties as "the first legal code within New England"); *see also* "Introduction," in Puritan Political Ideas, 1558–1794, at xxv (Edmund S. Morgan, ed. 2003) (noting that in 1641 "the Puritans . . . drew up and enacted as legislation a 'Body of Liberties' . . . defining the rights of subjects more extensively than had ever been done in England" and

the Massachusetts Body of Liberties—setting forth the colonists' "liberties"[121]—was principally drafted for the Massachusetts Bay Colony by the Rev. Nathaniel

that "[h]ere the terms of the people's covenant with God and of the ruler's covenant with the people were spelled out in detail"); Norman Abjorensen, Historical Dictionary of Democracy 286 (2019) (noting that "[t]he Petition of Right of 1628 marked an important step in the constitutional development of England, imposing as it did limits on the power of the monarch," and that the Petition of Right "was also instrumental in shaping the Massachusetts Body of Liberties of 1641, the first legal code established by European colonists in New England").

[121] Commonwealth v. Alger, 61 Mass. 53, 70–71 (Mass. Sup. Jud. Ct. 1851):

> The term "liberties" was used as synonymous with laws, or legal rights founded and established by law. In the published edition of the colony ordinances, generally, they are denominated the Laws and Liberties. The code already alluded to as having been accepted and adopted in 1641, was called the "Body of Liberties." It is said by Hutchinson, that they were composed by Rev. Nathaniel Ward, of Ipswich, who, he adds, had been a minister in England, and formerly a student and practiser in the course of the common law. 2 Winthrop's Journal, 55. They bear intrinsic evidence of having been drawn with great skill and legal accuracy, and have a constant reference to the established principles of the laws of England Yet they were called Liberties. Perhaps this was advisedly done, because the colonial government were acting under a charter which made them a corporation; and although it conferred on the governor and company large powers to govern the settlement which they might establish, yet it was always so as "not to be repugnant to the laws of England." It might seem to them less arrogant to set forth and declare their "liberties" and rights in this form, than to enact in terms a body of laws, which might seem to indicate a disregard of the authority of the mother country. This use of the term "liberty," as synonymous with right, franchise, and privilege, is strictly conformable to the sense of the term as used in *Magna Charta,* in the Declaration of Rights, and in English statutes, grants, and legal instruments. Jacob's Law Dict. Tit. Liberty.

Ward, a Puritan exile[122] who, in England, had studied and practiced law.[123] As

[122] Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1836 (2024) ("Ward, a Puritan exile, arrived in Massachusetts in 1634 at a moment of political ferment. The colony's government relied on local magistrates who exercised vast discretion; in administering justice, they 'had few guidelines other than Scripture and their own sense of moral equity.' But by the 1630s, frustration at these expansive powers had galvanized efforts to codify a basic law. Ward was appointed to the committee charged with doing so."); *id.* ("The project was fraught. Among other obstacles, Governor John Winthrop, himself a former justice of the peace, continually interfered. But in 1641 the Massachusetts General Council adopted the Body of Liberties, which Ward had drafted. The bail clause appeared in Liberty 18 . . . ."); *id.* at 1837 ("This clause represented a dramatic check on the discretion (to bail or commit) that magistrates had previously exercised. . . . Ward's bail clause made bail mandatory except in narrowly drawn categories."); *id.* ("Ward left no commentary, so his motivations must be gleaned from context. Although he was a fervent Puritan, Ward also had a deep sense of the legal boundedness of government. He had been briefly jailed in England for his religious and political views and had seen his fellow Puritans jailed without bail. His experience, combined with his strict Puritan commitments, instilled a deep disdain for arbitrary government. As a whole, Ward's Body of Liberties was a 'colossal rebuke' to the governance approach that deferred to the divinely sanctioned authority of magistrates. It would remain the New England law of bail for the next two centuries.").

[123] Jackson v. Phillips, 14 Allen 539, 562, 96 Mass. 539, 562 (Mass. Sup. Jud. Ct. 1867) ("The Massachusetts Body of Liberties, as Governor Winthrop tells us, was composed by Nathaniel Ward, who had been 'formerly a student and practiser in the course of the common law.'") (citation omitted); *see also* Conant v. Jordan, 77 A. 938, 941 (Me. 1910):

> While the founders of that colony recognized their political dependence upon England, they came to these shores with a fixed purpose to found a common-wealth with laws of their own. They left England just after the troubles between Charles I and his early parliaments, and partly because of those troubles. Most of them sympathized with the parliaments rather than with the king. The royal charter authorized them to make laws and ordinances "not repugnant to the laws of England." And they did so. They did not consider the common law of England as binding upon them, but they felt at liberty to adopt just so much of it as suited their purpose. From time to time, as occasion arose, they enacted laws of their own. But for 10 years they had no "body of laws," and were without the security of a system of statutes or any recognition of the authority of the common law. Palfrey, Hist. of New England, vol. 1, at page 280. Rights of parties were settled by the magistrates, where there was no express ordinance, according to their conceptions of equity and justice, or according to their understanding of the law of God. The people grew dissatisfied with this somewhat uncertain and irregular administration of justice and wished for a "body of laws." Consequently in 1636 a committee was appointed "to make a draught of laws agreeable to the word of God." "In the meantime the magistrates and their associates" were "to determine all causes according to the laws" already established, and, where there "was no law, then as near the law of God as they" were able. In 1641 a "Body of Liberties" was adopted. It was the first system of statutes in that colony. It had been drafted for the most part by Rev. Nathaniel Ward, who while in England had both studied and practiced law. The Body of Liberties consisted of 100 sections, and covered a wide range of subjects.

Professor John Witte, Jr. writes of the Massachusetts Bay Colony: "Massachusetts Bay issued its Body of Liberties in 1641, just over a decade after the arrival of the first colonists. The document was drafted by Nathaniel Ward, a distinguished Cambridge-trained lawyer and Heidelberg-trained Calvinist minister."[124] In explaining Ward's background, Professor Witte notes: "Ward had come to New England in 1634, with ten years of legal experience as a barrister in England. He had also been a preacher in England but had been removed from his pulpit in 1631 because of his dissenting Calvinist views."[125]

The Massachusetts Body of Liberties—the product of a request of the General Court of Massachusetts for a draft of laws "agreeable to the word of God"[126]—set

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[124] John Witte, Jr., *A New Magna Carta for the Early Modern Common Law: An 800th Anniversary*, 30 J.L. & RELIGION 428, 438 (2015).

[125] *Id.* at 438–39; *see also id.* at 438:

> Among the many colonial rights documents from the seventeenth century, let me focus on a surprising early one: The Body of Liberties drafted for Massachusetts Bay in 1641—"in resemblance of a Magna Charta," as Governor John Winthrop put it. The Body of Liberties incorporated not only the rights guarantees of the Magna Carta (1215) and the Petition of Right (1628) but also many of the most daring rights proposals of the early modern pamphleteers in England, along with a number of surprising innovations.
>
> I say "surprising" because seventeenth-century colonial Massachusetts was hardly known in its day as a haven of liberty. It was better known for its austere Calvinist morality; its early banishment of Roger Williams, Anne Hutchinson, and others for heresy; its belligerent treatment of the Quakers, hanging four of them in the Boston Common; and its horrible and deadly campaigns against the "witches" of Salem. This seems like the wrong place to look for rights.
>
> But in fact, the articulation and protection of rights was an early and important part of the constitutional development of this young colony. It must be remembered that Massachusetts Bay was set up in part as a haven for Puritan Calvinists, who shared many of the rights ideas of the English revolutionaries of the 1640s; indeed, some of the New England colonists had been forced to flee from England in the 1620s and 1630s because of their radical views. Moreover, the Puritans of both England and New England were heirs to a century of European Calvinist rights talk that had become ever more radical and expansive in the later sixteenth and early seventeenth centuries as Calvinists faced tyrannical oppressors in church and state and rose up in revolutionary defense of their God-given "fundamental rights." The New England Puritans knew this Calvinist rights heritage, and had taken a number of the key theological and political documents with them to the new world.

[126] J. Nelson Happy & Samuel Pyeatt Menefee, *Genesis!: Scriptural Citation and the Lawyer's Bible Project*, 9 REGENT U. L. REV. 89, 109 (1997):

> In 1636, "the General Court of Massachusetts requested the divine John Cotton and others "'to make a draught of lawes agreeable to the word of God, which may be the Fundamentalls of this commonwealth."' As the son of an attorney, Cotton "had some understanding of the law but was known more for his biblical scholarship and his expositions of Puritan orthodoxy"; that his work owed much to the Old Testament, is suggested by Gov. John Winthrop's characterization of the draft as "'A Model of Moses His

forth various legal rights, although it also made many acts punishable by death and referenced corporal punishments.[127] "No mans person," article 18 of the Massachusetts Body of Liberties provided, "shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle, or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." Regarding fines, article 22 of the Body of Liberties read: "No man in any suit or action against an other shall falsely pretend great debts or damages to vex his Adversary, if it shall appeare any doth so, The Court shall have power to set a reasonable fine on his head." Similarly, article 37 of the Body of Liberties—reflecting the importance of the concept of proportionality—referred to the court's power to impose "a proportionable fine." "No man shall be beaten with above 40 stripes, nor shall any true gentleman, nor any man equall to a gentleman be punished with whipping, unless his crime be very shamefull, and his course of life vitious and profligate," article 43—another of nearly one hundred separate articles in the Body of Liberties—reads, with the Body of Liberties citing biblical verses authorizing the punishment of death.[128] "No man shall be forced by Torture to confesse any

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Judicialls."' While these were not adopted, the work of another minister, the Rev. Nathaniel Ward, produced a "Body of Liberties" in 1641 which had greater influence on Massachusetts' colonial laws. This corpus included "contributions from the Mosaic code in the drafting of the laws punishable by death."

127 Drawing upon the Bible and Exodus, Leviticus, Numbers, and Deuteronomy, Ward—annotating the "Body of Liberties" with specific biblical verses to show its derivation from "the word of God," made these crimes punishable by death: (1) idolatry; (2) witchcraft; (3) blasphemy; (4) murder; (5) manslaughter; (6) poisoning; (7) bestiality; (8) sodomy; (9) adultery; (10) man-stealing; (11) false witness in capital cases; and (12) conspiracy and rebellion. *Id.* at 109–10 & n.48. And the Puritans made use of executions and other harsh punishments such as exile in the decades to come. Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 Wm. & Mary Bill Rts. J. 291, 322 (2010) ("The authorities of Massachusetts Bay accused dissenters, such as Roger Williams and Anne Hutchinson, of the crime of heresy, and exiled them upon conviction. These actions only increased the Colony's thirst for purity. Two decades later, the Bay Colony executed four Quakers. A generation later, in 1692, a general madness overcame the Massachusetts Puritans, and they executed twenty persons at Salem whom they thought to be witches. The Puritans felt justified in inflicting these punishments because they believed that the laws against heresy and witchcraft reflected the will of God."). Even when people were not put to death or banished, they might be subjected to harsh corporal punishments. *See* Geoffrey R. Stone, *The Second Great Awakening: A Christian Nation?*, 26 Ga. St. U. L. Rev. 1305, 1318 (2010) ("In the American colonies, the Puritans took blasphemy quite seriously. Invoking Leviticus, which commands that 'He who blasphemes the name of the Lord shall be put to death,' the early Puritan codes declared blasphemy a capital offense. From the 1660s through the 1680s, the Puritans initiated approximately twenty blasphemy prosecutions. In one case, the defendant was prosecuted for calling God a bastard; in another, for stating that the devil was as merciful as God. Although the Puritans never executed anyone for blasphemy, they whipped, pilloried and mutilated those found guilty of the offense.").

128 *1641: Massachusetts Body of Liberties*, Liberty Fund, https://oll.libertyfund.org/page/1641-massachusetts-body-of-liberties (last visited Apr. 4, 2025).

Crime against himselfe nor any other unlesse it be in some Capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty," article 45 of the Body of Liberties began, with the very next provision—article 46—reading: "For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruell."[129]

Nathaniel Ward, the drafter of the Massachusetts Body of Liberties, had been admitted to Lincoln's Inn in 1607.[130] The relevant provisions of the Body of Liberties, as one academic, Celia Rumann, observes, "can be traced back to the writings of Englishman Robert Beale.'"[131] "Sir Robert Beale," Rumann notes, "had been a member of the High Commission which had been turned into an ecclesiastical court and had used 'torture to extract confessions.'"[132] The High Commission had been set up "to try certain types of ecclesiastical offenses," and Beale had resigned "because of its inquisitorial methods and because of his Puritan beliefs."[133] As Rumann emphasizes: "Beale objected to the use of torture 'when authorized by the royal prerogative' and other inquisitorial methods. Later Beale published a manuscript in which, among other things, he condemned the use of torture by the High Commission."[134]

John Whitgift, the Archbishop of Canterbury from 1583 to 1604 and described by Rumann as "the architect of the High Commission," did not react well to Beale's actions, with Whitgift having a "Schedule of Misdemeanors" drawn up against Beale "for condemning such things as the use of the rack as 'cruel, barbarous, [and] contrary to law."[135] "Given the influence Beale had on Ward," Rumann explains, "it appears that Ward's language, used in the Massachusetts Body of Liberties, was motivated by concerns about torture that was used to extract confessions in the absence of a conviction and bodily punishments that were 'inhumane Barbarous or cruel.'"[136]

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[129] *Id*.; *see also* People v. Broadie, 332 N.E.2d 338, 348 (N.Y. 1975) ("[T]he Massachusetts Code of 1648 incorporated large sections of Nathaniel Ward's 1641 Body of Liberties, including clause 46 which read: 'For bodilie punishments we allow none that are inhumane, barbarous, or cruel'.") (citations omitted).

[130] Granucci, *supra* note 5, at 850-51.

[131] Rumann, *supra* note 119, at 668; *see also Furman*, 408 U.S. at 316 n.6 ("Beale's views were conveyed from England to America and were first written into American law by the Reverend Nathaniel Ward who wrote the Body of Liberties for the Massachusetts Bay Colony. Clause 46 of that work read: 'For bodilie punishments we allow amongst us none that are inhumane, Barbarous or cruel.'") (citing 1 B. Schwartz, The Bill of Rights: A Documentary History 71, 77 (1971)); *see also* Gorman, *supra* note 37, at 460 n.161 (citations omitted) ("[T]he underpinnings of the phrase were first promulgated by Sir Robert Beale and Nathaniel Ward. Beale, an Oxford-educated member of Parliament, published a manuscript in 1583 in which he attacked the crown's right to punish persons for ecclesiastical offenses."); *id.* ("Ward, after being deprived of his benefice, set sail for Massachusetts. In 1641, the General Court of the freeman of the colony of Massachusetts, in an attempt to stabilize the colony and frame a body of laws, enacted Ward's draft codes into law. Clause 46 of Ward's Body of Liberties stated: 'For bodily punishments we allow amongst us none that are inhumane, barbarous or cruel.'").

[132] Rumann, *supra* note 119, at 668.

[133] *Id*.

[134] *Id.*

[135] *Id.* at 668–69.

[136] *Id.* at 669.

In the late sixteenth century, Sir Robert Beale had invoked the Magna Carta to question the monarchy's power to inflict cruel punishments.[137] Beale, an Oxford-educated member of Parliament and a lawyer who opposed torture, had written a manuscript in 1583 that attacked the English crown's right to punish persons for ecclesiastical offenses. The Clerk of the Privy Council, Beale represented Puritan ministers deprived of their benefices, argued in vain that the use of torture to extract confessions violated the Magna Carta, and in 1592 was banished from the Royal Court. The powerful Archbishop of Canterbury, John Whitgift, explicitly admonished Beale that had he "condemneth (without exception of any cause) the racking of grievous offenders as being cruel, barbarous, contrary to law, and unto the liberty of English subjects."[138] A Puritan, Robert Beale—as one academic wrote in the *University of Chicago Law Review*—"bemoaned the death of Magna Carta," with Beale complaining in 1589 about High Commission agents "by a warrant under the hands of the Comissioners" entering "into mens howses," breaking up "their chestes and chambers," carrying out "what they list," and afterwards making arrests.[139]

C. The Punishment of Titus Oates

In the constellation of punishments imposed upon Titus Oates in 1685 by the Court of King's Bench for perjury,[140] Oates—to the horror of many English Protestants, especially those concerned about absolute royal power and Stuart tyranny—was

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137 *Furman*, 408 U.S. at 316 (Marshall, J., concurring).

138 *See id.*; Gorman, *supra* note 37, at 460 n.161; Scott A. Trainor, *A Comparative Analysis of a Corporation's Right Against Self-Incrimination*, 18 Fordham Int'l L.J. 2139, 2153–54 (1995).

139 Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1213–14 (2016); *see also* Benjamin White, Comment, *Pain Speaks for Itself: Divorcing the Eighth Amendment from the Spirit of the Moment*, 58 San Diego L. Rev. 453, 458–59 (2021):

> The Tudor monarchy sanctioned numerous grotesque forms of torture and execution, including the "rack" in the Tower of London. Robert Beale . . . condemned royal use of the rack, calling the practice "cruel, barbarous, contrary to law, and unto the liberty of English subjects." In 1615, the Court of King's Bench declared that throwing a man into a dungeon with no bed or food for criticizing an officer of the crown represented an "unlawful or extreme" punishment. In its condemnation of depriving the man of food and water, the Court of King's Bench acknowledged that passive cruelty inflicts just as much pain and suffering as active cruelty, and should be similarly protected against.

140 *See* The Tryals, Convictions & Sentence of Titus Otes, upon Two Indictments for Willful, Malicious, and Corrupt Perjury: At the Kings-Bench-Barr at Westminster, Before the Right Honourable George Lord Jeffreys, Baron of Wem, Lord Chief Justice of His Majesties Court of Kings-Bench, and the Rest of the Judges of that Court Upon Friday the 8th. and Saturday the 9th. Days of May, Anno Domini, 1685 and in the First Year of the Reign of Our Soveraign Lord King James the II. &c. (1685). Justice Francis Wythens (sometimes spelled "Withins") actually pronounced the sentence upon Titus Oates, but George Jeffreys—the Lord Chief Justice of the Court of King's Bench—presided over Oates's perjury trial. *Id.* at 59-60.

infamously stripped of his clerical garb and ordered to be imprisoned for life, to be whipped, fined, and to ignominiously stand in the pillory multiple times a year for the rest of his life.[141] "The judges, as they believed, sentenced Oates to be scourged to death," one leading English historian, Lord Macaulay, once observed, though Oates did not die as some—including, most likely, the Court of King's Bench judges sentencing him[142]—may have expected.[143] While fines, imprisonment, whipping, and the pillory were, individually, common punishments in seventeenth-century England, the specific punishment (or, more accurately, the defrocking and combination of punishments) imposed upon Oates in the mid-1680s was later seen by members of Parliament as "cruel, barbarous and illegal."[144]

It is, frankly, not hard to see why, especially when one reads the actual punishments he endured over the course of just one week—and what he was sentenced to suffer in the future. "On Monday," one history notes in describing the first day of the 1685 punishment inflicted upon Oates, "he had to walk through the Courts of Justice in Westminster Hall wearing a notice describing his offence, before standing in the pillory for an hour, where an estimated crowd of 10,000 people pelted him with rotten eggs." Oates also reportedly had dead cats thrown at him.[145] "On Tuesday," that historian's description continues, "he went through the same treatment but this time at the Royal Exchange." While, on Wednesday, Oates was then "whipped the mile and a half from Aldgate to Newgate," just two days later—on Friday—he was similarly "whipped the two miles from Newgate to Tyburn," ultimately falling unconscious and—at one point—being "dragged on a sled." Along with being fined 2,000 marks[146] and ordered to be imprisoned for life,

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141 *E.g.*, *Harmelin*, 501 U.S. at 969-70.

142 *E.g.*, Nishi Kumar, Note, *Cruel, Unusual, and Completely Backwards: An Argument for the Retroactive Application of the Eighth Amendment*, 90 N.Y.U. L. Rev. 1331, 1346 n.71 (2015).

143 *Harmelin*, 501 U.S. at 970.

144 *See also* Timothy J. Foley, *The Ongoing Debate: The Constitutionality of Death*, 19 Harv. C.R.-C.L. L. Rev. 245, 248 n.15 (1984) (citing Granucci, *supra* note 5, at 857-59; reviewing Raoul Berger's book, *Death Penalties: The Supreme Court's Obstacle Course* (1982); noting that "[o]ne of Granucci's central focuses in the interpretation of the English clause is the petition of Titus Oates in 1689 for an overturning of an obviously excessive sentence for perjury"; that "[t]here was no dispute that individual punishments, including life imprisonment, whipping, and a large fine, were legal, only whether the judgment was, in total, 'inhumane and unparalleled'"; and that "[w]hile the Oates petition was denied, Granucci emphasizes that a minority of the House of Lords dissented, specifically noting that the judgment was 'cruel, barbarous and illegal,'" and in violation of both "ancient practice"' and the provision of the English Declaration of Rights prohibiting cruel and unusual punishments).

145 2 Montgomery Lord, Bizarre Laws and Curious Customs of the UK 108 (2023); 9 John L. Stoddard, John L. Stoddard's Lectures 241 (1914); 5 Henry Foley, Records of the English Province of the Society of Jesus: Historic Facts Illustrative of the Labours and Sufferings of Its Members in the Sixteenth and Seventeenth Centuries 77 (1879); *see also* 5 The Roxburghe Ballads: Illustrating the Last Years of the Stuarts 606 (J. Woodfall Ebsworth, ed. 1885) ("Ah, poor falling *Titus!* 'tis a cursed debasement / To be pelted with Eggs thro' a lewd *wooden-casement*!").

146 A *mark* was equivalent to two-thirds of a pound. 1 Charles Knight, The Popular History of England: An Illustrated History of Society and Government from

"on four occasions each and every year," historian David Hanrahan summarizes of the public and annual recurring pillorying to be suffered, Oates "was forced to stand for an hour in the pillory at various locations around London."[147]

D. The Ratification of the Eighth Amendment

When, centuries ago, Americans debated the provisions of the U.S. Constitution and the U.S. Bill of Rights before ratifying them,[148] at least some lawmakers opposed including the "cruel and unusual punishments" prohibition because of its assertedly indefinite meaning,[149] with considerable uncertainty—truth be told—about what exactly "nor cruel and unusual punishments inflicted" meant[150] or might be interpreted to mean in the future.[151] That language in the Eighth Amendment was, plainly, borrowed from the English Bill of Rights (1689)[152] and the Virginia

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the Earliest Period to Our Own Times 369 (1873).

147 David C. Hanrahan, Charles II and the Duke of Buckingham: The Merry Monarch and the Aristocratic Rogue (2013), ch. 22.

148 "We have very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights," Justice William Brennan once wrote. *Furman*, 408 U.S. at 259 (Brennan, J., concurring). "The absence of such a restraint from the body of the Constitution," he emphasized, "was alluded to, so far as we now know, in the debates of only two of the state ratifying conventions." *Id.*

149 *See* Weems v. United States, 217 U.S. 349, 368–69 (1910) ("The provision received very little debate in Congress. We find from the Congressional Register, p. 225, that Mr. Smith, of South Carolina, 'objected to the words 'nor cruel and unusual punishment,' the import of them being too indefinite.' Mr. Livermore opposed the adoption of the clause saying: 'The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary.'").

150 *E.g.*, Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. Rev. 817, 821-23 (2016) (noting that "[t]here is widespread agreement that there is very little direct evidence of what the First Congress intended to convey by inserting the provision into the Bill of Rights"; that "there was little contemporaneous debate or commentary when the Amendment was introduced and ratified"; that "[l]egal historians have suggested that founding era concerns about state-sanctioned cruelty emanated from several sources"—"prior experience with the British monarchy; Enlightenment critiques of torture and other punishments employed by England and, to some degree, its colonies; and intellectual commentary that was influential during the founding era"; and that "Blackstone, who used the term 'cruel and unusual' to illustrate what constituted 'express malice' for the purpose of murder, exerted considerable influence on the founding generation, and Cesare Beccaria's treatise on crime and punishment was popular on both sides of the Atlantic").

151 In debates of the First Congress, Representative William Loughton Smith of South Carolina "objected to the words 'nor cruel and unusual punishments'" because of his view that "the import" of those words was "too indefinite." By contrast, Representative Samuel Livermore of New Hampshire offered this perspective of the Eighth Amendment's text: "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary." Bessler, Cruel and Unusual, *supra* note 46, at 186, 302, 328.

152 The English Declaration of Rights was drafted after William of Orange invaded England and King James II was deposed, with Willam and his wife, Mary, ultimately becoming co-sovereigns. After a Parliament was called to determine succession to the throne, "a

Declaration of Rights (1776).[153] But the language chosen for the Eighth Amendment and revolutionary era state constitutions, whether America's founders knew all the particular details or not about the origins of the "cruel and unusual punishments" language, had a pedigree stretching back much further than the 1680s. At the very least, America's founders would have known that the bar on "cruel and unusual punishments" had "ancient" roots, because they were very familiar with the English Bill of Rights and that is what the English Bill of Rights itself recites.[154]

In fact, the legal protections found in the English Bill of Rights had roots predating that act of Parliament. The English common law[155]—as incorporated into the English Declaration of Rights and then codified in the English Bill of

declaration of rights was drafted which the new monarchs, William and Mary, would ratify." Granucci, *supra* note 5, at 852. The tenth declaratory clause read: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." *Id.* at 852-53, 855. For additional information on the Revolution of 1688–1689 and the English Declaration of Rights, see The Revolution of 1688–1689: Changing Perspectives (Lois G. Schwoerer. ed. 1992); Lois G. Schwoerer, The Declaration of Rights, 1689 (1981); Bessler, *A Century in the Making*, *supra* note 7.

153 Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 Dick. L. Rev. 419, 421 (1995) ("George Mason, one of Virginia's delegates to the Constitutional Convention, proposed a bill of rights and a constitution for his state government which included the prohibition against cruel and unusual punishments."). The final draft of article 10 of the English Declaration of Rights, codified in the English Bill of Rights (1689), provided that "excessive Baile ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689); *accord Browning-Ferris Industries of Vermont, Inc*., 492 U.S. at 291 (O'Connor, concurring in part and dissenting in part).

154 State v. Burlington Drug Co., 78 A. 882, 885 (Vt. 1911) ("The framers of our Constitution considered, as did the English Parliament in 1689, that protection against excessive fines and cruel and unusual punishments was one of the 'true, ancient and indubitable rights and liberties of the people,' and that it should so 'be esteemed, allowed, adjudged, deemed, and taken to be.'") (quoting 1 William & Mary, Sess. 2, c. 2, §§ 1, 6); *see also* Stinneford, *The Original Meaning of "Unusual", supra* note 16, at 1765 ("[O]ne of the primary reasons for the enactment of the American Bill of Rights was the removal from Congress of any hint of power to violate certain fundamental principles embodied in the common law, including the ancient right to be free from cruel and unusual punishments.").

155 *E.g*., Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 Santa Clara L. Rev. 365, 411 (2004):

> A common law right is a right based on general or local customs rather than written law. These common law rights were rooted in custom or usage, enforced or "discovered" by common law courts, and revealed in reported judicial decisions. According to one nineteenth century treatise on the laws of England, common law rights "receive[d] their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom." The custom giving rise to the common law right must be ancient; "[T]he goodness of a custom depends upon its having been used time out of mind . . . time whereof the memory of man runneth not to the contrary."

Rights—had long prohibited cruel and unusual punishments as evidenced by that prohibition's classification by the English as an "ancient" right[156] in the late 1680s.[157] It took considerable time for a common law right to be recognized by an English court, although the common law—the very foundation of English law—was tied to custom and meant to be flexible and adaptable. As Theodore F. T. Plucknett, a Professor of Legal History at the University of London, has explained of the history of the common law in a section titled "The Flexibility of Custom": "If we want the view of a lawyer who knew from experience what custom was, we can turn to Azo (*d*. 1230), whose works were held in high respect by our own Bracton. 'A custom can be called *long*,' he says, 'if it was introduced within ten or twenty years, *very long* if it dates from thirty years, and *ancient* if it dates from forty years.'"[158]

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[156] To qualify as an "ancient" right, that right obviously had to be preexisting for a substantial period of time. *See* Richard O. Zerbe, Jr., *Justice and the Evolution of the Common Law*, 3 J.L. Econ. & Pol'y 81, 94 (2006) (citing William Blackstone, Commentaries on the Laws of England 56-67 (19th ed. 1900); Theodore Plucknett, A Concise History of the Common Law 308 (5th ed. 1956)):

> In his treatise, Blackstone provided a list of criteria judges should consider before codifying norms into the common law. Blackstone contended that norms must be long-established and uncontentious before being incorporated into the common law. According to Plucknett, the civilian jurist Azo, held in high esteem by Bracton, noted that "a custom can be called *long* if it was introduced within ten or twenty years, *very long* if it dates from thirty years, and *ancient* if it dates from forty years." This requirement helped ensure that the public's willingness to accept the changes was greater than their willingness to maintain the status quo. Blackstone suggested that prior to codifying a norm, a social sanction for failure to obey the norm should already exist in order to guarantee that only important customs became enshrined into law. Thus, Blackstone's criterion ensured the incorporation of only true norms, which are efficient norms.

[157] Anno Regni Gulielmi et Mariæ, Regis & Reginæ Angliæ, Scotiæ, Franciæ & Hiberniæ Primo: On the Sixteenth Day of December, Anno Dom. 1689. In the First Year of Their Majesties Reign, this Act Passed the Royal Assent (London: Charles Bill and Thomas Newcomb, "Printers to the King and Queens most Excellent Majesties," 1689) (available in the rare books room at the University of Minnesota Law Library); *see also* Holloway v. Wittry, 842 F. Supp. 1193, 1196 (S.D. Iowa 1994) ("Prior to the adoption of the English Bill of Rights in 1689, a prohibition against 'excessive punishments in any form' had developed in English common law over the centuries."); Ex parte Biggs, 64 N.C. 202, 213 (1870) (describing disfranchisement of one's license to practice law as "a 'cruel and unusual punishment,' unknown to, and forbidden by, the common law of England").

[158] Theodore F. T. Plucknett, A Concise History of the Common Law 307–08 (5th ed. 1956) (Union, NJ: The Lawbook Exchange, Ltd. 2001) (italics in original); *see also id*.:

> The modern age of legislation by means of laws deliberately set up and expressed in certain authoritative texts covers but a very small period of legal history. Preceding it the principal element in most legal systems was custom. There were, of course, other factors as well in many cases. In canon law, for example, there were authoritative texts from the Bible and elsewhere, and most systems had at least a few examples to show of deliberate legislation. But the great mass of the law into which these exceptional elements had to be fitted was custom. Our earliest Anglo-Saxon

Another law professor, Craig Dallon, has also written:

> A common law right is a right based on general or local customs rather than written law. These common law rights were rooted in custom or usage, enforced or "discovered" by common law courts, and revealed in reported judicial decisions. According to one nineteenth century treatise on the laws of England, common law rights "receive[d] their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom." The custom giving rise to the common law right must be ancient; "[T]he goodness of a custom depends upon its having been used time out of mind . . . time whereof the memory of man runneth not to the contrary."[159]

Taking stock of the "cruel and unusual punishments" prohibition, American revolutionary Patrick Henry and others—at a distance of many decades from the language's appearance in the English Bill of Rights as a byproduct of the Revolution of 1688–1689[160]—forcefully expressed the view, from an eighteenth-century vantage point, that it prohibited barbarous punishments and torture.[161] "The very

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> "laws" are modifications of detail and obviously assume that the legal fabric is essentially customary. The communal courts which survived into historical times, especially the hundred and the county, were customary in their origin, and declared customary law whose sanction was derived from custom. But the remarkable feature of custom was its flexibility and adaptability. In modern times we hear a lot too much of the phrase "immemorial custom". In so far as this phrase implies that custom is or ought to be immemorially old it is historical inaccurate. In an age when custom was an active living factor in the development of society, there was much less insistence upon actual or fictious antiquity.

159 Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 Santa Clara L. Rev. 365, 411 (2004) (quoting 1 Herbert Broom & Edward A. Hadley, Commentaries on the Laws of England 40-41, 43 (1875)).

160 Howell v. McAuliffe, 788 S.E.2d 706, 721 n.14 (Va. 2016) ("As many commentators have noted, the Founders 'felt themselves the heirs of the Revolution, of the glory derived from 1688. Americans of the 1770s felt they were approaching a 'centennial' of their own, reliving memories of the English Bill of Rights.") (quoting Garry Wills, Inventing America: Jefferson's Declaration of Independence 64 (2002)).

161 Estelle v. Gamble, 429 U.S. 97, 102 (1976) (noting of the Eighth Amendment's prohibition of "cruel and unusual punishments": "It suffices to note that the primary concern of the drafters was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment."); *see also Furman*, 408 U.S. at 319 (Marshall, J., concurring) ("Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing that language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments."); *Bucklew*, 587 U.S. at 131:

> Patrick Henry, for one, warned that unless the Constitution was amended to prohibit "cruel and unusual punishments," Congress would be free to inflict "tortures" and "barbarous" punishments. 3 Debates on the Federal

use of the phrase 'bill of rights' in popular parlance to describe the new documents that the Revolutionary American states adopted was an allusion to the English Bill of Rights," Eighth Amendment scholar Laurence Claus explains of early American history and the founders' familiarity with the English Bill of Rights.[162]

It is impossible to say what exactly was in the minds of every American framer of revolutionary era state constitutions or the U.S. Bill of Rights. It can be safely asserted, however, that early American lawmakers—without prying too deeply into how the "cruel and unusual punishments" prohibition first arose,[163] at least beyond their shared understanding from studying English history and reading Sir William Blackstone's treatise[164] indicating that the English prohibition arose in response to

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Constitution 447–448 (J. Elliot 2d ed. 1891). Many early commentators likewise described the Eighth Amendment as ruling out "the use of the rack or the stake, or any of those horrid modes of torture devised by human ingenuity for the gratification of fiendish passion." J. Bayard, A Brief Exposition of the Constitution of the United States 140 (1833); see B. Oliver, The Rights of an American Citizen 186 (1832) (the Eighth Amendment prohibits such "barbarous and cruel punishments" as "[b]reaking on the wheel, flaying alive, rending asunder with horses, ... maiming, mutilating and scourging to death").

162 Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 Harv. J.L. & Pub. Pol'y 35, 36 (2008); *see also id.* ("The strategy of adopting seriatim lists to allege political wrongdoing and to assert political entitlements is embedded in the English political tradition, going back to Magna Carta. . . . [T]he American Declaration of Independence imitated the seriatim listing of wrongs that opened the English Declaration of Rights, as the English Bill of Rights had been called prior to its passage through Parliament in 1689.").

163 The first usage of the "cruel and unusual punishments" terminology has long been associated with the English Declaration of Rights. *E.g.*, People v. Broadie, 332 N.E.2d 338, 347-48 (N.Y. Ct. App. 1975); Note, *What Is Cruel and Unusual Punishment*, 24 Harv. L. Rev. 54, 54–55 (1910) ("The inhibition of the infliction of 'cruel and unusual punishment' first appears in the Bill of Rights of 1689, at a time when the inhumanity of Judge Jeffreys of 'Bloody Assizes' fame and of his fellows under the Stuarts, loomed large in the popular mind."); Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 Dick. L. Rev. 419, 420–41 (1995) ("The phrase 'cruel and unusual punishments' first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary. The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved. However, American drafters, who adopted the English phraseology in drafting the Eighth Amendment, were primarily concerned with proscribing 'tortures' and other 'barbarous methods of punishment.'"); Gorman, *supra* note 37, at 460–61 ("The phrase 'cruel and unusual punishments' first appeared in the English Declaration of Rights of 1689 at the accession of William and Mary. By the time England adopted its Bill of Rights, the country had already developed a common law prohibition against excessive punishment.").

164 *E.g.*, James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 Harv. L. Rev. 1613, 1614 n.1 (2011) ("First published in England between 1765 and 1769, when Blackstone held the Vinerian chair at Oxford, the *Commentaries on the Laws of England* enjoyed remarkable success in America."); Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign's Immunity, I Learned from King Henry III*, 49 St. Louis U. L.J. 393, 479 (2005) ("By 1776,

King James II's abuses[165]—mainly wanted the same basic rights as Englishmen.[166] The legal protection against cruel and unusual punishments was, certainly, one of those rights, as the U.S. Supreme Court itself later confirmed.[167] "Blackstone's impact on American jurisprudence cannot be understated," one scholar writes, observing that—among others—Chief Justice John Marshall, James Wilson, John Jay, Nathaniel Greene, James Kent, and John Adams "subscribed" to Blackstone's *Commentaries on the Laws of England*.[168]

The prohibition against "cruel and unusual punishments" was first *codified* in the English Bill of Rights, but common law rights did not need to be codified by statute to be considered viable legal rights. As noted above, that English legal instrument that served as a model for the Eighth Amendment and similarly worded state constitutional provisions was inspired in part by draconian punishments

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American lawyers and many of the Founding Fathers were well-versed in English law and practice through Blackstone."); Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 4 n.24 (1989) ("Included among those who read and acknowledged the authority of Blackstone's *Commentaries* were John Adams, Nathaniel Green, James Madison, Alexander Hamilton, John Jay and Patrick Henry.") (citation omitted). For additional material on William Blackstone's influence, see Blackstone in America: Selected Essays of Kathryn Preyer (Mary Sarah Bilder, Maeva Marcus & R. Kent Newmyer, eds. 2014).

165 Bachmann, *supra* note 95, at 256–57 (noting that Sir William Blackstone attributed the cruel and unusual punishments prohibition in the English Declaration of Rights to excessive punishments imposed during James II's reign, which lasted from 1685 to 1688).

166 George Mason, the drafter of the Virginia Declaration of Rights, certainly felt that way. *E.g*., M. E. Bradford, Founding Fathers: Brief Lives of the Framers of the United States Constitution 150 (2d ed. rev. 1994). In his public letter "To the Committee of Merchants in London," he wrote: "We claim Nothing but the Liberty and Privileges of Englishmen, in the same degree, as if we had still continued among our brethren in Great Britain." *Id.*

167 Solem v. Helm, 463 U.S. 277, 285–86 (1983).

168 Eliana Geller, *Protest Lawyering*, 35 Geo. J. Legal Ethics 715, 727 (2022).

imposed upon Titus Oates[169] and many others[170] during the Stuart dynasty,[171]

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[169] Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 69, 91–92 (2012).

[170] *E.g.*, *Timbs*, 586 U.S. at 162–64 (Thomas, J., concurring) (citations omitted):

> In 1680, a committee of the House of Commons "examined the transcripts of all the fines imposed in King's Bench since 1677" and found that "the Court of King's Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty's Protestant Subjects." The House of Commons determined that the actions of the judges of the King's Bench, particularly the actions of Chief Justice William Scroggs, had been so contrary to law that it prepared articles of impeachment against him. The articles alleged that Scroggs had "most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors" without "any Regard to the Nature of the Offences, or the Ability of the Persons."
>
> Yet "[o]ver the next few years fines became even more excessive and partisan." The King's Bench, presided over by the infamous Chief Justice Jeffreys, fined Anglican cleric Titus Oates 2,000 marks (among other punishments) for perjury. For speaking against the Duke of York, the sheriff of London was fined £100,000 in 1682, which corresponds to well over $10 million in present-day dollars—"an amount, which, as it extended to the ruin of the criminal, was directly contrary to the spirit of [English] law." The King's Bench fined Sir Samuel Barnadiston £10,000 for allegedly seditious letters, a fine that was overturned by the House of Lords as "exorbitant and excessive." Several members of the committees that would draft the Declaration of Rights—which included the prohibition on excessive fines that was enacted into the English Bill of Rights of 1689—had themselves "suffered heavy fines." And in 1684, judges in the case of John Hampden held that Magna Carta did not limit "fines for great offences" against the King, and imposed a £40,000 fine.
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> "Freedom from excessive fines" was considered "indisputably an ancient right of the subject," and the Declaration of Rights' indictment against James II "charged that during his reign judges had imposed excessive fines, thereby subverting the laws and liberties of the kingdom." Article 10 of the Declaration declared "[t]hat excessive Bayle ought not to be required nor excessive fynes imposed nor cruel and unusuall Punishments inflicted."
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> Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £30,000 fine against the Earl of Devonshire as "excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." Although the House of Lords refused to reverse the judgments against Titus Oates, a minority argued that his punishments were "contrary to Law and ancient Practice" and violated the prohibition on "excessive Fines." The House of Commons passed a bill to overturn Oates's conviction, and eventually, after a request from Parliament, the King pardoned Oates.

[171] *E.g.*, Joseph Story, Commentaries on the Constitution of the United States § 1006, at 170–71 (Carolina Acad. Press 1987) (1833) (citing Blackstone and observing that the Eighth Amendment was adopted "as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reign of some of the Stuarts"); Diane-Michele Krasnow,

including by Lord Chief Justice George Jeffreys of the Court of King's Bench.[172] The codified prohibition in the English Bill of Rights reflected a general understanding of what the English common law prohibited—or at least was thought to already prohibit—even in the absence of a written constitutional guarantee.[173] The U.S.

To Stop the Scourge: The Supreme Court's Approach to the War on Drugs, 19 Am. J. Crim. L. 219, 261 n.399 (1992) (noting that "[h]istorians attribute the abuses" of Lord Chief Justice George Jeffreys of the Court of King's Bench "during the Stuart reign of James II as the impetus for the cruel and unusual punishments provision"); *see also* Aisha Ginwalla, Note, *Proportionality and the Eighth Amendment: And Their Object Not "Sublime, to Make the Punishment Fit the Crime,"* 57 Mo. L. Rev. 607, 615 (1992):

> Justice Scalia argues that Justice Powell distorted the history of the Eighth Amendment in *Solem* when he claimed that proportionality was an inherent aspect of the cruel and unusual punishment clause. Justice Scalia's reading of English history does not persuade him that Justice Powell is correct. According to Justice Scalia, historians agree that the cruel and unusual punishment clause was included in the English Declaration of Rights of 1689 to prevent the excesses that were carried out by a certain Justice Jeffreys on the King's Bench during the Stuart reign of King James II. Contemporary discussions of "cruel and unusual" (for example in the House of Lords), focused on the illegal aspects of the punishments that Jeffreys meted out, rather than on the disproportionate aspects. In any case, says Justice Scalia, the important question is whether this clause embodied the same meaning for Americans when they adopted it in the Bill of Rights in 1791. He believes that it did not.

[172] George Jeffreys was the Lord Chief Justice of the Court of King's Bench from 1683 to 1689. Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Judges*, 38 Am. J. Legal Hist. 117, 132 n.54 (1994). "Many commentators (including William Blackstone) believe that the bloody rule of King James II, and the King's Bench headed by Lord Chief Justice George Jeffreys, was the cause for the English Bill of Rights ban" on cruel and unusual punishments. Jessica Powley Hayden, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 Geo. L.J. 237, 251 (2007); *see also id.*:

> Judge Jeffreys "sent 292 prisoners to their deaths and brutally punished hundreds of others." In 1685, Jeffreys conducted the "Bloody Assize" against rebels captured during the Duke of Monmouth's rebellion. Others, however, posit that the ban was a result not of the Bloody Assize, but rather arose from the case of Titus Oates, a cleric of the Church of England who was sentenced to life for perjury. His sentence also included four annual floggings. This punishment was viewed as excessive for the crime of perjury as well as cruel. Regardless of the animating event, the goal of the provision was two-fold: to restrain judges from devising methods to keep prisoners detained indefinitely and to prohibit barbarous punishment.

[173] *See, e.g.*, United States v. Aquart, 912 F.3d 1, 67 (2d Cir. 2018) (referring to "the common law origins of the English Bill of Rights' ban on cruel and unusual punishments"); Risdal v. Martin, 810 F. Supp. 1049, 1052 (S.D. Iowa 1993) ("The Eighth Amendment prohibition of 'cruel and unusual punishments' has its origin in English law. Prior to the adoption of the English Bill of Rights in 1689, a prohibition against 'excessive punishments in any form' had developed in English common law over the centuries.") (citations omitted); *see also* John Makdisi, *A Thomistic Perspective on Natural Law Reasoning in the Supreme Courts*, 45 Ohio N.U. L. Rev. 301, 376 (2019):

Supreme Court itself has acknowledged the importance of England's common-law protections in its own Eighth Amendment jurisprudence. For example, in *Ford v. Wainwright*,[174] the Supreme Court expressly examined the English common law in holding that the execution of the insane violates the Eighth Amendment's prohibition against cruel and unusual punishments.[175]

Some of the history pertaining to how the prohibition against cruel and unusual punishments first came to be codified in England is relatively well-known. That history includes the factual background relating to the "Popish Plot" and Titus Oates, his acts of perjury, and the punishments then inflicted upon him that drew so much criticism in Parliament.[176] In 1685, the Court of King's Bench infamously ordered that Titus Oates, the disgraced clergyman convicted of perjury, be defrocked, fined 2,000 marks, be "whipped from Aldgate to Newgate" the following Wednesday, be similarly whipped "from Newgate to Tyburn" the following Friday, be pilloried four times annually, and be imprisoned for the remainder of his life.[177] Four years after

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> Aquinas states that, if a penalty is excessive, it becomes cruelty or brutality. The court in *Commonwealth ex rel. Brown v. Baldi* stated that "[c]ruel and unusual punishment is prohibited by the United States Constitution; it is prohibited by the Constitution of Pennsylvania; it is prohibited by moral law and natural law." The dissent in *State v. Rivers* relied heavily on natural law definitions for the meaning of cruel punishment, "because the original, popular understanding of the term 'cruel punishment' necessarily framed that understanding in a natural law context." The court in *State v. Gardner* asserted that natural law should be used to give an expansive interpretation to the meaning of "cruel and unusual punishments" in the state constitution because the framers "never meant to establish a comprehensive or positive law but merely to reaffirm various natural rights that exist independent of any constitution."

174 477 U.S. 399 (1986).

175 *Id.* at 406–08; *id.* at 418, 420–21 (Powell, J., concurring); *see also id.* at 408 (opinion of Justice Marshall announcing judgment of Court) ("We know of virtually no authority condoning the execution of the insane at English common law."); *id*. at 408 n.1 ("At one point, Henry VIII enacted a law requiring that if a man convicted of treason fell mad, he should nevertheless be executed. 33 Hen. VIII, ch. 20. This law was uniformly condemned. The 'cruel and inhumane Law lived not long, but was repealed, for in that point also it was against the Common Law.'") (citing Hale, Hawkins and Coke).

176 In the alleged "Popish Plot" conspiracy, James II's secretary, Edward Coleman, was identified as a ringleader in the concocted plot to murder King Charles II and set fire to London, with Jesuits and Catholics said to be planning to kill 100,000 Protestants in London. "The main accusations," legal historian John Langbein writes, "were made by Titus Oates, a failed Anglican clergyman who admitted to having sojourned on Jesuit charity in France, where he claimed to have overheard details of the plot." Another perjurer, William Bedloe, also embellished Oates's sensational charges, and as the resulting treason prosecutions played out, other false accusations were made even as suspicions about the veracity of Oates's testimony grew, ultimately leading to Oates's conviction for perjury in 1685. Perjury was a misdemeanor, but Lord Chief Justice George Jeffreys called Oates's perjury a "crime infinitely more odious than common murder." After his sentencing, Langbein notes, "Oates was savagely whipped and pilloried before a crowd that was reckoned to number 10,000 people." Langbein, The Origins of Adversary Criminal Trial, *supra* note 109, at 69–72.

177 Mannheimer, *Cruel and Unusual Federal Punishments*, *supra* note 169, at 91–92.

that court—led by Lord Chief Justice George Jeffreys—ordered those draconian punishments, Oates petitioned Parliament for relief in the wake of the promulgation of the English Declaration of Rights and members of Parliament engaged in an extended debated about his case.[178]

One leading Eighth Amendment scholar, Meghan Ryan, emphasizes that "[t]he more commonly accepted view among scholars today" is that Article 10 of the English Bill of Rights was "drafted to prevent courts from doling out cruel and illegal punishments or severe punishments that are 'unauthorized by statute and not within the jurisdiction of the court to impose,'" such as occurred during Stuart reign. "Titus Oates," she writes, "falsely proclaimed under oath that there was a plot to assassinate King Charles II," further emphasizing that Oates's lies "caused fifteen innocent people to be convicted and executed." "[A]fter it was discovered that these undeserved executions were the result of Oates's perjury," Professor Ryan explains, summarizing what happened, "Oates was sentenced to a 2,000-mark fine, life imprisonment, whippings, quarterly pillorying, and defrocking."[179]

The punishment of Titus Oates was—and naturally would have been—front of mind when Parliament drafted the English Declaration of Rights. "Some Whig believers never conceded the falsity of the Popish Plot," legal historian John Langbein observes, noting that, in England's Revolution of 1688–1689, "complaints about the severity of Oates' punishments were among the grievances that led to Article 10 of the Declaration of Rights, proscribing excessive fines and cruel and unusual punishments."[180] When Oates petitioned Parliament for relief from his sentence, Meghan Ryan points out, "the House of Lords rejected the petition" but "[a] minority of the Lords dissented," concluding: "the said judgments are barbarous, inhuman, and unchristian"; "there is no precedent to warrant the punishments of whipping and committing to prison for life, for the crime of perjury"; allowing the sentence to stand would "be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter"; the "judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed."[181]

In volume four of his *Commentaries on the Laws of England* (1769), Sir William Blackstone wrote of English punishments, including of the kind meted out during the Tudor and Stuart dynasties.[182] "Of these," Blackstone observed,

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178 *Id.* (noting that after Titus Oates "petitioned Parliament for relief from his sentence," the House of Lords rejected the petition but "a minority of Lords dissented" and provided "an opinion containing six somewhat overlapping reasons for granting Oates's request"; that "Oates had greater luck in the House of Commons, which voted to annul the sentence"; and that "[t]he Commons also issued a report detailing their position").

179 Ryan, *supra* note 61, at 576–77.

180 Langbein, The Origins of Adversary Criminal Trial, *supra* note 109, at 72.

181 Ryan, *supra* note 61, at 576–77; *see also* Casey Adams, *Banishing the Ghost of Red Hannah: Proportionality, Originalism, and the Living Constitution in Delaware*, 27 Widener L. Rev. 23, 31 (2021) (noting "the death penalty no longer applied to perjury" and Oates was sentenced to (1) a fine of 2,000 marks, (2) life imprisonment, (3) whippings, (4) pillorying four times a year, and (5) to be defrocked; that the House of Lords later rejected Oates's plea for release from the judgment but a minority report described the punishment as "cruel, barbarous, and illegal" and "contrary to" the English Declaration of Rights; and that the House of Commons agreed with the minority report, with one member moving to "have this judgment against Oates called 'cruel and illegal'").

182 Wilkerson v. Utah, 99 U.S. 130, 135 (1878) (quoting William Blackstone's

"some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain or disgrace are superadded: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading, and quartering; and in murder, a public dissection." "And, in case of any treason committed by a female," Blackstone added, "the judgment is to be burned alive." "But the humanity of the English nation," Blackstone emphasized in the midst of the Enlightenment, "has authorized, by a tacit consent, an almost general mitigation of such parts of these judgments as savour of torture or cruelty." In describing English penal practices in 1769, Blackstone concluded: "Some punishments consist in exile or banishment, others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, others induce a disability. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears, others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek."[183]

After noting that other punishments are "merely pecuniary, by stated or discretionary fines," Blackstone stressed that, "lastly, there are others which consist principally in their ignominy, though most of them are mixed with some degree of corporal pain, and these are inflicted chiefly for such crimes as either arise from indigence or render even opulence disgraceful, such as whipping, hard labor in the house of correction or otherwise, the pillory, the stocks, and the ducking stool."[184]

Commentaries); Robert J. McWhirter, *Baby, Don't Be Cruel: What's So "Cruel & Unusual" About the Eighth Amendment? Part 1*, 46 Ariz. Att'y 12, 15 n.17 (2009) (same); *see also* Reuben Oppenheimer, *Infamous Crimes and the* Moreland *Case*, 36 Harv. L. Rev. 299, 306 (1923) ("Blackstone, in giving the various kinds of punishments sanctioned by English law . . . put capital punishment, with hanging, quartering and disembowelling, at the head of the list and 'punishments that consist chiefly in their ignominy, such as whipping, hard labor in the house of correction or otherwise, the pillory, the stocks and the ducking-stool' at the bottom.").

183 4 William Blackstone, Commentaries on the Laws of England 1510–11 (T. Cooley & J. Andrews 4th ed. 1899).

184 State v. Woodward, 69 S.E. 385, 388 (W. Va. Sup. Ct. App. 1910) (quoting the fourth volume of Blackstone's *Commentaries*); *accord* Owens v. Stirling, 904 S.E.2d 580, 592 (S.C. 2024) (same).

Blackstone also discussed the punishment for forgery,[185] perjury,[186] affrays,[187] and other offenses.[188] In another part of his treatise, Blackstone added: "By the antient law of England, he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro*: which is still the law in Sweden. But this went afterwards out of use: partly because the law of retaliation, as was formerly shewn, is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated."[189] Blackstone's treatise made reference to a number of non-lethal corporal punishments, including the pillory,[190] and that individuals, for example,

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185 4 William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769, at 245–46 (1769) (1979) (noting that forgery "was punished by the civil law with deportation or banishment, and sometimes with death"; that "at common law" it may be defined to be "the fraudulent making or alteration of a writing to the prejudice of another man's right" for which "the offender may suffer fine, imprisonment, and pillory"; and that "by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases," with "statute 5 Eliz. c. 14." making forgery "punished by a forfeiture to the party grieved of doubled costs and damages; by standing in the pillory, and having both his ears cut off; and his nostrils slit . . . .");

186 4 William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769, at 137 (1769) (1979):

> The punishment of perjury and subornation, at common law, has been various. It was antiently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. But the statute 5 Eliz. c. 9. (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40 *l*. on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months imprisonment, perpetual infamy, and a fine of 20 *l*. or to have both ears nailed to the pillory.

187 *Id.* at 145–46; *see also id.* at 146 ("[I]f any person in such church or church-yard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto*; or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall besides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek.").

188 "[M]onopolists," Blackstone wrote, "are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb . . . ." *Id.* at 159; *see also id.* at 159–60 ("Combinations also among victuallers or artificers, to raise the price of provisions, or any commodities, or the rate of labour, are in many cases severely punished by particular statutes; and, in general, by statute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10*l*, or twenty days imprisonment, with an allowance of only bread and water, for the first offence; 20*l*. or the pillory, for the second; and 40*l*. for the third, or else the pillory, loss of one ear, and perpetual infamy.").

189 *Id.* at 206.

190 *Id.* at 29, 61, 157–59, 160, 162, 217, 219, 221, 245–46; *see also id.* at 146 ("The punishment of unlawful assemblies, if to the number of twelve, we have just now seen may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. The same is the cases in riots and routs by the common law; to which the pillory in very enormous cases has been sometimes superadded.").

"stand two hours on the pillory"[191] or have "both ears nailed to the pillory."[192]

Blackstone, the Oxford scholar, felt strongly that English law—though harsh—was still enlightened compared to the laws of other countries.[193] "Disgusting as this catalogue may seem," Blackstone wrote of punishments authorized by English law, "it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe."[194] "[I]t is moreover," Blackstone explained, "one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons."[195] "[W]here an established penalty is annexed to crimes," Blackstone offered, "the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judgment, of his actions."[196]

It was after this discussion that Blackstone cited the "cruel and unusual punishments" clause of the English Bill of Rights. "The discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose," Blackstone first explained, "may seem an exception to this rule."[197] "But," he noted, "the general nature of the punishment, *viz*. by fine or imprisonment, is in these cases fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances."[198] As Blackstone wrote: "Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punishment by fine, in general, without specifying the certain sum: which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but it's discretion is regulated by law."[199] "For the bill of rights,"

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191 *Id.* at 136.

192 *Id.* at 137. A number of corporal punishments were once authorized by the common law. Street v. State, 513 A.2d 870, 871 (Md. 1986) ("Compared with other forms of punishment used at common law, the imposition of a fine was a mild penalty indeed. Criminal sentences embodied a litany of abhorrent practices, including cutting off the hand or ears, slitting the nostrils, branding the hand or face, whipping, the pillory, and the ducking-stool.").

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

194 4 William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769, at 370–71 (1769) (1979).

195 *Id.* at 371. Death sentences at that time were mandatory upon conviction. Scott W. Howe, Furman*'s Mythical Mandate,* 40 U. Mich. J.L. Reform 435, 472 (2007).

196 4 William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769, at 371 (1769) (1979).

197 *Id.*

198 *Id.* (italics in original).

199 *Id*. at 372.

Blackstone emphasized, "has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted."[200]

II. The Conventional Account: The Prohibition Against "Cruel and Unusual Punishments" Originated in the English Declaration of Rights

A. The Traditional Narrative of the Origins of the "Cruel and Unusual Punishments" Prohibition

Prominent constitutional law scholars have long taken note of some of the English history undergirding the Eighth Amendment's Cruel and Unusual Punishments Clause. "[I]n the late eighteenth century," Yale Law School professor Akhil Amar writes, "every schoolboy in America knew that the English Bill of Rights' 1689 ban on excessive bail, excessive fines, and cruel and unusual punishments—a ban repeated virtually verbatim in the Eighth Amendment—arose as a response to the gross misbehavior of the infamous Judge Jeffreys."[201] "The Founders," Amar has written, "borrowed the phrase 'cruel and unusual' from the celebrated English Bill of Rights of 1689." "In England," he explains, "the phrase aimed chiefly to prevent bloodthirsty judges from inflicting savage penalties that were legislatively unauthorized—that is, 'unusual.'" "If Parliament had previously approved a given punishment for a given crime," he adds, "that punishment, even if unspeakably inhumane, was not 'unusual' within the meaning of the 1689 declaration."[202]

Article 10 of the English Bill of Rights was plainly designed to prevent a reoccurrence of abuses associated with seventeenth-century Stuart reign.[203] The Stuart era was a period of history in which England's monarchs frequently abused their power and the judicial system, often using common law and prerogative courts to kill, dismember or maim, oppressively fine, or degrade and humiliate

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

[201] Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 87 (1998). A driving force behind the English Bill of Rights was abuses by Lord Chief Justice George Jeffreys—the judge involved with the sentencing of Titus Oates and who presided over the "Bloody Assizes" (in which hundreds of rebels were tried, convicted, and executed through such horrific means as disembowelment, beheading, and drawing and quartering) after the Duke of Monmouth's ill-fated rebellion in 1685. John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 Nw. J. L. & Soc. Pol'y 195 (2009).

[202] Akhil Reed Amar, *America's Lived Constitution*, 120 Yale L.J. 1734, 1778–79 (2011); Steven L. Winter, *Melville, Slavery, and the Failure of the Judicial Process*, 26 Cardozo L. Rev. 2471, 2483 (2005).

[203] *Harmelin*, 501 U.S. at 967–68 ("Most historians agree that the 'cruell and unusuall Punishments' provision of the English Declaration of Rights was prompted by the abuses attributed to the infamous Lord Chief Justice Jeffreys of the King's Bench during the Stuart reign of James II. They do not agree, however, on which abuses.") (citations omitted).

their political and religious opponents through the use of the pillory, branding, and ear cropping.[204] The Stuart kings regularly sparred with Parliament and attempted to rule or raise revenue without it.[205] Some were forced to stand in the pillory with signs over their heads declaring their crimes. One such high-profile figure seen by members of England's Parliament to have been cruelly and unlawfully punished during Stuart rule: Titus Oates, the English clergyman.[206]

For his acts of perjury in providing false testimony in treason trials of Catholics wrongfully convicted and condemned to death in connection with the concocted "Popish Plot," Oates was harshly sentenced in 1685 by the Court of King's Bench,[207] then led by the notoriously cruel and highly volatile Lord Chief

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[204] *E.g.*, Malick Ghachem, Book Review, *The Question of La Question*, 15 Yale J.L. & Human. 179, 180 n.8 (2003) (reviewing Lisa Silverman, Tortured Subjects: Pain, Truth, and the Body in Early Modern France (2001)):

> The prohibition on "cruel and unusual punishment" in the Eighth Amendment echoed identical language in the English Bill of Rights of 1689. That language was a reaction to the famous 1685 case of the political dissenter Titus Oates. Oates was convicted of perjury and sentenced to be pilloried repeatedly for his role in fomenting opposition to the alleged "Popish Plot" of the Stuart monarchy. (The punishment of the pillory was a kind of shaming sanction, involving the use of a wooden framework through which the convicted person's hands and head were inserted, thus subjecting him to the indignities of public display and insult.) Oates's punishment galvanized opposition to the excesses of the Court of Star Chamber in trials of members of the English gentry, a development that James Q. Whitman has recently situated in the context of a more general Anglo-American tendency towards degrading, low-status criminal punishment.

[205] *E.g.*, James J. Friedberg, *Ambiguity, Sovereignty, and Identity in Ireland: Peace and Transition*, 20 Ohio St. J. on Disp. Resol. 113, 117-18 (2005):

> In the late 1600s, the English Parliament continued the struggle that had lasted most of that century against Stuart absolutism. The two Charleses and two Jameses had indeed sought to limit Parliament's power and thus the growth of representative democracy. Emerging Enlightenment philosophers such as John Locke gave philosophical foundation to the politics of parliamentary power. A religious element enhanced the conflict through the seventeenth century, in varying degrees, depending on the tenor of the times and whether the particular James or Charles was merely a high Anglican, a closet Catholic, or an overt Catholic—the latter being most offensive to the Puritan-leaning parliaments. Push came to shove when the parliamentary party encouraged the Dutch Prince of Orange, William, to wrest the English throne from James II. William, along with his Protestant and parliamentary supporters, was successful at ousting James II from power. On Britain itself, the "revolution," which was rather bloodless, gave birth to the English Bill of Rights and entrenched representative democracy with its Enlightenment foundations—hence the term "Glorious."

[206] *Harmelin*, 501 U.S. at 969-73 (discussing the trial and punishment of Titus Oates for perjury and his punishment and Parliament's reaction thereto); *see also Timbs*, 586 U.S. at 162 (Thomas, J., concurring) (discussing the punishment of the Anglican cleric Titus Oates).

[207] *Harmelin*, 501 U.S. at 969-70 (noting that the false allegations of Titus Oates "had caused the execution of 15 prominent Catholics for allegedly organizing a 'Popish Plot'

Justice George Jeffreys.[208] "By common law," one historical account notes of that time frame, "felonies were punishable by death, but perjury was a misdemeanor, and the punishment for a misdemeanor could be any punishment short of death ordered by the judges."[209] With the death penalty off the table for perjury and a discretionary sentence left in the hands of the Court of King's Bench judges, Oates was—as legal historians have recalled again and again—infamously ordered to be defrocked, fined, imprisoned for life, flogged, and set in the pillory multiple times a year for the rest of his natural life.[210]

Titus Oates's ordered punishment and the adoption of the English Declaration of Rights occurred in close proximity—and their connection to one another is clear. "Because these events shortly preceded the adoption of the English Declaration of Rights in 1689," one legal commentator explains of Oates's sentence and a U.S. Supreme Court opinion authored by Justice Antonin Scalia, "the *Harmelin* court considered public reaction to the Titus Oates trial crucial to an understanding of the intent behind the 'cruell and unusuall Punishments' clause."[211] Members of Parliament had objected to Oates's sentence, in part because "the king's bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only."[212] In seventeenth-century England, common law

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to overthrow King Charles II in 1679"; that Oates "was tried and convicted before the King's Bench for perjury" for the crime of "'bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed'"; that such an offense "had, at one time, been treated as a species of murder, and punished with death"; that "[a]t sentencing, Jeffreys complained that death was no longer available as a penalty and lamented that 'a proportionable punishment of that crime can scarce by our law, as it now stands, be inflicted upon him'"; that "[t]he judges met, and, according to Jeffreys, were in unanimous agreement that 'crimes of this nature are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or member'"; that "[a]nother justice taunted Oates that 'we have taken special care of you'"; and that "[t]he court then decreed that he should pay a fine of '1000 marks upon each Indictment,' that he should be 'stript of [his] Canonical Habits,' that he should stand in the pillory annually at certain specified times and places, that on May 20 he should be whipped by 'the common hangman' 'from Aldgate to Newgate,' that he should be similarly whipped on May 22 'from Newgate to Tyburn,' and that he should be imprisoned for life").

208 *See generally* H. Montgomery Hyde, Judge Jeffreys (2d ed. 1948).

209 Joseph A. Melusky & Keith A. Pesto, The Death Penalty (2017).

210 Benjamin White, Comment, *Pain Speaks for Itself: Divorcing the Eighth Amendment from the Spirit of the Moment*, 58 San Diego L. Rev. 453, 459-60 (2021).

211 Deborah M. Forhan, Note, Harmelin v. Michigan: *Should the Existence of an Eighth Amendment Guarantee of Proportionate Prison Sentences Rest on the Fate of Titus Oates and the Dreaded Consequences of Overtime Parking?*, 22 Sw. U. L. Rev. 1133, 1141 (1993); *see also* Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishments Clause*, 68 Tenn. L. Rev. 41, 43 (2000) ("The English [Bill of Rights] provision was motivated by the Titus Oates affair."); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 Wm. & Mary Bill Rts. J. 475, 510 (2005) ("The [English Bill of Rights] was evidently inspired by objections to Titus Oates's punishments.").

212 Michael J. Zydney Mannheimer, Harmelin's *Faulty Originalism*, 14 Nev. L.J. 522, 527 (2014) (citing Second Trial of Titus Oates (1685), *reprinted in* 10 A Complete

and ecclesiastical courts coexisted.[213] While the House of Lords refused to reverse Oates's conviction, Oates—having petitioned Parliament for relief as a victim of the King's Bench and Lord Chief Justice Jeffreys's cruelty—was released from prison in the wake of the Glorious Revolution.[214]

Driven by parliamentary and Protestant conflicts with King James II, England's unpopular Catholic monarch, the Revolution of 1688–1689 was a seminal moment in English history. "In 1688–1689, these conflicts culminated in the Glorious Revolution," Professor John Stinneford sums up a portion of the relevant English history, making this observation of what preceded the Glorious Revolution[215] that produced the English Declaration of Rights and its cruel and unusual punishments prohibition: "Members of the English aristocracy invited William and Mary to invade England and depose King James II on the ground that the king had violated the rights of English subjects in a variety of ways—including through the imposition of 'excessive Bayle,' 'excessive fynes,' and 'illegal and cruell punishments.'" After England's Parliament offered to recognize William and Mary as king and queen "on the condition that they accept a declaration of rights designed to limit the arbitrary exercise of the monarch's power," Stinneford recalls, the landmark English declaration was drafted and later codified by Parliament as the English Bill of Rights (1689) and thus "entrenched the constitutional settlement that followed the overthrow of James II."[216]

In the wake of the Glorious Revolution, England's new monarchs, William and Mary, were also crowned in Scotland, with the Scottish Claim of Right (1689)

Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783, at 1325 (T.B. Howell ed., 1816)).

213 *E.g.*, Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 Iowa L. Rev. 559, 596 (2008) ("During the formation of the common law, in the several centuries before its maturity in the eighteenth and nineteenth centuries, the common law—that is, the courts of the King's Bench—was only one of many legal systems in England. Others, public as well as private, included the courts of Chancery, ecclesiastical courts, and law merchant courts, to name only a few."); Commonwealth v. Romesburg, 509 A.2d 413, 416 (Pa. Super. 1986) ("The common law privilege evolved from general disapproval of the inquisitorial practices that existed prior to 1700 in the ecclesiastical courts and the courts of Star Chamber and High Commission in England.").

214 Langbein, The Origins of Adversary Criminal Trial, *supra* note 109, at 72.

215 In addition to assuming the English throne, William and Mary also became the monarchs of Ireland and Scotland. *See* Joanne Katz & David Tushaus, *Terrorism and Human Rights: The South Africa and Northern Ireland Experience*, 2008 J. Inst. Just. Int'l Stud. 182, 192 (2008) ("In 1690, the Protestant King William III (of Orange) was victorious over the Catholic James II, and Ireland became the possession of the British. The Scottish and British settlers, especially in the north of Ireland, maintained their identity and ties with Britain, which also was expressed in their religion as Protestant. The native Irish were predominantly Catholic.") (citation omitted).

216 Brief Amicus Curiae of Professor John F. Stinneford in Support of Neither Party, *Kahler v. Kansas*, 2019 WL 2418947, at *10 (U.S. June 7, 2019).

legitimatizing their coronation there.[217] The Scottish Claim of Right[218] and the Scottish Parliament's 1701 "Act for preventing wrongous Imprisonments and undue delayes in Tryals" also addressed the issue of torture[219] and other abuses of

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[217] Rumann, *supra* note 119, at 671:

> [T]he same year that the English Bill of Rights was enacted, the Scottish Parliament also enacted a similar measure to address the excesses of the same King. That document, the Scottish Claim of Right, specifically used the word punishment when referring to torturous interrogation. The Claim of Right of 1689 stated "[t]hat the forcing of Leiges to depone against themselves in capital crimes, however the punishment be restricted is contrary to law." It further stated "[t]hat the using of torture without evidence or in ordinary crimes, is contrary to law."

[218] The Scottish Claim of Right (1689) complained about "Arbitrary Despotic Power," "extravagant Bail" and "Exorbitant Fines." *See* Bessler, *A Century in the Making, supra* note 7, at 1006:

> Along with England, both Ireland and Scotland were also part of James II's realm, though James II—because of Scottish history—went by James VII in his Scottish kingdom. In Edinburgh, on April 11, 1689, the same day William and Mary were crowned as England's new king and queen, the Declaration of the Estates of the Kingdom of Scotland, containing the Claim of Right, and the Offer of the Crown to their Majesties King William and Queen Mary, was issued. Like the English Bill of Rights, it similarly declared that "King *James* the Seventh, being a professed *Papist*," had failed to take "the Oath required by Law ... to maintain the Protestant Religion"; did, through "the Advice of Wicked and Evil Counsellers, Invade the Fundamental Constitution of this Kingdom, and Altered it from a Legal Limited Monarchy, to an Arbitrary Despotic Power"; and had, thereby, "Forfeited the Right to the Crown, and the Throne is become Vacant." That Scottish Declaration further asserted that James had subverted "the *Protestant* Religion," had violated "the Laws and Liberties of the Kingdom," and also contained the following recital, among many others, about how his reign had violated Scottish liberty: "By imposing Exorbitant Fines, to the Value of the Parties Estates, exacting extravagant Bail; and disposing Fines and Forfeitures before any Process or Conviction." The Scottish declaration further pronounced "[t]hat the imposing of extraordinary Fines, the exacting of exorbitant Bail, and the disposing of Fines and Forfeitures, before Sentence, are contrary to Law."

[219] Concerns about the use of torture had been raised by Sir Robert Beale, who—in the words of Justice Thurgood Marshall—"protested that cruel and barbarous torture violated Magna Carta," though "his protests were made in vain." *Furman*, 408 U.S. at 317 (Marshall, J., concurring); *see also* Rumann, *supra* note 119, at 670-72 (noting "the concerns of Sir Robert Beale, which included both the use of torture and inquisitorial methods"; that the preamble of the English Bill of Rights of 1689 refers to "prosecutions in the court of the King's bench, for matters and causes cognizable only in parliament; and by divers other arbitrary and illegal courses"; that "the Scottish Parliament also enacted a similar measure to address the excesses of the same King," with that document, the Scottish Claim of Right, specifically using the word punishment when referring to torturous interrogation (i.e., "[t]hat the forcing of Leiges to depone against themselves in capital crimes, however the punishment be restricted is contrary to law") and further stating, "[t]hat the using of torture without evidence or in ordinary crimes, is contrary to law"; that "[t]here is no doubt that in the years before the enactment of the Bill of Rights

the criminal law by James II (known as James VII in Scotland).[220] Scotland's Claim of Right, agreed to by a convention on April 11, 1689, with William and Mary, not being consulted, declared king and queen of Scotland the following day. Thirteen Articles of Grievances, agreed to on April 13, 1689, were also produced by the Scottish convention.[221] Among the grievances: "That most of the Laws Enacted in the Parliament *Anno 1685*. are Impious and Intollerable Grievances"; "That the Marriage of a King or Queen of this Realm to a Papist, is Dangerous to the Protestant Religion, and ought to be provided against"; and "That the Levying, or Keeping on Foot a Standing Army in time of Peace, without Consent of Parliament, is a Grievance."[222]

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of 1689, torture had been widely used by courts to extract confessions" as "exemplified by Lord Jeffreys who bore responsibility for many of the excesses of the court of King James"; that "[o]f the notorious Lord Jeffreys, it has been said 'his methods of dragging the evidence he wanted out of an unwilling witness, would have inspired admiration among the modern professors of 'the third degree'"'; and that "[t]he English drafters of the Bill of Rights of 1689 were likely also reacting against and attempting to limit cruel and unusual punishments that involved the use of torture to extract confessions").

220 *E.g.*, T. B. Smith, *Bail Before Trial: Reflections of a Scottish Lawyer*, 108 U. Pa. L. Rev. 305, 315 (1960):

> The history of bail in Scottish criminal law reaches back to very early times. Persons accused even of the gravest capital offences might be liberated upon providing security for their appearance to stand trial. Prior to the Act of 1701, however, bail was allowed or refused in all cases at the court's discretion, and there were no safeguards against prolonged incarceration pending trial. Following upon the Claim of Right, 1689, the Scottish Parliament in 1701 passed an "Act for preventing wrongous Imprisonments and against undue delayes in Tryals." This act, which is cumbrously expressed by modern standards, made a distinction between "bailable" and "non bailable" offences. "Bailable offences" were such as could not be dealt with by capital sentence. In respect of these the granting of bail was a right, and a maximum tariff was fixed according to the social status of the accused. The maximum amounts fixed by the act were twice increased during the 18th century to bring them into closer accord with contemporary economic circumstances. The Act of 1701 left undisturbed the existing discretion of the court to grant bail for "non bailable" crimes and offences—*scil.*, offences which could competently be punished by death if the court so decided. These, of course, in the 18th century, comprised a wide range of criminal activity, including deforcement of revenue officers, thefts by habitual thieves, thefts by housebreaking of anything—however small in value—and so forth. If bail was refused in such cases, the accused was given a statutory right to speedy trial or (in default thereof) to unconditional liberation.

221 Ann Margaret Shukman, The Fall of Episcopacy in Scotland 1688–1691, MPhil (History), University of Glasgow (June 2011), at 33-36, https://theses.gla.ac.uk/3182/1/2011shukmanmphil.pdf.

222 The Articles of Grievances Represented by the Estates of the Kingdom of Scotland, to the King's most Excellent Majesty, to be Redressed in Parliament (Apr. 13, 1689), *in* The Acts & Orders of the Meeting of the Estates of the Kingdom of Scotland Holden and Begun at Edinburgh, the 14th Day of March, 1689 Called by Circular Letters from His Highness the Prince of Orange, under His Hand and Seal 20-21 (1690), https://quod.lib.umich.edu/e/eebo2/A92518.0001.001?rgn=main;view=fulltext.

When American jurists and scholars recite that the "cruel and unusual punishments" prohibition first originated in the English Declaration of Rights, they have gotten the history wrong by missing consequential prior references.[223] Those references to the cruel and unusual punishments concept can be traced to the reigns of King James I and his son, King Charles I—two key figures in royal English history. James I (1567–1625), known in Scotland as King James VI, was the first Stuart king of England, with his reign in England beginning in 1603 after Queen Elizabeth's death and ending with his own death in 1625.[224] On April 10, 1606, near the beginning of his reign, James I chartered the Virginia Company of London, granting its proprietors "license to make habitation, plantation, and to deduce a colony of sundry of our people into that part of America, commonly called Virginia . . . not now actually possessed by any Christian prince or people."[225] After Queen Elizabeth I's death,[226] the crowns of Scotland, England and Ireland were worn by the same monarch,[227] with King James I (James VI in Scotland) ushering in a new era when he became England's king.[228]

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[223] Eighteenth-century Americans were, themselves, quite familiar with English history. But they too seem to have forgotten or never found out (or at least never brought up in the limited debate at the First Congress over the Eighth Amendment's text and in the ratification debates that followed) that the cruel and unusual punishments concept dated back at least as far as King James I's reign. Then again, their lack of concrete historical detail is very understandable; unlike twenty-first century Americans, they had no access to electronic databases, Google, or Boolean searches.

[224] *See* Alan Stewart, The Cradle King: A Life of James VI & I (2003).

[225] Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery*, 36 Seton Hall L. Rev. 481, 523–24 (2006); *see also id.* at 524 ("As a proponent of the divine right theory of monarchy, James 'relied on his personal authority . . . to grant letters patent to the Virginia Companies of London and Plymouth.'").

[226] Craig R. Shagin, *Who Belongs and Who Doesn't: The Concept of Nationality in Provincial Pennsylvania*, 38 Pa. Law. 18, 21 (2016) (noting that, while England, Ireland and Scotland "were separate kingdoms with distinct laws, parliaments, geographic boundaries, and judiciaries," they had "shared a king since James VI of Scotland became James I of England in 1603").

[227] During the reigns of Queen Elizabeth and King James I, English settlers migrated to Ireland and the Irish were dispossessed of their lands. *See* Brian P. White, Comment, *Walking the Queen's Highway: Peace, Politics and Parades in Northern Ireland*, 1 San Deigo Int'l L.J. 175, 208 (2000):

> The Elizabethan conquest of Ireland in the late 1500's was followed by the first colonial plantation of Ulster. In the early 1600's, James I embarked on a system designed to ensure loyalty to the Crown. He set out to replace what remained of the native population with loyal British subjects. However, the influx of English settlers failed to eradicate the native population as influxes of settlers had eradicated native peoples elsewhere in the world. When the initial settlement of Ulster faltered, the Ulster Irish wreaked savage vengeance on the Planters in 1641.

[228] *See* Robert W. Emerson & John W. Hardwicke, *The Use and Disuse of the Magna Carta: Due Process, Juries, and Punishment*, 46 N.C. J. Int'l L. 571, 595–96 (2021):

> When Elizabeth I died in March 1603, the Tudor line of monarchs passed over to the House of Stuart. The new monarch, King James I of England,

James I's son, King Charles I, fought bitterly with Parliament, which sought to curb his royal prerogative, and was ultimately executed in 1649 after his unpopular period of personal rule (1629–1640),[229] violent conflicts in Scotland and Ireland and years of civil war in England,[230] and being put on trial for treason.[231] His own public execution by beheading followed on the heels of the impeachment, attainder, and execution of his two chief advisors, Thomas Wentworth (the 1st Earl of Strafford)[232]

> perceived himself to be a philosopher king, whose motto was taken from the Sermon on the Mount—*beati pacifici*—blessed are the peacemakers. As a *rex pacificus*—king of peace—James had much work to do. England had been at war with Spain throughout much of Elizabeth I's reign. Additionally, England often fought with other Catholic neighbors, namely France, and even with James' native Scotland, a country despised by English nobility and members of both Houses of Parliament.
>
> King James had a personal program for achieving peace with Spain and for solving disagreement over religious doctrine by a Biblical translation bearing his name, the King James Bible. He sought to be a personal participant in both endeavors. However, James I's reign saw a rebellious Parliament that had long been subservient to the Tudor monarchs. During his reign, the Magna Carta remained in the shade, where it would remain until Edward Coke picked it up and used it as a powerful tool to argue against the pretensions of the Crown.

229 Henrik Langeluddecke, *Law and Order in Seventeenth-Century England: The Organization of Local Administration During the Personal Rule of Charles I*, 15 Law &. Hist. Rev. 49, 50 (1997).

230 The English Civil War stretched from 1642 to 1651. Owen W. Gallogly, *Equity's Constitutional Source*, 132 Yale L.J. 1213, 1245 (2023); Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 2015 Mich. St. L. Rev. 1, 135 (describing the English Civil War as "a brutal conflict between Parliamentarians (Roundheads) and the Royalists (Cavaliers), in which huge numbers of the English, Scottish, and Irish populations perished").

231 Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquitricentennial Reflection*, 16 Const. Comment. 51, 53 (1999)

232 *See generally* Craig S. Learner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. Chi. L. Rev. 2057 (2002) (reviewing 3 Proceedings in the Opening Session of the Long Parliament: House of Commons and the Strafford Trial (22 March-17 April 1641) (Maija Jansson, ed., 2001)); *see also* M. Jackson Nichols, Jackson S. Nichols & Matthew Buckner, *Bill of Attainder: "Old Wine in New Bottles"*, 36 N.C. Cent. L. Rev. 278, 280–81 (2014):

> Famous persons who were executed as a result of a Bill of Attainder included Thomas Cromwell (1540), Catherine Howard (1542), and the Earl of Strafford, Thomas Wentworth (1641). The Bill of Attainder issued against the Earl of Strafford is particularly notable. During the 1620s, Thomas Wentworth was a well-known member of the House of Commons and had a reputation for his "obstinacy towards the Crown." Over the years, however, Wentworth's political power within the House of Commons eroded. He resigned his post in Parliament and sided with the King. He was later appointed as the Earl of Strafford. In a quest for political reform, House of Commons leader John Pym, recognizing that Wentworth would be his "main obstacle," instituted an impeachment trial against him for the cause of treason. At the trial, Wentworth and his lawyers "debunked all the allegations soundly." At the close of the evidence, it was clear that the prosecution had failed. Pym turned to the Bill of Attainder for recourse. It

and William Laud (the Archbishop of Canterbury).[233] They, like the king himself, had accumulated many enemies over time.[234] Wentworth was executed in 1641 as a result of Parliament's passage of a bill of attainder,[235] while Laud—the "high church" archbishop—was executed in 1645,[236] also as a result of a bill of attainder.[237]

> passed the House of Commons by a final vote of 204–59 and in the House of Lords by a vote of 26–19. The King signed the bill, and Wentworth was executed soon thereafter.

233 Nikolas Bowie, *Why the Constitution Was Written Down*, 71 Stan. L. Rev. 1397, 1432 n.219 (2019) ("Archbishop William Laud, the head of the commission overseeing the *quo warranto*, was removed from the House of Lords in 1640 and eventually impeached, condemned by a bill of attainder, and executed."); *see also* Bachmann, *supra* note 95, at 202–03 ("Energized with the vigor of his relentless Archbishop William Laud, Charles also used the Star Chamber and ecclesiastical Court of High Commission to enforce Anglican conformity against Puritan tendencies. Between 1628 and 1640, some 20,000 Puritans immigrated to New England. In 1637, three Puritans, who composed and circulated attacks on bishops, were prosecuted, convicted, mutilated, fined, and imprisoned for life.").

234 Paul Raffield, *A Discredited Priesthood: The Failings of Common Lawyers and Their Representation in Seventeenth Century Satirical Drama*, 17 Law & Literature 365, 379 (2005) (noting that Sir Thomas Wentworth, Earl of Strafford, was "an advisor to Charles I (and proponent of the levying of ship-money as an effective means of taxation)" and "became a symbol of unlawful, arbitrary power and of contempt for the rule of law"); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 Stan. L. Rev. 1397, 1432 n.219 (2019) (noting that William Laud, the Archbishop of Canterbury, "was removed from the House of Lords in 1640 and eventually impeached, condemned by a bill of attainder, and executed") (citing The Trial of Dr. William Laud, Archbishop of Canterbury, for High Treason (1640–1644), *in* 4 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors 315, 599, 626 (T.B. Howell ed., London, T.C. Hansard 1816)).

235 Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 Mich. L. Rev. 203, 211 n.22 (1996) ("Thomas Wentworth, the Earl of Strafford and one of the most famous attainder victims ever, was beheaded in 1641"); Joseph A. Woods, Jr., *How High the Crime?*, 51 Hastings L.J. 753, 757 (2000):

> Thomas Wentworth, Earl of Strafford, was chief among the advisors of Charles I. He was impeached in 1640 on charges of subversion of "the Fundamental Laws and Government of the Realms" and endeavoring "to introduce Arbitrary and Tyrannical Government against Law." Even in the heat of the struggle over the divine right of kings, the Commons, faced with a determined defense, declined to bring the trial to a vote in the House of Lords. Instead, the Commons adopted a bill of attainder against Strafford, thereby avoiding the tiresome necessity of making their case. The difference between impeachment and attainder could hardly be made more clearly.

236 Kevin Francis O'Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations that Restrict a Condemned Prisoner's Law Words*, 33 Ariz. St. L.J. 1159, 1172 n.97 (2001) ("William Laud, Archbishop of Canterbury, was impeached in 1640 on grounds of 'popery' and treason. Laud was afforded a last dying speech from the scaffold.").

237 R. H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 Duke L.J. 1207, 1217 n.37; *see also* Matthew Steilen, *Bills of Attainder*, 53 Hous. L. Rev. 767, 817 (2016) ("Strafford's was not the last English attainder. Three years later, proceedings against the archbishop William Laud unraveled in much the same fashion, with initial efforts to observe common law forms ending in an ordinance of attainder.").

The trial and execution of Charles I set the stage for the rise of Oliver Cromwell as the Lord Protector of England, Scotland and Ireland—an office he held from 1654 to 1658. After that military dictatorship collapsed after Cromwell's death, with Oliver Cromwell's son, Richard, lacking his father's political skills and lasting less than a year in that high office, the Stuart monarch was restored in 1660, with Charles II assuming the throne.[238] Although Charles I had been executed following his trial, his sons, Charles II and James II, nevertheless thumbed their noses at Parliament and the concept of popular sovereignty. Upon assuming the throne, Charles II—who had, after his father's execution, vowed revenge upon those responsible for his father's death[239]—ordered that the bodies of Oliver Cromwell and two of his compatriots be dug up, hanged, and decapitated, and their heads were impaled on spikes and carried through London.[240]

Charles II and James II believed, like their father, in the "divine right of kings," desiring to exercise absolute power.[241] This ultimately led the English

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238 Liam Seamus O'Melinn, Note, *The American Revolution and Constitutionalism in the Seventeenth-Century West Indies*, 95 Colum. L. Rev. 104, 106 n.8 (1995) ("The years 1649 to 1660 are known as the Interregnum, during which Oliver Cromwell presided over the government. The Interregnum ended with the Restoration of Charles II to the monarchy of England, Scotland, Ireland, and the dominions."); Ethan J. Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 Wm. & Mary L. Rev. 1297, 1327 (2021) ("After Cromwell died and his weak son attempted to rule, restoration of the Stuart monarchy soon followed in 1660 under Charles II, the son of Charles I.").

239 *See* Don Jordan & Michael Walsh, The King's Revenge: Charles II and the Greatest Manhunt in British History (2016), preface.

240 Christine Quigley, The Corpse: A History 283 (1996).

241 The conflict between English monarchs seeking absolute power and believers in the unwritten British constitution dated back many centuries. After winning the Battle of Hastings with 10,000 men, William the Conqueror "pledged in his oath to respect all the ancient Saxon liberties expressed in the *Leges Edwardii*." "These acts of fealty to the Ancient Constitution," law professor Steven Calabresi writes, "were essential to maintaining William's control over the Anglo-Saxon population." Steven G. Calabresi, *On Originalism and Liberty*, 2016 Cato Sup. Ct. Rev. 17, 42. But not every king honored England's ancient constitution. As Calebresi writes: "King John, who reigned from 1199 to 1216, was a tyrant who did not follow the rules of the Ancient Constitution. It was for this reason that his barons and earls forced King John on June 15, 1215—800 years ago—to sign Magna Carta." *Id.* "Magna Carta was seen, according to Sir Edward Coke, as being no new thing but merely an affirmation of fealty to the ancient Anglo-Saxon constitution." *Id.* "The chief merit of the document," Calabresi emphasizes, "was bringing John to admit that there were popular rights 'perpetually inherent, and time out of mind enjoyed.' (So said Coke in the *Institutes*.)'" *Id.* The tug-of-war went on for centuries in England until the common law prevailed over the king's assertion of absolute power and the divine right of kings. *See id.* at 43-44:

> The vibrancy of the Ancient Constitution, and the proof that England's kings were under and not above the law, is illustrated by the fact that between 1300 and 1485 five English kings were removed and executed. The five unfortunate monarchs were: (1) Edward II, (2) Richard II, (3) Henry VI, (4) Edward V, and (5) Richard III. Pre-Tudor England was a very unsafe kingdom in which to be a king because Englishmen fought vigilantly to maintain the Ancient Constitution. Three of the Tudor monarchs, Henry VII, Henry VIII, and Elizabeth I, proved to be very powerful but they all took great care to get Parliament's approval for everything they did. When James

people—through the Revolution of 1688–1689—to seek written legal protections against further monarchical abuses.[242] Among the provisions of the English Bill of Rights as capitalized and spelled in some early English sources: "excessive Baile ought not to be required, nor excessive Fines imposed; nor cruell and unusuall Punishments inflicted."[243] As one history notes of the English Bill of Rights: "Some of its most important provisions reflected the experience of Charles II and James II's extensions of the prerogative and their use of the law courts as instruments of

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> I inherited the English throne in 1603, the English people did not believe in absolute monarchy or the divine right of kings. Since James I, and his son Charles I, did believe in those things, the stage was set for a century of conflict, which included the English Civil War and ended with the Glorious Revolution of 1688, which restored the Ancient Constitution in England. Many Englishmen during the 17th century wrote that the Stuarts were trying to restore the "Yoke of the Norman Oppression" on the English people.
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> Sir Edward Coke was the preeminent lawyer and judge of his generation, and he was very active politically during the reign of James I and at the beginning of the reign of Charles I. He fought both monarchs tirelessly, and he was fired by James I from his position as lord chief justice of England for issuing injunctions and writs of mandamus which nullified orders issued by James I on the ground that they violated the Ancient Constitution. Coke denied that James I had the power to issue monopolies and to create special courts that intruded upon the jurisdiction of the common law courts. After being fired from his judgeship, Coke ran for and was elected to be a member of the House of Commons. By then King Charles I was engaging in the unseemly practice of arresting wealthy individuals and then offering to free them for a "loan," which would never be repaid. Coke led the House of Commons in securing passage of the Petition of Right, which restated the validity of Magna Carta, forswore any royal power to arbitrarily imprison people, acknowledged that only Parliament had the power to raise taxes, and secured the right of *habeas corpus* to the English people.
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> Charles I reneged on all of his promises and tried to arrest five members of parliament by sending troops into the House of Commons. Thus began the English Civil War, which ended in the execution of Charles I. The monarchy was restored in 1660, but when James II claimed tyrannical powers under the divine right of kings, he was overthrown in the Glorious Revolution of 1688, which once and for all settled the principle that the king was a constitutional monarch who was under the law and who had no royal prerogative. In the Act of Settlement of 1701, Parliament changed the line of succession to the monarchy to exclude Catholics and to ensure a steady supply of docile and subservient kings and queens. The views of Sir Edward Coke, and his championing of the Ancient Constitution, eventually triumphed completely after a century of struggle.

[242] A. E. Dick Howard, *Magna Carta's American Adventure*, 94 N.C. L. Rev. 1413, 1415 (2016):

> The Stuarts invoked the divine right of kings, putting them on a collision course with Parliament. That turbulent century saw the English Petition of Right, the execution of Charles I, the Cromwellian Commonwealth, and the restoration of the Stuarts. In 1688, the Glorious Revolution brought William and Mary to the throne, followed swiftly by the enactment of the English Bill of Rights in 1689.

[243] Stinneford, "Back to the Future," in The Eighth Amendment and Its Future in a New Age of Punishment, *supra* note 52, at 31.

political manipulation and vengeance."[244]

In truth, one cannot possibly understand the cruel and unusual punishments prohibition without wading into the morass of English history, so a recitation of at least a sketch of a bit more of that history is warranted to understand how the prohibition came to be codified into English law. After the Restoration of 1660, King Charles II of the House of Stuart reigned until his death in 1685,[245] with "Whigs" such as the Earl of Shaftesbury and his close associate, physician and political theorist John Locke,[246] having previously sought to exclude James—then the Duke of York—as an heir to the throne, fearing that he would rule as a Catholic tyrant.[247] On the other hand, during the Exclusion Crisis, Charles II and his supporters, known as "Tories,"[248] insisted that Charles II's younger brother, James, a Catholic convert, should inherit the crown—which is exactly what happened after much intrigue in Parliament and among English aristocrats, including multiple treason trials arising out of the Rye House Plot (1683) that provided the Stuarts with an opportunity and an excuse to silence—indeed, to kill—their harshest critics.[249]

The Rye House Plot—as legal historian John Langbein writes—"resulted in the conviction and execution, among others, of two leading Whig figures, Lord William Russell, their leader, and the political theorist Algernon Sidney."[250] The Rye House Plot, as Langbein explains, "was a supposed conspiracy among Whig extremists determined to prevent James from acceding to the throne" and involved a plot to assassinate the king.[251] As one source summarizes the end result of the Exclusion Crisis and the Rye House Plot: "The Whigs failed, and James Stuart, Duke of York became King James II in 1685. He governed as a tyrant, just as Locke and Shaftesbury had feared."[252] After James II and his allies ruthlessly crushed a rebellion in 1685 led by a Presbyterian, James Scott, the 1st Duke of Monmouth, often referred to as Charles II's "bastard" son,[253] the Revolution of 1688-1689 led by Prince William of Orange—a Dutch stadtholder—ultimately deposed James II

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244 John van der Kiste, James II and the First Modern Revolution (2021).

245 While King Charles II, on his deathbed, professed his adherence to Roman Catholicism, his younger brother, James, had become a Roman Catholic in the 1670s. Their mother, Henrietta Maria, King Charles I's wife, was a Roman Catholic. Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 40 Washburn L.J. 187, 235 n.417 (2001).

246 *E.g.*, Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 Mo. L. Rev. 525, 529–30 (2007) (discussing John Locke's work for Lord Anthony Ashley Cooper, the first Earl of Shaftesbury).

247 Alexander D. Northover, Comment, *"Enough and as Good" in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine*, 65 Emory L.J. 1363, 1366–67 (2016) ("Locke was closely entangled in this conflict through his employer, Lord Shaftesbury, who introduced the Exclusion Bill that sought to prevent King Charles II's Catholic brother, James II, from ascending to the throne.").

248 Bradford William Short, *The Healing Philosopher: John Locke's Medical Ethics*, 20 Issues L. & Med. 103, 141–42 (2004).

249 *Id.* at 140–41.

250 Langbein, The Origins of Adversary Criminal Trial, *supra* note 109, at 75.

251 *Id.* at 75 & n.37.

252 Short, *supra* note 248, at 142–44.

253 *E.g.*, Edward J. McGowan, Note, *Eighth Amendment Proportionality in the Aftermath of* Harmelin v. Michigan, 10 N.Y.L. Sch. J. Hum. Rts. 185, 188–89 (1992).

and brought Protestant rulers, William and Mary, to the throne.[254]

Eighteenth-century Americans embraced natural law[255] and relied heavily

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[254] *Harmelin*, 501 U.S. at 968 (discussing "the Bloody Assizes' following the Duke of Monmouth's abortive rebellion in 1685"); Farrington v. State of Tennessee, 95 U.S. 679, 684 (1877) (discussing "the accession of William and Mary to the throne" after the "Revolution of 1688"); *see also* Ray S. Pierce, Note, *Constitutional and Criminal Law—Eighth Amendment—Now You Can't Do That: Disproportionate Prison Sentences as Cruel and Unusual Punishment.* Henderson v. Norris, *258 F.3d 706 (8th Cir. 2001)*, 24 U. Ark. Little Rock L. Rev. 775, 781–83 (2002):

> The text of the Eighth Amendment is almost a verbatim recitation of a similar provision of the Virginia Declaration of Rights, which was itself an exact copy of a provision of the English Bill of Rights of 1689. The English Parliament enacted a Bill of Rights after William of Orange took over the English throne in 1688. There is a conflict, however, between traditional history and more modern scholarship as to the events that served as the launching point of the English prohibition of cruel and unusual punishments.
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> Traditional history has it that the prohibition on cruel and unusual punishments was the result of the "Bloody Assizes." The Bloody Assizes refers to a special commission established by King James II, and led by King's Bench Chief Justice George Jeffreys, to try captured rebels following the ill-fated revolt against the king by James's nephew, the Duke of Monmouth. During the trials, Sir Henry Pollfexen, the chief prosecutor for the special commission, let it be known that anyone accused of treason who pleaded guilty would not be put to death. While the plea offer was honored for a time, the government later executed almost 200 prisoners who had accepted the plea bargain. Puritan propaganda against Jeffreys—and by extension James II, who had appointed Jeffreys Lord Chancellor—and his "insane lust for cruelty" spread, leading traditional history to mark the Bloody Assizes as the spur for an English declaration against cruel and unusual punishments upon the abdication of James II.
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> A modern view insists that the prohibition stemmed from the "Titus Oates Affair." Titus Oates was one of the Puritan pamphleteers. In September 1678, Oates told about a "Popish Plot" to assassinate the Protestant King Charles II. Oates, however, had made up the story as a way of solidifying the opposition against a Catholic retaking the throne. With political backing, Oates swore to his story, and as a result, a number of Catholics were executed. Ultimately, Oates came before Chief Justice Jeffreys on a perjury charge. The court convicted Oates and sentenced him to a high fine and life imprisonment. The sentence also required Oates to be whipped, pilloried four times a year, and be stripped of his clerical position. After James II was dethroned, the House of Commons, disagreeing with the House of Lords, denounced Oates's punishment as being cruel and unusual. Granucci states that this was the only recorded contemporary use of the term "cruel and unusual."

[255] Scott D. Gerber, *An Unavoidably Brief Historiography of the Third Amendment*, 82 Tenn. L. Rev. 627, 645-46 (2015) ("The Bill of Rights does not seek to protect only natural rights—several provisions merely secure certain common law rights—but natural rights are what the Bill of Rights is most concerned with. . . . The Eighth Amendment prohibitions against excessive bail and cruel and unusual punishment protect an individual's natural right to be free from inhuman treatment by the government."); *see also* Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. Jefferson L.

on the application of common-law principles to protect their legal rights.[256] Consequently, the prohibition of cruel and unusual punishments—already characterized by England's Parliament as an "ancient" right in the late seventeenth century[257]—must be seen through those lens, in addition to the prohibition's written

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Rev. 559, 583 (2003) ("Jefferson's reformulation of Locke's theory in the Declaration of Independence is a statement of the natural rights philosophy that served as the Framers' philosophical underpinning for their democratic experiment.").

256 *E.g.*, Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive."); John F. Stinneford, *Experimental Punishments*, 95 Notre Dame L. Rev. 39, 57 (2019) ("Americans were steeped in the English constitutional writings of Coke and Blackstone, and justified their break from England on the ground that the British refused to respect their longstanding common-law rights."); Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law, supra* note 48, at 337–38 (discussing the common law and the prohibition against cruel and unusual punishments); Letter from Richard Henry Lee to Elbridge Gerry (Sept. 29, 1787), *in* 24 Letters of Delegates to Congress, 1774-1789, at 451–52 (Paul H. Smith ed., 1996) (arguing the proposed federal constitution should be amended to include common-law rights, including the prohibition of cruel and unusual punishments); *accord* Granucci, *supra* note 5 (reviewing the history of the "cruel and unusual punishments" prohibition from its basis in English common law); Cameron Casey, Note, *Cruel and Unusual: Why the Eighth Amendment Bans Charging Juveniles with Felony Murder*, 61 B.C. L. Rev. 2965, 2995–96 (2020) ("The English common law inspired the Cruel and Unusual Punishments Clause. By the 1600s, English common-law courts had started to apply the principle of proportionality to criminal punishments.") (citing Hodges v. Humkin (1615) 80 Eng. Rep. 1015, 1016 (K.B.) (opinion of Croke, J.)).

257 John Stinneford, *Original Meaning and the Death Penalty*, 13 U. St. Thomas J. L. & Pub. Pol'y 44, 55 (2018) (discussing the punishment of Titus Oates, debate in Parliament about his punishment, and noting that members of Parliament found Oates's punishment was "contrary to law and ancient practice"); Mannheimer, *Cruel and Unusual Federal Punishments*, *supra* note 169, at 92 (noting that, after the adoption of the English Declaration of Rights, "the following three paragraphs of the statement by the dissenting Lords shed light on why they felt the sentence" of Titus Oates for acts of perjury "was objectionable": "4. [T]hat this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter, unless this judgment be reversed."; "5. . . . That the said judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed."; and "6. Because it is contrary to the declaration on the twelfth of February last . . . that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."); *id.* at 92-93:

> That the punishment of Oates was "contrary to law and ancient practice" (paragraph five), violated the Cruel and Unusual Punishments provision of the 1689 Bill (paragraph six), and thus set a bad precedent (paragraph four), tell us nothing about which characteristics of the punishment were objectionable. Were one or more of the methods of punishment (e.g., fine, defrocking, imprisonment, pillorying, or whipping) "contrary to law and ancient practice" because no law authorized such methods? Or was some part of the punishment (e.g., imprisonment for life, annual pillorying, whipping for the entire distance from Aldgate to Newgate and from Newgate to Tyburn) "contrary to law and ancient practice" because it was in some way disproportionate to Oates's crime? These portions of

codification in the English Bill of Rights and, later, the Eighth Amendment.[258] When, in Williamsburg, the leading Virginians of the Revolutionary War era gathered for a convention and adopted the Virginia Declaration of Rights (1776) "in the heat of rebellion against British oppression of the American colonies," they were—as one legal commentator puts it—espousing "the inherent and natural rights of men, including the right to be free from cruel and unusual punishments" that was, itself, seen as grounded in England's common law.[259]

At a distance of approximately 250 years, it is unknowable what Virginians collectively thought about their own "cruel and unusual punishments" prohibition, let alone what they believed about the parallel English prohibition put in place in 1689.[260] Of course, what twenty-first-century jurists do with their own admittedly

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> the dissenting Lords' statement could bear either meaning. However, given that fines, imprisonment, pillorying, and whipping were all commonly used punishments at the time, the latter reading appears the more natural.

[258] Downes v. Bidwell, 182 U.S. 244, 282 (1901) (referring to the prohibition on "cruel and unusual punishments" as among "certain natural rights enforced in the Constitution"); State v. Santiago, 122 A.3d 1, 142 n.6 (Conn. 2015) (Rogers, C.J., dissenting) (describing the "unenumerated right to be free from cruel and unusual punishment" as "well established under the common law in 1818" and discussing "'the framers' understanding of whether a particular right was part of the natural law, i.e., on the framers' understanding of whether the particular right was so fundamental to an ordered society that it did not require explicit enumeration'").

[259] Andrew T. Peebles, Note, *Supreme Court Decision on Juvenile Sentencing Results in Cruel and Unusual Difficulties for Missouri:* State v. Hart, *44 S.W.3d 232 (Mo. 2013)*, 79 Mo. L. Rev. 1139, 1143-44 (2014); *see also* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 Harv. J.L. & Pub. Pol'y 119, 121–22 (2004):

> 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. Punishments that departed from the common law, that is, punishments that departed from the historic custom of the community, could be described as "illegal" or as "*unusual*." In the England of 1689, those two terms were used interchangeably. But in adopting the Bill of Rights, the English Parliament sought to condemn only punishments that departed from the common law in the direction of greater severity. In other words, they sought to condemn punishments that were harsher than the common law allowed, and thus *cruel* and unusual.
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> A century later, the American founders took this language of their English heritage and applied it as a constitutional limitation upon the validity of federal action. Through the Eighth Amendment and its state counterparts, they sought to condemn whatever the English prototype condemned. Those among them who had read Blackstone, and thus understood what the 1689 Bill of Rights condemned, would have known that the provision made the common law an objective referent for which punishments were unusual (illegal at common law) and cruel (harsher than the common law allowed).

[260] In prior books, I have documented many of the views of America's founders on punishments—and on capital punishment in particular—and of their general embrace of Enlightenment writers. *See generally* Bessler, Cruel and Unusual, *supra* note 46; Bessler, The Birth of American Law, *supra* note 53. A recent article also describes the views of Pennsylvanians associated with the inclusion of the prohibition against "cruel punishments" in the 1790 Pennsylvania constitution. *See* Kevin Bendesky, *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 J. of Const. L. 201 (2023).

incomplete knowledge of seventeenth-century English history and eighteenth-century American society[261]—and of what lawmakers in those eras meant, or might have meant, by using the "cruel and unusual punishments" language (whether for their generations or future ones)[262]—is, by definition, up to those living, breathing judges to decide and adjudicate in legal cases as they arise.[263]

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[261] One prior study of the U.S. Constitution's Eighth Amendment pointed out that many early Americans (who often focused on the *mode* of punishment) may have misunderstood the original meaning of the English Declaration of Rights—later enacted by Parliament as the English Bill of Rights of 1689. Granucci, *supra* note 5, at 843–44, 860; *see also id.* at 843 ("The American framers . . . believed that they were being faithful to the interpretation of the English Puritans who had first drafted the cruel and unusual punishments clause in 1689. However, a fresh look at the history of punishment in England, and especially the framing of the English Bill of Rights of 1689, indicates that the framers themselves seriously misinterpreted English law."); *id.* at 847 ("[P]rior to adoption of the Bill of Rights in 1689 England had developed a common law prohibition against excessive punishments in any form. Whether the principle was honored in practice or not is an open question. It was reflected in the law reports and charters of England. It is indeed a paradox that the American colonists omitted a prohibition on excessive punishments and adopted instead the prohibition on cruel methods of punishment, which had never existed in English law."). In fact, the English Declaration did not end horrific methods of execution such as hanging and drawing and quartering. As Anthony Granucci wrote: "Executing male rebels by drawing and quartering continued with all its embellishments until 1814, when disembowelling was eliminated by statute. Beheading and quartering were not abolished until 1870. The burning of female felons continued in England until the penalty was repealed in 1790." *Id.* at 855–56.

[262] *E.g.*, U.S. v. Walker, 514 F. Supp. 294, 318 n.25 (E.D. La. 1981) (noting that the English version of the "cruel and unusual punishments" prohibition "'appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved'"; that American "draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment"; and that Anthony Granucci, is his article on the history of the Eighth Amendment's Cruel and Unusual Punishments Clause, "focuses on the Framers' misinterpretation of the term 'cruel' to refer solely to the manner or method of imposing punishment").

[263] *Cf.* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 Fordham L. Rev. 375, 386 (2013) ("If we know that the Founders simultaneously adopted a rule against cruel and unusual punishments and embraced the death penalty, this should not help us assemble a list of accepted punishments or create a special carve-out for the death penalty from the general principle. Rather, it should help guide us in understanding what principle they thought they were adopting with the cruel and unusual punishment clause."); *id.* at 386 n.54 ("Even so, having inferred from various pieces of evidence what the meaning of the Cruel and Unusual Punishments Clause is, the adjudicator might still conclude that the Founders were mistaken in thinking that the death penalty and the constitutional provision could be reconciled in a principled way.").

Whether America's founders,[264] framers[265] and ratifiers,[266] misinterpreted or misunderstood (or simply gave little thought to) the nature of the English bar on "cruel and unusual punishments"[267] when they adopted revolutionary era

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[264] The conception of "America's founders" is somewhat elastic, if not elusive, especially if one is attempting to divine the "original meaning" of provisions of the U.S. Constitution. *See, e.g.*, Paul Finkelman, *The Constitution and the Intention of the Framers: The Limits of Historical Analysis*, 50 U. Pitt. L. Rev. 349, 356 (1989) ("Since the Constitution begins, 'We the People,' and it is in fact an organic document, perhaps we should include all those who voted for members of the state legislatures that chose the delegates to the Philadelphia convention as well as all those who voted for delegates to the ratifying conventions. Obviously, the larger the group, the more difficult it is to determine the intentions of the framers."); Terry Bouton, *Whose Original Intent? Expanding the Concept of the Founders*, 19 Law & Hist. Rev. 661, 661 (2001) (noting that "[t]he Founders are identified alternatively as drafters, framers, ratifiers, adopters, or even 'we the people'"; that "most scholars still identify the Founders as the delegates to the Philadelphia convention in the summer of 1787"; that "[m]ost also include the hundreds of men who participated in state ratifying conventions"; and that "[s]ome have expanded the definition to encompass those who raised their voices in the public debates over the Constitution").

[265] *E.g.*,, Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 Tenn. L. Rev. 693, 698 (2011) ("The Framers were the fifty-five men who drafted the Constitution at the federal convention in Philadelphia, between May 29, 1787 and September 17, 1787."); Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 Santa Clara L. Rev. 567, 580 (1991) (noting that Justice Brennan was "perplexed by the shifting definition of 'Framers'"; asked whose intentions were most relevant: "Were the 'Framers' the thirty-eight men who signed the Philadelphia document, the delegates at the state ratifying conventions, or the representatives chosen to the First Congress?"; and concluded: "the idea of an original intention is not a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states").

[266] Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 Tenn. L. Rev. 693, 698 (2011) ("The Ratifiers were the 1,648 delegates at the thirteen state ratifying conventions held from November, 1787 through May 29, 1790. The Federalists were those participants in the public ratification debates who argued for adopting the Constitution. Their opponents were Anti-Federalists."); *see also* Nathaniel M. Fouch, *"A Document of Independent Force": Towards a Robust Ohio Constitutionalism*, 49 U. Dayton L. Rev. 1, 16 (2023) (noting that "[t]he U.S. Constitution was drafted in secret and without public comment, by delegates selected by state legislatures to attend the Convention"; that "[t]he state legislatures then called ratifying conventions to which delegates were elected to ratify or reject the proposed constitution, with nine states required to approve the document for it to become effective"; and that "[r]atification occurred at a time when it was radical to give franchise to unpropertied white men, let alone to men of other races or to women of any race").

[267] *See* Ryan, *supra* note 61, at 576–77:

> The more commonly accepted view among scholars today is that Article 10 was . . . drafted to prevent courts from doling out cruel and illegal punishments or severe punishments that are "unauthorized by statute and not within the jurisdiction of the court to impose," such as occurred during the events of the Popish Plot of 1678 and 1679. Setting into motion the tragic events in 1678, Titus Oates falsely proclaimed under oath that there was a plot to assassinate King Charles II. This untruth caused fifteen innocent people to be convicted

declarations of rights and state constitutions[268] and ratified the Eighth Amendment in 1791 is itself unknowable at a distance of more than two centuries, to say nothing about what the broader American public[269] may or may not have thought or known

> and executed, and after it was discovered that these undeserved executions were the result of Oates's perjury, Oates was sentenced to a 2,000-mark fine, life imprisonment, whippings, quarterly pillorying, and defrocking. After the English Bill of Rights was enacted, Oates petitioned both houses of Parliament for a release from the judgment, but the House of Lords rejected the petition. A minority of the Lords dissented, however, stating that "the said judgments are barbarous, inhuman, and unchristian"; "there is no precedent to warrant the punishments of whipping and committing to prison for life, for the crime of perjury"; maintaining the judgment would "be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter"; the "judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed"; and the judgments were contrary to Article 10 of the English Bill of Rights. The House of Commons concurred with the dissenting Lords.
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> The understanding that Article 10 prohibits such punishments unauthorized by statute and not within the jurisdiction of the court to impose derives from the complaint in the English Bill of Rights that "illegal and cruel punishments [have been] inflicted" and the simultaneous prohibition in Article 10 of "cruel and unusual punishments." Scholars such as Anthony Granucci have argued that "illegal" and "unusual" were used interchangeably in the document, that the use of "unusual" was merely the product of sloppy drafting, and that the term "unusual" was used to mean "illegal" in seventeenth-century England. These scholars buttress this argument with the fact that the subsequent language of the dissenting Lords in response to Oates's petition for release from judgment similarly referred simultaneously to "cruel, barbarous, and illegal judgments" and "cruel and unusual punishments."

[268] Many courts have opined on the broadly worded prohibition against "cruel and unusual punishments," though without always acknowledging, or apparently even knowing, the reality that corporal punishments such as the pillory and the whipping post were still authorized and used in early America along with the death penalty. *E.g.*, Ellis v. State, 19 P.2d 972, 974 (Okla. Crim. Ct. App. 1933) (citations omitted):

> The courts and text-writers agree that the term "cruel or unusual punishment" is not susceptible of exact definition. Originally, no doubt, this prohibition was intended to forbid punishment of a barbarous character as the whipping post, the pillory, burning at the stake, breaking on the wheel, dismemberment, mutilation, or punishment in the nature of torture. Some of the authorities intimate that a punishment so disproportionate to the character of the offense for which it is imposed as to shock the conscience and moral senses of the people is cruel and unusual.

[269] The men who participated in state ratifying conventions had only limited knowledge, often disagreed with one another and were only a small subset of America's overall population in the eighteenth century, raising additional questions as to original intent or original public meaning. *E.g.*, Walter F. Murphy, *Lincoln's Constitution*, 2 Charleston L. Rev. 585, 603 (2008) ("Ratifying conventions, made up of more than a thousand men, met separately in each state. And those delegates not only disagreed with each other within their own conventions, but also knew little or nothing about the debates in Philadelphia or what people in other conventions thought the Constitution meant or might come to mean."); Gregory E. Maggs, *A Concise Guide to the Records of the State*

about what the lofty sounding prohibition on "cruel and unusual punishments" meant, if they even gave those familiar words a second thought after seeing them in print.[270] By the time Americans drafted their revolutionary era constitutions and the U.S. Constitution's Bill of Rights, the prohibition against "cruel and unusual punishments"—as one scholar writes—"was considered to be constitutional boilerplate."[271]

What is clear is that the legal prohibition—still an integral part of state constitutions and the U.S. Constitution,[272] and which many eighteenth-century Americans in the midst of the Revolutionary War (1775–1783) and its heady aftermath no doubt gave little thought to beyond knowing that it derived from English law, arose out of Stuart abuses, and afforded an important and desired protection against future abuses—must be interpreted in real-world cases and controversies involving prisoners whose very lives may be on the line.[273] And that is so whether American jurists embrace originalism, living constitutionalism, or some blended version of those judicial philosophies.[274] Notably, while Justice

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Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution, 2009 U. Ill. L. Rev. 457, 490 (2009) (noting that more than 1,600 men attended the state ratifying conventions, and adding: "Claims about the original meaning of the Constitution sometimes rely on statements made by individual ratifiers. In many instances, these claims might be impeached on grounds that the views of individual delegates may not represent the understanding of the ratifiers generally.").

270 While George Mason drafted the Virginia Declaration of Rights and James Madison helped usher the U.S. Bill of Rights through the First Congress, the ratification process for the U.S. Constitution and its Bill of Rights involved far more than one individual or a group of legislators debating on the same legislative floor. This fact may explain, in part, why originalists made the shift form "intentionalism" to "the original public understanding of the Constitution's text." *E.g.*, D. A. Jeremy Telman, *Originalism: A Thing Worth Doing* . . ., 42 Ohio N.U. L. Rev. 529, 540–41 (2016).

271 Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 Dick. L. Rev. 419, 421 n.13 (1995).

272 The U.S. Constitution required ratification by nine of the thirteen states. Gregory C. Downs, *Religious Liberty that Almost Wasn't: On the Origin of the Establishment Clause of the First Amendment*, 30 U. Ark. Little Rock L. Rev. 19, 27 n.36 (2007). The U.S. Bill of Rights, like the U.S. Constitution, also had to go through a ratification process. Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. Rev. 893, 900 (1990).

273 Josh Blackman, Response, *Originalism at the Right Time?*, 90 Tex. L. Rev. See Also 269, 278 (Apr. 25, 2012) (noting that while neither hanging nor flogging were seen as cruel and unusual punishments at the time of the Eighth Amendment's ratification, "we know as an advanced society that the Framers of the Eighth Amendment were wrong in their beliefs that such acts were not cruel and unusual"; "[b]ecause the Framers of the Eighth Amendment were simply mistaken in their facts, and because today we know that such practices are in fact cruel and unusual, the procedures are unconstitutional based on the original understanding of the Eighth Amendment, or so the argument would go").

274 *See* D. A. Jeremy Telman, *Originalism: A Thing Worth Doing* . . ., 42 Ohio N.U. L. Rev. 529, 537-38 (2016):

> Originalism, as an academic movement in constitutional interpretation with a popular following, began as a response to the Warren and Burger Courts. Judge Robert Bork contributed to this area by expanding

Antonin Scalia once offered that an originalist reading of the U.S. Constitution would permit branding or flogging (once common punishments), he also—at least at one time—called himself a "faint-hearted originalist" because he could not conceive of upholding the constitutionality of flogging or hand branding as criminal punishments—and doubted whether any federal judge would do so in the face of an Eighth Amendment challenge.[275]

To truly understand the history of the English and American prohibitions on "cruel and unusual punishments," one must explore—it turns out—many sources and multiple historical events long pre-dating the Revolution of 1688–1689. In particular, one must study poetry written by George Wither, an English courtier who fought on the side of Parliament in the English Civil War and served on a committee for the sale of the late king's goods after Charles I's execution;[276] the nature of natural rights, the English common law, and their ancient roots; abuses of prerogative courts (i.e., England's Court of Star Chamber and Court of High Commission and Ireland's Court of Castle Chamber), which used inquisitorial methods and resorted to extraordinarily cruel punishments; the use of a variety of non-lethal corporal punishments, especially as painfully inflicted upon Puritan dissenters in the 1630s by those insisting on religious conformity to Church of England practices; how the king's subjects frequently expressed their displeasure through petitions and remonstrances, or written protests; the everyday use of the English language in the seventeenth century, with references to the cruel and unusual punishments concept appearing as early as Willlliam Shakespeare's lifetime; and the versatility of the "cruel and unusual punishments" moniker. Each of these subjects is addressed below.

B. The U.S. Supreme Court's Reinforcement of the Traditional Narrative

In prior cases, the U.S. Supreme Court and other courts have consistently traced the Eighth Amendment's origins back to the English Declaration of Rights, codified as the English Bill of Rights in 1689.[277] "The specific incident giving rise to the

upon Herbert Wechsler's "neutral principles" approach. In Judge Bork's view, the judge's task was to apply "neutral principles" articulated in the Constitution. Originalism was at this point a reactive theory that sought to rein in judicial activism by forcing judicial attention to the original meaning of the Constitution.

275 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 861 (1989). Justice Scalia later "recanted this statement insofar as it indicated his willingness to hold laws unconstitutional simply because they were unpalatable." Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1921 n.1 (2017).

276 Charles S. Hensley, The Later Career of George Wither 112–15 (1969) (citing Marcia Coyle, The Roberts Court: The Struggle for the Constitution 165 (2013) (reporting a 2011 interview in which Justice Scalia "recanted" being a "faint-hearted" originalist and in which he asserted that, contrary to his 1989 statement, he would uphold a state law imposing a punishment like "notching of ears" because "it's a stupid idea but it's not unconstitutional")); *accord* William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2405 (2015) (citing the July 2011 interview with Justice Scalia).

277 Roper v. Simmons, 543 U.S. 551, 577 (2005) (noting of "the Eighth Amendment's

provision was the perjury trial of Titus Oates in 1685," Justice William Brennan wrote of England's prohibition against "cruel and unusual punishments" in his *Furman v. Georgia* concurrence.[278] Although the punishments imposed upon Oates, the convicted perjurer, were customary ones when considered individually, he suffered an array of punishments at the hands of the English judicial system that, collectively or because of their unique, unprecedented combination,[279] deeply

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own origins": "The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: '[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.'") (quoting 1 W. & M., ch. 2, § 10, *in* 3 Eng. Stat. at Large 441 (1770)).

278 *Furman*, 408 U.S. at 274 n.17 (Brennan, J., concurring).

279 *E.g.*, Stinneford, *The Original Meaning of "Unusual," supra* note 16, at 1761–63:

> In 1689, after the Bill of Rights was enacted, Oates petitioned both houses of Parliament for release from judgment. In the House of Lords, "there was not one Lord but thought the Judgments erroneous, and was fully satisfied, That such an extravagant Judgment ought not to have been given, or a Punishment so exorbitant inflicted upon an English subject." Nonetheless, the Lords affirmed the judgment, because they considered Oates to be "so ill a Man." A minority protested, however, on several grounds, most of which related to the cruel and unprecedented nature of the punishments imposed on Oates. The punishments were "contrary to law and ancient practice." They were "barbarous, inhuman and unchristian." There was "no precedent" to support such punishments, and the House of Lords' decision to affirm them would create a precedent "for giving the like cruel, barbarous and illegal Judgments hereafter." Finally, the protesters asserted that the punishments imposed on Oates violated the command in the Bill of Rights that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."
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> The House of Commons, however, did pass a bill to release Oates from the judgment. Representatives from Commons then held a free conference with the Lords. Echoing the protesters from the House of Lords, the Commons representatives emphasized the fact that the cruel punishments imposed on Oates were beyond the bounds established by the common law and that affirmance of these punishments would set a precedent for even greater cruelty in the future. It was of "ill example" for a temporal court to exercise ecclesiastical jurisdiction by defrocking a cleric. It was of "ill example, and illegal" to impose a sentence of life imprisonment without express statutory authorization because there was no common law precedent to support such a punishment. It was "of ill example, and unusual" to sentence an Englishman to undergo pillorying four times a year for life. It was "illegal, cruel, and of dangerous example" to impose such a severe whipping on an offender that it would likely result in death. Moreover, the Commons representatives emphasized that Oates's punishment violated the Cruel and Unusual Punishments Clause in the newly enacted Bill of Rights. The House of Commons had a "particular regard" to Oates's sentence—among others—when it drafted the prohibition on cruel and unusual punishments. If his punishment were affirmed, this would strip the prohibition of its meaning and eviscerate the "ancient Right of the People of England that they should not be subjected to cruel and unusual Punishments."
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> As Justice Scalia noted, the primary thrust of the argument that Oates's punishment was "cruel and unusual" was that it was contrary to precedent. There was "no precedent to warrant" such punishments. They

troubled many Englishmen.[280] "There is no doubt that the Declaration of Rights is the antecedent of our constitutional text," Justice Scalia wrote in announcing the Supreme Court's judgment in *Harmelin v. Michigan*,[281] pointing out that the English Declaration of Rights "was promulgated in February 1689, and was enacted into law as the Bill of Rights."[282]

The English Bill of Rights codified a number of legal rights, with its "cruel and unusual punishments" prohibition rooted, it turns out, in long-forgotten prior literary sources and England's common law tradition. Perhaps not surprisingly given its inclusion in that historic document, that legal prohibition has drawn extensive commentary from many quarters over time, especially because of its codification into English and then American law. Along with being debated in both houses of England's Parliament, the legal prohibition was destined to draw the attention of multiple figures of considerable prominence in legal circles. For instance, the now-little-remembered Irish legal writer Sollom Emlyn (1697-1754) wrote a preface to *A Complete Collection of State-Trials, and Proceedings for High-Treason, and Other Crimes and Misdemeanours* (1730) in which he observed that a judge who uses "discretionary Power to gratify a private Revenge, or the Rage of a Party, by inflicting indefinite and perpetual Imprisonment, excessive and exorbitant Fines, unusual and cruel Punishments, is equally guilty of perverting Justice and acting against Law, as he, who in a Case where the Law has ascertained the Penalty, willfully and knowingly varies from it."[283]

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were "contrary to law and ancient practice." Moreover, if allowed, such punishments would set a bad precedent for the future. They were an "ill example," a "dangerous example," and would ultimately be of "pernicious consequence to the People."

280 John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, 37 Mitchell Hamline L.J. Pub. Pol'y & Prac. 1, 71 (2016); Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law, supra* note 48, at 386; *see also Furman*, 408 U.S. at 274 n.17 (Brennan, J., concurring):

> 'None of the punishments inflicted upon Oates amounted to torture. . . . In the context of the 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.' Granucci, 'Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning, 57 Calif. L. Rev. 839, 859 (1969). Thus, '(t)he irregularity and anomaly of Oates' treatment was extreme.' Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1789 n.74 (1970). Although the English provision was intended to restrain the judicial and executive power, see n. 8, supra, the principle is, of course, fully applicable under our Clause, which is primarily a restraint upon the legislative power.

281 501 U.S. 957, 966 (1991).

282 *Id.* Under England's seventeenth-century Julian calendar, not abandoned for the Gregorian model until 1751, each new year did not start until March 25th, so the English Declaration of Rights—presented to William and Mary on February 13, 1689 (using today's calendar) was then seen as a product of 1688, not 1689. *See* Lois G. Schwoerer, The Declaration of Rights, 1689, at 11 (1981).

283 1 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the year 1783, at xxxv (Thomas Jones Howell ed., 1816); *Mr. Emlyn's Preface to the Second Edition of*

For Sollom Emlyn, judges exercising their discretionary sentencing authority had a common-law duty to set reasonable not excessive penalties. "[W]here a court has a power of setting Fines," Emlyn made clear in his preface, "that must be understood of setting reasonable Fines: 'an excessive Fine,' says lord Coke, 'is against law,' and so it is declared to be by the Act 'for declaring the Rights and Liberties of the Subject.'"[284] In his *Institutes of the Lawes of England*, Sir Edward Coke (1552–1634) wrote extensively about the common law,[285] as well

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the State Trials, 1 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to Present Time, at xxii, xxv (1809) (reprinting "Mr. Emlyn's Preface to the Second Edition of the State Trials, in Six Volumes Folio: Printed in the Year 1730"); Francis Hargrave, A Complete Collection of State-Trials, and Proceedings for High-Treason, and Other Crimes and Misdemeanours, at xi-xii (4th ed. 1776) (reprinting the preface to the second edition). Sollom Emlyn (1697-1754) was an Irish legal writer who became a member of Lincoln's Inn, was the compiler of the six-volume second edition of *State Trials*, and contributed "a lengthy preface critically surveying the condition of English law at the time." 25 The Encyclopaedia Britannica: A Dictionary of Arts, Sciences, Literature and General Information 806 (11th ed. 1911); *cf.* Louis Hyman, The Jews of Ireland: From Earliest Times to the Year 1910, at 16 (1972); Basil Montagu, The Opinions of Different Authors upon the Punishment of Death, at ix (1812); The New Oxford Companion to Law 1123 (Peter Cane & Joanne Conaghan eds., 2008); Bessler, *A Century in the Making, supra* note 7, at 1041 n.347.

284 *Mr. Emlyn's Preface to the Second Edition of the State Trials*, 1 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to Present Time, at xxxv (1809). Sir Edward Coke had earlier played a key role in England's Petition of Right. *See* Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 Berkeley J. Int'l L. 223, 229 n.26 (2005) ("Another interesting document that sets out the rights and liberties of the subject as opposed to the prerogatives of the Crown, favoring the common man, is the Petition of Right of 1628, championed by Sir Edward Coke, Speaker of the House of Commons, Attorney General, Chief Justice of the Court of Common Pleas and Chief Justice of the King's Bench."). Sir Edward Coke has been described as "the champion of common law." He once observed that "the common law itself is nothing but reason." Allen v. Harvey, 568 S.W.2d 829, 834 (Tenn. 1978); *see also* Gary L. McDowell & Stephen B. Presser, *Foreword: Human Rights, the Rule of Law, and National Sovereignty*, 2 Nw. J. Int'l Hum. Rts. 1, 7 (2004) ("[I]n the seventeenth century great champions of the common law like Sir Edward Coke and his colleagues in the House of Commons began 'collectively to assert the 'rights' of the people,' in order to counter the threat of Stuart absolutism.").

285 MacArthur v. San Juan County, 405 F. Supp.2d 1302, 1316 n.18 (D. Utah 2005). As Chief Justice of England's Court of Common Pleas, Sir Edward Coke wrote an opinion in *Dr. Bonham's Case* (1610), 8 Co. Rep. 107a, 114a C.P. 1610, "that is frequently credited as 'providing an early foundation for the idea that courts might invalidate legislation that they found inconsistent with a written constitution.'" *Id.* (quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 162 (1996) (Souter, J., dissenting)). "Under Coke's leadership in 1628, the House of Commons forced Charles I of England to accept Coke's 'Petition of Right' by withholding appropriation of revenues." *Id.* In *Dr. Bonham's Case*, Chief Justice Coke stated that "when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void." People v. Likine, 823 N.W.2d 50, 66 n.51 (Mich. 2012) (quoting *Dr. Bonham's Case*)

as about fines and amercements,[286] and he described the Magna Carta as "but a confirmation or restitution of the Common Law."[287] The English common law itself interpreted the Magna Carta as requiring reasonable and proportional fines.[288] The English Bill of Rights, Emlyn observed, inverting two key words from what appears in Parliament's Bill of Rights, "declares the Illegality of unusual and cruel Punishments."[289] Likewise, the still-famed and much-cited Oxford-educated jurist, Sir William Blackstone (1723-1780), wrote about the English prohibition against cruel and unusual punishments in the fourth volume of his popular treatise, *Commentaries on the Laws of England* (1769), with Blackstone—on the flip side to an "unusual" punishment—mentioning the "usual punishment" for petit treason.[290]

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[286] Nathaniel Amann, Note, *Restitution and the Excessive Fines Clause*, 58 Am. Crim. L. Rev. 205, 213-14 (2021):

> By the seventeenth century in Britain, the distinction between an amercement and a fine had not yet been eliminated, but it rested on shaky ground. The great Scottish jurist Sir Edward Coke's seminal work on law, *Institutes of the Laws of England*, which was published between 1628 and 1644, illustrates the dissolution of the line between a fine and an amercement. There, he wrote that a "fine signifieth a percuniarie punishment for an offence, or a contempt committed against the king." Coke's definition shows that the old understanding of a fine as an alternative to prison had been supplanted, if not wholly replaced, by the amercement's purpose as a punitive payment to the king. While Coke recognized amercements separately in *Institutes*, his definition of a fine reveals a significant overlapping of the concepts.
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> Furthermore, any differences that Coke might have recognized between a fine and an amercement were not reflected in actual English practice of the time. Take the case of Titus Oates, for example. This case appeared before the King's Bench in 1685 when Mr. Oates was "fine[d] . . . 1000 marks upon each indictment" for his crimes. Even though the court called this a fine, it exhibited the two key qualities of an amercement: it was payable to the king, and it was meant to punish Mr. Oates for his crimes. The court's own confusion about the distinction between an amercement and fine illustrates the fading distinction between the two.

[287] 1 Edward Coke, Institutes of the Lawes of England (1608), *reprinted in* 2 The Selected Writings and Speeches of Sir Edward Coke § 108, at 697 (Steve Sheppard ed., 2003).

[288] Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1332 (11th Cir. 2021) (Tjoflat, J., concurring in part and dissenting in part).

[289] *Mr. Emlyn's Preface to the Second Edition of the State Trials*, 1 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to Present Time, at xxxv (1809).

[290] Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law, supra* note 48, at 334:

> In his popular and widely distributed *Commentaries on the Laws of England*, Sir William Blackstone himself used the phrase "usual punishment" in writing about the punishment of "petit treason" committed "by those of the female sex." In another part of his *Commentaries*, Blackstone specifically referenced the bar on "cruel and unusual punishments." In particular, Blackstone saw the prohibition against cruel and unusual punishments as constraining *arbitrary* and *discretionary* power. As to fines and prison sentences, Blackstone observed that "the duration and quantity" of such fines or terms

There is, certainly, considerable evidence to show that Titus Oates's ordered punishment helped to inspire the *codification* of the bar on "cruel and unusual punishments" in article 10 of the English Bill of Rights, even though that terminology had, quite literally, been around *for decades* in the English language before Oates's 1685 sentencing for perjury. After the English Declaration of Rights was drafted and read as part of William and Mary's acceptance of the English throne, Oates petitioned the House of Lords to set aside his sentence as illegal[291] and his case became a cause célèbre and one of the first subjects of debate over England's ancient and then-hortatory bar on "cruel and unusual punishments."[292] As Anglo-American history shows, the tradition of people claiming a particular punishment is "cruel and unusual" has continued ever since.

The U.S. Supreme Court's reinforcement of the traditional narrative of the history of the cruel and unusual punishments concept has stymied a full understanding of that concept's origins, even though an understanding of the Titus Oates case is absolutely critical to understanding that concept's codification in the English Bill of Rights. Although the House of Lords affirmed the judgment against Titus Oates following his conviction for perjury, a minority of peers dissented and "their statement"—as Justice Scalia observed in *Harmelin v. Michigan* of the

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> of incarceration were properly left to judges. "[H]owever unlimited the power of the court may seem," Blackstone emphasized of such judgments, "it is far from being wholly arbitrary," for the judge's "discretion is regulated by law." "For the bill of rights has particularly declared," Blackstone wrote, "that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted."

[291] *Harmelin*, 501 U.S. at 970; *see also* Ryan, *supra* note 61, at 577:

> After the English Bill of Rights was enacted, Oates petitioned both houses of Parliament for a release from the judgment, but the House of Lords rejected the petition. A minority of the Lords dissented, however, stating that "the said judgments are barbarous, inhuman, and unchristian"; "there is no precedent to warrant the punishments of whipping and committing to prison for life, for the crime of perjury"; maintaining the judgment would "be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter"; the "judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed"; and the judgments were contrary to Article 10 of the English Bill of Rights. The House of Commons concurred with the dissenting Lords.

[292] Jency Megan Butler, Note, *Shocking the Eighth Amendment's Conscience: Applying a Substantive Due Process Test to the Evolving Cruel and Unusual Punishments Clause*, 43 Hastings Const. L.Q. 861, 864-65 (2016):

> The Eighth Amendment is rooted in British law. The Magna Carta of 1215 purported the idea that punishments should fit their respective crimes. In 1689, the English Bill of Rights was created by Parliament, affirming that "cruel and unusual punishments" *ought* not to be inflicted. The Titus Oates case is a famous example of the first application of the English Cruel and Unusual Punishments Clause. Titus Oates, an Anglican cleric, was convicted of lying in court. Oates's lies resulted in the execution of fifteen innocent people. . . . What offended the English Members of Parliament was that the pillory would occur annually, and the repetition of pillory made the punishment excessive and disproportionate.

English legal prohibition—"sheds light on the meaning of the 'cruell and unusuall Punishments' clause."[293] Oates is still remembered as a rogue for his scurrilous acts of perjury.[294] In 2005, Oates appeared on a list of the ten "worst" Britons of the last 1,000 years prepared by a group of historians for the BBC History Magazine.[295]

C. The Bar on Cruel and Unusual Punishments: The Star Chamber and the Search for Meaning

The meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause has been especially contentious in American law,[296] with multiple jurists[297] and

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[293] *Harmelin*, 501 U.S. at 970. That dissenting statement read:

> 1st, [T]he King's Bench, being a Temporal Court, made it a Part of the Judgment, That Titus Oates, being a Clerk, should, for his said Perjuries, be divested of his canonical and priestly Habit . . .; which is a Matter wholly out of their Power, belonging to the Ecclesiastical Courts only.
>
> 2dly, [S]aid Judgments are barbarous, inhuman, and unchristian; and there is no Precedent to warrant the Punishments of whipping and committing to Prison for Life, for the Crime of Perjury; which yet were but Part of the Punishments inflicted upon him.
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> . . . . .
>
> 4thly, [T]his will be an Encouragement and Allowance for giving the like cruel, barbarous and illegal Judgments hereafter, unless this Judgment be reversed.
>
> 5thly, . . . [T]hat the said Judgments were contrary to Law and ancient Practice, and therefore erroneous, and ought to be reversed.
>
> 6thly, Because it is contrary to the Declaration, on the Twelfth of February last, . . . that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual Punishments afflicted."

Id. at 971 (quoting 1 Journals of the House of Lords 367 (May 31, 1689)).

[294] Watkins v. United States, 354 U.S. 178, 190 (1957) ("[D]uring the reign of Charles II, there was great unrest over the fact that the heir apparent, James, had embraced Catholicism. Anti-Catholic feeling ran high, spilling over a few years later when the infamous rogue, Titus Oates, inflamed the country with rumors of a 'Popish Plot' to murder the King.").

[295] "'Worst' Historical Britons List," BBC News, Dec. 27, 2005, http://news.bbc.co.uk/2/hi/uk_news/4561624.stm.

[296] Scores of law review articles have been written about the Eighth Amendment and its three clauses. *E.g.*, Ryan, *supra* note 61; Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 Harv. J. L. & Pub. Pol'y 119 (2004); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833 (2013).

[297] *E.g.*, United States v. Aquart, 912 F.3d 1, 63 n.43 (2d Cir. 2018) (citing John Stinneford's scholarship and Justice Scalia's opinion in *Harmelin*):

> There is no ready agreement on the original meaning of the Cruel and Unusual Punishments Clause. The article posits that English sources, especially Coke and Blackstone, show that, within the common law tradition, "unusual" meant contrary to long usage, hence the outrage at judicial imposition of sentences unprecedented at common law. But Justice Scalia, after reviewing some of those same sources, concluded that

scholars searching for, and writing about, the "original meaning" of its language.[298] For example, Professor John Stinneford has written that, although "the term 'unusual'" in the seventeenth and eighteenth centuries "had many of the meanings we currently associate with the term" (i.e., "rare," "uncommon," "out of the ordinary"), that word "also had a more specific meaning . . . as a legal term of art: 'contrary to long usage' or 'immemorial usage.'"[299] I have, myself, written extensively about the Eighth Amendment in a prior book[300] and in multiple book

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> "unusual" could not have had the same meaning in the Eighth Amendment because "[t]here were no common-law punishments in the federal system." Thus, the Eighth Amendment's Cruel and Unusual Punishments Clause had to have been "meant as a check not upon judges but upon the Legislature." So understood, Justice Scalia maintained that the original constitutional meaning of "unusual" in the Eighth Amendment was its common meaning, *i.e.,* "such as [does not] occu[r] in ordinary practice."

298 John F. Stinneford, *The Original Meaning of "Cruel,"* 105 Geo. L.J. 441 (2017) (finding that the word "cruel" in the Cruel and Unusual Punishments Clause means "unjustly harsh," not "motivated by cruel intent"); Stinneford, *The Original Meaning of "Unusual," supra* note 16, at 1767 (finding that the word "unusual" in the Cruel and Unusual Punishments Clause means "contrary to long usage"); *see also* Scott W. Howe, *Slavery as Punishment, Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 Ariz. L. Rev. 983, 989 (2009) ("In the end, the slavery-as-punishment clause poses one of the great challenges in our Constitution to all who see themselves as original-public-meaning originalists. Even for broad originalists, an original-public-meaning approach to the clause would allow torturous punishments such as whipping and inhumane prison conditions."); Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. Jefferson L. Rev. 559, 560 (2003) ("This Article will examine the originalist approach to interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause and conclude that restricting the meaning of the Clause to the historical moment contemporary with ratification does an injustice to the truly 'original intent' of the Framers that the Constitution was to serve American posterity in a truly meaningful way."); Joshua E. Kastenberg, *An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment*, 5 Temp. Pol. & Civ. Rts. L. Rev. 49, 50-51 (1995):

> The influence of Enlightenment-era philosophy had a tremendous impact in early American law. Any complete study of American legal history includes the philosophies of John Locke, Montesquieu, and Jean-Jacques Rousseau because of their influences on the founders. Any study of the Eighth Amendment's prohibition against cruel and unusual punishment should not only include an examination of their works, but should also include a study of Francois-Marie Arouet, otherwise known by his pseudonym, Voltaire (1694 -1778). Voltaire not only wrote on the subject of punishments, but had direct contact with some of the nation's founders, namely Benjamin Franklin and Dr. Benjamin Rush. This article centers on the influences of the Enlightenment through Voltaire on both the framers of American law and on the Eighth Amendment's prohibition against cruel and unusual punishment.

299 Stinneford, *The Original Meaning of "Unusual," supra* note 16, at 1767.

300 Bessler, Cruel and Unusual, *supra* note 46.

chapters[301] and law review articles.[302] For instance, I have studied the concepts of "usual" versus "unusual punishments" in Anglo-American law.[303] Of course, the varied prohibitions against "cruel and unusual punishments," "cruel or unusual punishments," or simply "cruel punishments" were included in revolutionary era state constitutions[304] even before the Eighth Amendment's ratification in 1791.[305]

While the U.S. Supreme Court and modern Eighth Amendment scholars have conventionally traced the Eighth Amendment's "cruel and unusual punishments" prohibition back no further than the 1680s,[306] those writings have missed the actual first usages of the cruel and unusual punishments language. One scholar, University of San Diego law professor Donald Dripps, has written that "[t]he full story" of the legal prohibition "begins not with the flogging of Titus Oates in 1685, but with the abolition of the Star Chamber in 1641."[307] In his 2023 article, Professor Dripps

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301 Bessler, "From the Founding to the Present," *in* The Eighth Amendment and Its Future in a New Age of Punishment, *supra* note 52; John D. Bessler, "What-Ifs and Missed Opportunities," in Death Penalty in Decline? The Fight against Capital Punishment in the Decades since *Furman v. Georgia* (Austin Sarat, ed. 2024).

302 Bessler, *A Century in the Making, supra* note 7.

303 Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law, supra* note 48.

304 *Harmelin*, 501 U.S. at 966:

> In 1791, five State Constitutions prohibited "cruel or unusual punishments," see Del. Declaration of Rights, § 16 (1776); Md. Declaration of Rights, Art. XXII (1776); Mass. Declaration of Rights, Art. XXVI (1780); N.C. Declaration of Rights, § X (1776); N.H. Bill of Rights, Art. XXXIII (1784), and two prohibited "cruel" punishments, Pa. Const., Art. IX, § 13 (1790); S.C. Const., Art. IX, § 4 (1790). The new Federal Bill of Rights, however, tracked Virginia's prohibition of "cruel *and* unusual punishments," see Va. Declaration of Rights, § 9 (1776), which most closely followed the English provision. In fact, the entire text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights, which provided "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."

305 U.S. Const., amend. VIII.

306 Gregg v. Georgia, 428 U.S. 153, 169 (1976) ("The history of the prohibition of 'cruel and unusual' punishment already has been reviewed at length. The phrase first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary.") (citing Granucci, *supra* note 5, at 852–53).

307 Donald A. Dripps, *The "Cruel and Unusual" Legacy of the Star Chamber*, 1 J. Am. Con. Hist. 139, 139–40 (2023). The abuses of the Court of Star Chamber have long been recognized. *E.g.*, John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 Nw. U. L. Rev. 9, 25 (2020) ("The Court of Star Chamber's penchant for punishing those who had not violated preexisting law led Parliament not only to abolish it but to condemn it on the ground that it had 'undertaken to punish where no law doth warrant, and to make decrees for things having no such authority, and to inflict heavier punishments than by any law is warranted . . . . [Such judgment had proven] to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and government.'"); *id.* ("The Court of Star Chamber abused its power by inflicting punishments either unauthorized by law or heavier than authorized by law, and also by issuing decrees it had no authority to issue."); *id.* ("The idea that the government may not inflict punishment for conduct that does not violate preexisting law is reflected in the traditional common law prohibition of ex post facto punishments. English rulers did not always honor this principle, of course, but when they violated it they were ultimately condemned as

ties England's 1680s "cruel and unusual punishments" prohibition to a concern about not allowing a resurrection of England's prerogative Court of Star Chamber, which Parliament had abolished in 1641 along with the ecclesiastical Court of High Commission. "[A]lthough the methods of punishments inflicted on Oates—two days of horrific flogging, recurring stands in the pillory, and life imprisonment—were horrific," Dripps explains, "they were not capital, were not unusual in 1685, and were all included in the Crimes Act passed by the First U.S. Congress in 1790."[308] "Sentencing Oates," Dripps writes of the Court of King's Bench and its one-time leader, Lord Chief Justice George Jeffreys, "claimed for the King's Bench all the Star Chamber's lawless power to determine punishments less than capital."[309]

Article 10 of the English Bill of Rights, restricting such discretionary authority, "repudiated this attempt to resurrect the Star Chamber," Dripps concludes, stressing that the First Congress, "responding to Anti-Federalists fears about Congress adopting European-style executions by torture, freighted the 'cruel and unusual' language with two additional meanings."[310] As Dripps, comparing the English and American provisions, explains: "The clause now applied to capital, as well as noncapital, penalties. It now also restricted legislative as well as judicial discretion."[311] "Synthesizing the English original and the later concerns of the American founders," Dripps writes, "the Eighth Amendment forbids

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acting unconstitutionally. For example, English monarchs created prerogative courts, such as the Court of Star Chamber, in part to evade procedural and substantive limits to government power generally respected by common law courts.").

308 Dripps, *supra* note 307, at 139. Originalists have long argued that the inclusion of death-eligible offenses in the Crimes Act of 1790 makes the death penalty constitutional and insulates it from an Eighth Amendment challenge. Raoul Berger, Reply, *G. Edward White's Apology for Judicial Activism*, 63 Tex. L. Rev. 367, 368 (1984) ("[T]he very same framers who drafted the Bill of Rights passed the Act of April 30, 1790, which made murder and other offenses punishable by death, a weighty contemporaneous construction that capital punishment was untouched by the eighth amendment."). In contrast, during their time on the U.S. Supreme Court, Justices William Brennan and Thurgood Marshall frequently wrote that capital punishment is a *per se* Eighth Amendment violation, with Justices Stephen Breyer and Ruth Bader Ginsburg—in their dissent in *Glossip v. Gross* (2015)—later announcing that it is "highly likely that the death penalty violates the Eighth Amendment." *See* Robert A. Stein, *The History and Future of Capital Punishment in the United States*, 54 San Diego L. Rev. 1, 10 (2017); Glossip v. Gross, 576 U.S. 863, 946 (2015) (Breyer, J., dissenting).

309 Dripps, *supra* note 307, at 142:

> To understand the Eighth Amendment, we must look beyond the despicable Oates . . . . We must focus instead on the infamous Judge George Jeffreys, who, in passing sentence on Oates, openly claimed that King's Bench had inherited the powers of the Star Chamber. The full story thus begins not with the punishment of Oates in the reign of James II, but with the abolition of the Star Chamber in the first days of the Long Parliament, under Charles I, in 1641. The Star Chamber notoriously wielded "a power of punishment extending to all lengths short of the death penalty, and a jurisdiction limited only by its own will." Parliament abolished this lawless power over noncapital punishments in 1641, and Jeffreys attempted to resurrect it in 1685.

310 *Id.*

311 *Id.*

lawless discretion in both capital and noncapital cases, and torturous methods of punishment."[312] The U.S. Supreme Court, in what Justice William Brennan once described as the "obvious unconstitutionality of such ancient practices as disemboweling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking on the wheel," emphasizes that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that inflict "torture or a lingering death."[313]

At the First Congress, there was only limited debate over the language that became the U.S. Constitution's Eighth Amendment.[314] At one point Representative William Loughton Smith of South Carolina "objected to the words 'nor cruel and unusual punishments'" because of his view that "the import" of those words was "too indefinite." In another instance, Representative Samuel Livermore of New Hampshire offered this perspective of the Eighth Amendment's text: "The clause seems to express a great deal of humanity, on which account I have no objection

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312 *Id.*; *see also id.* at 143:

> The cruel-and-unusual punishments clause is in fact an umbrella term covering two distinct concepts. First, it incorporates an *anti-discretion* norm that traces back to the 1689 Bill of Rights and its prohibition of Star Chamber lawlessness. Second, it incorporates a *substantive* prohibition of executions by torture that traces back to the Founding-era debates between federalists and Anti-Federalists. The Eighth Amendment was originally understood to bar arbitrary severity in the quantity or barbarity in the type of punishment, whether directed by courts or by legislatures, and whether capital or noncapital.

313 Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting from denial of cert.; joined by Justice Marshall) (citations omitted).

314 On June 8, 1789, in seeking the addition to the U.S. Constitution of a federal bill of rights, James Madison fulfilled the pledge he'd made to Virginians while campaigning for a seat in the U.S. House of Representatives. In his speech to the House of Representatives, Madison introduced each of his proposed amendments, moving that "a select committee be appointed to consider and report such amendments as are proper for Congress to propose to the legislatures of the several States . . . ." American History Through Its Greatest Speeches: A Documentary History of the United States 209–13 (Jolyson P. Girard, Darryl Mace & Courtney Michelle Smith, eds. 2016). As Madison said in his speech:

> It appears to me that this house is bound by every motive of prudence, not to let the first session pass over without proposing to the state legislatures some things to be incorporated into the constitution, as will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who have been friendly to the adoption of this constitution, may have the opportunity of proving to those where were opposed to it, that they were as sincerely devote to liberty and a republic government, as those who charged them with wishing the adoption of this constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community an apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.

Id. at 210.

to it; but as it seems to have no meaning in it, I do not think it necessary."[315] In particular, Representative Livermore offered these public musings on the import of the proposed language:

> What is meant by the terms excessive bail? Who are to be judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.[316]

In spite of these objections, when "[t]he question was put" on the Eighth Amendment's text in the First Congress, the historical record shows "it was agreed to by a considerable majority."[317]

In his 1986 Oliver Wendell Holmes, Jr. Lecture, Justice Brennan—examining the Eighth Amendment's text and discussing the possible intent of its framers—argued that capital punishment is unconstitutional. "The assertion that the Constitution shows that the Framers *intended* that there be capital punishment is, in my view, untenable," Brennan observed, noting that there is "no language" in the Eighth Amendment "which suggests that death was to be regarded for all time as presumptively *not* cruel and unusual."[318] "[T]he assertion that capital punishment must be constitutional because the 'intent of the Framers' was clearly to retain it," Brennan said, "turns out to be based on little more than assumption and negative implication."[319] "The tenuousness of the negative implication," he stressed, "is especially apparent given Livermore's objection during the first Congress's debate . . . that the [E]ighth [A]mendment would limit the Congress's power to impose death, or earcropping."[320] "We know that the language of the [E]ighth [A]mendment was taken from the English Bill of Rights of 1689, but we do not know why the Framers were particularly attracted to that language or, for that matter, exactly what the language signified to the English," Brennan wrote.[321]

Of course, Justice Brennan and Professor Dripps are not alone in having diligently searched for, or intellectually explored, what originalists would consider the Holy Grail: the Eighth Amendment's original public meaning or purpose. In fact, the Eighth Amendment's prohibition against "cruel and unusual punishments"—in part because of its unique, centuries-old wording—has been described as "a

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315 Bessler, Cruel and Unusual, *supra* note 46, at 186, 302, 328.
316 *Furman*, 408 U.S. at 244 (Douglas, J., concurring).
317 1 Annals of Cong. 754 (1789); *Furman*, 408 U.S. at 262 (Brennan, J., concurring).
318 William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 Harv. L. Rev. 313, 324 (1986).
319 *Id.*
320 *Id.* at 324–25.
321 *Id.* at 323.

constitutional enigma."[322] Jurists and scholars have long sought to ascertain the meaning of that prohibition,[323] with the U.S. Supreme Court itself using multiple tests—from its "evolving standards of decency" test to its "deliberate indifference" and "malicious and sadistic" standards—over time to determine if a punishment is an Eighth Amendment violation and constitutes a "cruel and unusual" punishment.[324]

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[322] Joseph L. Hoffmann, *"The 'Cruel and Unusual Punishment' Clause," in* The Bill of Rights in Modern America 173 (David J. Bodenhamer & James W. Ely, Jr. eds., rev. & expanded ed. 2000) ("The cruel and unusual punishment clause of the Eighth Amendment today remains a constitutional enigma.").

[323] *E.g.*, Miller v. Alabama, 567 U.S. 460, 510 (2012) (Alito, J., dissenting; joined by Justice Scalia) ("The Court long ago abandoned the original meaning of the Eighth Amendment, holding instead that the prohibition of 'cruel and unusual punishment' embodies the 'evolving standards of decency that mark the progress of a maturing society.' Both the provenance and philosophical basis for this standard were problematic from the start.") (citations omitted). Many scholarly articles have sought to identify the "original meaning" of the cruel and unusual punishments terminology. *E.g.*, Granucci, *supra* note 5, at 842; Stinneford, *The Original Meaning of "Cruel," supra* note 298; Stinneford, *The Original Meaning of "Unusual," supra* note 16. Others have explicitly rejected an originalist conception that looks to eighteenth-century views. *E.g.*, Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249, 1253 (1997) ("We have to choose between an abstract, principled, moral reading—the authors meant to prohibit punishments that are in fact cruel as well as unusual . . .—and a concrete, dated reading—they meant to say that punishments widely thought cruel as well as unusual at the time they spoke . . . are prohibited. If the correct interpretation is the abstract one, then judges attempting to keep faith with the text today must sometimes ask themselves whether punishments the Framers would not themselves have considered cruel—capital punishment, for example—nevertheless are cruel . . . ."). Citing the comments of Representative Samuel Livermore in America's founding era, Justice William Brennan explicitly rejected the idea that the Eighth Amendment's "cruel and unusual punishments" prohibition should be forever tied to eighteenth-century views. *Furman*, 408 U.S. at 263-64 (Brennan, J., concurring) (citation omitted):

> As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered 'cruel and unusual' at the time. The 'import' of the Clause is, indeed, 'indefinite,' and for good reason. A constitutional provision 'is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.'

[324] Hudson v. McMillian, 503 U.S. 1 (1992) (noting that the Eighth Amendment's prohibition of cruel and unusual punishments "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society'"; "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated."); Farmer v. Brennan, 511 U.S. 825 (1994) (to show an Eighth Amendment violation, a prisoner must show that a defendant acted with "deliberate indifference"); *id.* at 833–34 ("Prison conditions may be 'restrictive and even harsh,' but gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective[e],' any more than it squares with "'evolving standards of decency.'" Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"); Whitley v. Albers, 475

People may draw different lines in distinguishing between cruel versus non-cruel acts and between unusual versus usual ones, but *cruel* and *unusual* are common words that—on their face—are admittedly quite capable of interpretation by judges. Judges, like anyone else, can recognize a cruel act when they see one, and it is hardly beyond the capacity of jurists to judge what is unusual.

Although the U.S. Supreme Court has long interpreted the Eighth Amendment to bar barbarous punishments and torture,[325] the Court has failed to classify capital punishment as an Eighth Amendment violation since backing away from *Furman* and upholding the punishment's constitutionality in *Gregg* in 1976.[326] The use of capital charges, death sentences, and state-sanctioned killing in the United States thus continues, at least in the jurisdictions that still authorize it.[327] Meanwhile, American jurists have already classified credible death threats, including mock executions, as cruel and torturous in nature.[328] As I have pointed out elsewhere, one of the death penalty's immutable characteristics is that—beyond its arbitrary and discriminatory administration throughout history[329]—it makes regular use of threats

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U.S. 312, 320–21 (1986) ("Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'") (citation omitted).

325 Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("[T]he primary concern of the drafters was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment. Accordingly, this Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment.") (citations omitted); *see also Bucklew*, 587 U.S. at 131 ("Patrick Henry, for one, warned that unless the Constitution was amended to prohibit "cruel and unusual punishments," Congress would be free to inflict 'tortures' and 'barbarous' punishments.") (citing 3 Debates on the Federal Constitution 447–448 (J. Elliot 2d ed. 1891)).

326 Joshua Liester, Student Article, *Risking Suffering: How* Bucklew v. Precythe *Weakened Eighth Amendment Protections*, 66 S.D. L. Rev. 338, 349 (2021) ("The 1976 case of *Gregg v. Georgia* upheld the constitutionality of capital punishment, and the Court in *Baze* highlighted that '[i]t necessarily follows that there must be a means of carrying it out.'").

327 There are currently twenty-seven American states that authorize the death penalty along with the U.S. Government and the U.S. Military. *Facts about the Death Penalty*, Death Penalty Info. Ctr., https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf?dm=1730726041 (updated Mar. 21, 2025).

328 *See generally* John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment,* 11 Ne. U. L. Rev. 1 (2019); John D. Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should Be Strictly Prohibited by American and International Law,* 58 Washburn L.J. 1 (2019).

329 Leah Haberman, Furman's *Phoenix in* McCleskey's *Flaw*, 55 Colum. Hum. Rts. L. Rev. 407, 415, 428 (2023) (discussing statistical studies conducted by Professor David Baldus, collectively known as the "Baldus Study," showing "consistent trends of racial discrimination in the administration of the death penalty" and "the arbitrariness of the death penalty" in spite of the U.S. Supreme Court's rulings); Bernadette M. Donovan, *Certain Prosecutors: Geographical Arbitrariness, Unusualness, & the Abolition of Virginia's Death Penalty*, 29 Wash. & Lee J. Civ. Rts. & Soc. Just. 1, 12 (2022) ("In the last twenty years . . . the death penalty has become increasingly unusual in this country. The contemporary death penalty is a local one: limited to certain states, and heavily practiced only within specific jurisdictions within those states. As result, one of the single greatest

of death that, in other contexts, are regularly classified as psychological torture.[330]

III. Venetian Executions, Marginalia, and an Index Entry: An Early Seventeenth-Century History of Venice Refers to "A Cruell and Unusuall Punishment"

A. The Generall Historie of the Magnificent State of Venice

The cruel and unusual punishments terminology—as the uncovered historical sources in this Article reveal—actually appears in multiple seventeenth-century sources, and many decades earlier than the 1680s, albeit in non-judicial, non-legislative contexts.[331] Of particular interest, the terminology shows up as early as the second decade of the seventeenth century, including in an index entry in *The Generall Historie of the Magnificent State of Venice* (1612). The book, written by Thomas de Fougasses, "Englished" by "W. Shute," and printed four years before William Shakespeare's death in 1616, refers to "A cruell and unusuall punishment"—a reference to Venetian executions in which people, for treasonous conduct, were buried alive.[332] In his own plays, including *Hamlet*, *Romeo and Juliet*,

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factors in whether a person will face the death penalty is not *who* they are, or *what* they did, but *where* they did it.") (italics in original); Lee Kovarsky, *The American Execution Queue*, 71 Stan. L. Rev. 1163, 1181–84 (2019) (discussing the arbitrariness of American executions); State v. Gregory, 427 P.3d 621, 627 (Wash. 2018) (en banc) ("The death penalty is invalid because it is imposed in an arbitrary and racially biased manner.").

330 Bessler, The Death Penalty's Denial of Fundamental Human Rights, *supra* note 47.

331 1 Thomas de Fougasses ("Gentleman of Avignon"), comp., The Generall Historie of the Magnificent State of Venice: From the First Foundation Thereof Untill This Present (London: G. Eld & W. Stansby, 1612) ("Englished by W. Shute, Gent.") (unpaginated index section of book, titled "A Table of the principall matters contained in the first volume of the Historie of Venice, compiled for *the more easie finding out thereof by the right course of* Alphabet," that reads (referencing a page number): "A cruell and unusuall punishment. 287").

332 *Id.* at 287; *see also id.* (unpaginated index section of the book, titled "A Table of the principall matters contained in the first volume of the Historie of Venice, compiled for *the more easie finding out thereof by the right course of* Alphabet," that reads (referencing the page number on which appears the information about the Venetian executions): "A cruell and unusuall punishment. 287"). As one source stresses of the siege of "the unfortunate Padua," the sharing of information with enemy forces during the siege, and the execution of the traitors by burying alive that followed:

> Even in this their extremity, they secured an interest in the besieging army, and Venetians were found sufficiently blinded by the love of gain to hold treacherous communication with the falling Princes. By means of billets fastened to the heads of arrows, and shot within the walls, intelligence was daily forwarded to them. The traitors were discovered; two of them were Priests; and as if in imitation, or in refinement upon that death of lingering horror which the Romans inflicted, when called to punish those whom they esteemed the most holy among their Ministers of Religion, these miserable criminals, having been conveyed to Venice, were buried alive, with their heads downwards, between the fatal Columns.

and *Titus Andronicus*, Shakespeare himself referred to the act, fear, or punishment of being buried alive.[333]

In "A Table of the principall matters contained in the first volume" of *The Generall Historie of the Magnificent State of Venice*—an index said to be "compiled for *the more easie finding out thereof by the right course of* Alphabet"—one find entries for, among other things, "A cruell and unworthie act" (listing page 18), "A punishment of God" (also listing page 18), "A cruell night-fight" (listing page 201), "A divine punishment" (listing page 245), "A law against murtherers" (listing page 277), "A cruell and unusuall punishment" (listing page 287), "A cruell decree of the Florentines" (listing page 328), "A cruell assault by night" (listing page 501),"A cruell fight betwixt *Alphonso* Duke of Calabria, & *Roberto* of A rimini General to the Venetiãs" (listing page 502), "Cruel death of the bishop of Grada" (listing page 21), "Cruell intent of the *Calloprini*" (listing page 53), "Crueltie of the Mahometans" (listing page 70), "Crüeltie against the Law of Nations" (listing page 105), "Cruell determination of a woman" (also listing page 105), "Crueltie of the Greekes and Genoueses" (listing page 150), "Candiots crueltie to the Venetians" (listing page 219), "Cruell warre at Tenedos" (listing page 276), "*Carrario* his great cruelty" (listing page 288), "*Eccelin* his crueltie against the Paduans" (listing page 143), "*Francisco Carrario* his great cruelltie" (listing page 288), "Great crueltie of the Huns" (listing page 40), "Great ingratitude and crueltie of a brother" (listing page 116), "Great crueltie falsly imputed to the Venetians" (listing page 203), "Great crueltie of the King of Hungarie" (listing page 292), "Great crueltie" (listing page 383), "The Emperours cruell Edict against the Venetians" (listing page 54), "Turkish cruelty" (listing page 424), and "Wonderfull crueltie of a Tyrant" (listing page 138).[334]

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1 Sketches from Venetian History 432 (London: John Murray, 1831).

333 Paul Barry, A Lifetime with Shakespeare: Notes from an American Director of All 38 Plays 39 (2010) (noting that in *Hamlet*, "when Hamlet learns that the corpse is Ophelia, he reveals himself, exploding with rage," and that "[h]e offers to prove his love by being buried alive with her corpse"); Annaliese F. Connollly, CliffsNotes Romeo and Juliet 75 (2000) (noting that, in *Romeo and Juliet*, "[w]hen Juliet is left alone, she is struck by the horror of her situation" and "imagines the gruesome, grisly, nightmarish horrors one would expect of a 13-year-old facing her own mortality: being buried alive in the airless tomb and facing Tybalt's corpse"); The Plays of Shakespeare: Titus Andronicus vii (George Brandes, ed. 1904) (noting that in *Titus Andronicus*, "[t]wo of Titus's sons are thrown into prison, falsely accused of the murder of their brother-in-law"; that "Aaron gives Titus to understand that their death is certain unless he ransoms them by cutting off his own right hand and sending it to the Emperor"; that "Titus cuts off his hand, only to be informed by Aaron, with mocking laughter, that his sons are already beheaded"; that "Titus now devotes himself entirely to revenge"; that "he lures Tamora's sons to his house, ties their hands behind their backs, and stabs them like pigs"; that "[i]n the slaughter which now sets in, Tamora, Titus, and the Emperor are killed"; and that "[u]ltimately Aaron, who has tried to save the bastard Tamora has secretly borne him, is condemned to be buried alive up to the waist, and thus to starve to death").

334 Fougasses, *supra* note 331 (unpaginated index). The index for the second volume of *The Generall Historie of the Magnificent State of Venice* also contains multiple entries pointing to cruel acts or persons (i.e., "A dutchesse is cruelly murthered in Padua" (page 486); "*Barbarossa* his cruell spoiles in his return home" (page 326); "Imperialls great cruelty in Rome" (page 174); "*Mustapha* his perfidious cruelty" (page 417); and "More than barbarous crueltie" (page 417)).

The unpaginated index's reference to "A cruell and unusuall punishment" comes in a section of *The Generall Historie of the Magnificent State of Venice* titled "The Eighth Booke of the Second Decad of the Historie of Venice."[335] The passage to which it refers—located in the book's first volume, on page 287—is about a siege of Padua by Francisco Gonzaga and its outcome and aftermath.[336] The history reports that the Venetians, after "they levied new forces," "made Francisco Gonzaga, their associate in this warre, Generall of that new Armie."[337] "*Gonzaga* having spoiled all the Paduan territorie, and taken divers townes, came and besieged Padua," the history reports.[338] With "the Paduans in continuall alarme," and "whilst Padua was thus besieged and defended" by those "bravely" defending "the Citie walles," the history observes, "*Massolerio* the Venetian was suspected secretly to have shot arrowes into the Citie with letters tied to their heads."[339]

The Venetian history notes that Massolerio—found to be providing information to the enemy—was then "imprisoned" and "sent to Venice, where being convicted of the crime he was hanged from the highest place of the Palace with a long rope."[340] "The same day his brother and two young Priests," the history added, "were put alive into the ground betwixt the two Columnes their heads downewards: The which punishment being not as yet usuall, did greatly terrifie all men."[341] The name

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335 *Id.* at 275.

336 *Id.* at 283-84, 286-87; *see also id*. (unpaginated index section of the book, titled "A Table of the principall matters contained in the first volume of the Historie of Venice, compiled for *the more easie finding out thereof by the right course of* Alphabet," that reads (referencing the page number on which appears the information about the Venetian executions): "A cruell and unusuall punishment. 287"). As one source stresses of the siege of "the unfortunate Padua," the sharing of information with enemy forces during the siege, and the execution of the traitors by burying alive that followed:

> Even in this their extremity, they secured an interest in the besieging army, and Venetians were found sufficiently blinded by the love of gain to hold treacherous communication with the falling Princes. By means of billets fastened to the heads of arrows, and shot within the walls, intelligence was daily forwarded to them. The traitors were discovered; two of them were Priests; and as if in imitation, or in refinement upon that death of lingering horror which the Romans inflicted, when called to punish those whom they esteemed the most holy among their Ministers of Religion, these miserable criminals, having been conveyed to Venice, were buried alive, with their heads downwards, between the fatal Columns.

1 Sketches from Venetian History 432 (London: John Murray, 1831).

337 Fougasses, *supra* note 331, at 284.

338 *Id.* at 286.

339 *Id.* at 286-87.

340 *Id.* at 287.

341 *Id.* In the same paragraph of *The Generall Historie of the Magnificent State of Venice*, this morsel of information is also provided: "*Giovanni* of Padua likewise who had great pay in the Venetian Armie, being accused to have had secret conference with the enemie, was sent to Venice, and there hanged betwixt the two Columnes." *Id.* In Venice, those two granite columns—commonly known as the Red Columns—mark the location where, for centuries, public executions took place near the Ducal Palace. Karen-edis Barzman, The Limits of Identity: Early Modern Venice, Dalmatia, and the Representation of Difference 73 (2017) ("It was not unusual to see executions at the south end of the

of Massolerio is also found in Pietro Giustiniani's *Le Historie Venetiane* (1566),[342] Juan de Pineda's *Quarta parte de la monarchia ecclesiastica, o historia universal del mundo* (1606),[343] and Giuseppe Cappelletti's *Storia della Repubblica di Venezia* (1850).[344]

The two massive granite columns, which sit in Venice's Piazzetta, with the Doge's Palace on the left and the Biblioteca Marciana—a public library—on the right as one faces the water, served as a ceremonial entrance to the city but were also used to support a scaffold for executions. "Near the water's edge, serving as a ceremonial 'gateway', are two huge monolithic granite columns brought back to Venice from the ill-fated expedition to Constantinople by Doge Vitale Michiel II and erected here at the end of the 12th century when they were given their Veneto-Byzantine capitals," Alta Macadam writes in the *Blue Guide* to Venice, giving this additional information about the columns: "Incredibly tall, one bears a bronze lion or griffin. Thought to be a Hellenistic work (4th-3rd century BC), it may have come from a tomb in Cilicia or Tarsus and has been adapted to represent a winged lion, the symbol of St. Mark." The nearby St. Mark's Basilica served as the doge's private chapel, with one leading history of Venice stating that the origins of the lion atop one of the two columns are "uncertain—perhaps Persian (fourth century A.D.) or Chinese, with wings added." "The other column," Macadam observes, writing in the present day, "is crowned with a copy of a statue of the first patron saint of Venice, the Greek soldier St. Theodore, accompanied by his dragon (the original statue is in the courtyard of the Doge's Palace)." "Because of the columns' immense

Piazzetta between the two columns that compromised a well-known landmark in the city since the late Middle Ages. Documented at this site by 1283 although surely in place earlier, those monolithic and monumental pillars were long fixed as distinguishing features of the Venetian cityscape."); "The Ducal Palace at Venice," London J. And Weekly Record of Literature, Science, and Art, Apr. 5, 1845 (No. 6, Vol. 1), at 89 ("Near the palace are the two magnificent granite pillars, which still adorn the Piazzetta of Saint Mark, and which are known as the Red Columns. . . . The bodies of countless malefactors were . . . gibbeted under the very windows of the palace of the chief magistrate, or Doge."); Sandra Toffolo, Describing the City, Describing the State: Representations of Venice and the Venetian Terraferma in the Renaissance 110 n.98 (2020) ("The pillars between which people were executed were the ones standing in the Piazzetta."). The two columns in Venice are shown in a new Spanish-language publication on the geography of cruelty—a resource that documents sites of executions. Geografía de la Crueldad: Lugares de Ejecución 1, at 450 (Rosaria de Vicente, Carlos Vizuete & Beatriz García Moreno, eds. 2022). The last execution to take place in Italy was in 1947. Rita J. Simon & Dagny A. Blaskovich, A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies, and Public Attitudes the World Over 21 (2007).

342 Pietro Giustiniani, Le Historie Venetiane del Clarissimo S. Pietro Giustiniano, Nobile Venetiano 128 (1566)

343 Juan de Pineda, Quarta parte de la monarchia ecclesiastica, o historia universal del mundo 91 (Barcelona: 1606) ("compuesta pro fray Juan de Pineda; de la Orden del Bienauenturado San Francisco"); *see also* Juan de Pineda, Quarta parte de la monarchia ecclesiastica, o historia universal del mundo 91 (Barcelona: 1620) (same).

344 Giuseppe Cappelletti, Storia della Repubblica di Venezia 287 (Venezia: 1850) (making note of Massolerio in Volume Quinto in a section of the book about "anno 1405").

height, both statues are seen silhouetted against the sky," Macadam writes, further gushing: "They constitute perhaps the most impressive ornaments to any square in the world."[345]

Given the use of "not as yet usuall" in the sentence of the Venetian history prepared by Fougasses and translated by Shute, it appears to be the condemned being buried alive between the two granite columns (known as the "Red Columns"),[346] their heads pointing downward at the public execution site,[347] to which the "cruell and unusuall punishment" reference in the book's index relates.[348] The large and

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345 Alta Macadam, Blue Guide - Venice 10, 74 (2023); John Julius Norwich, A History of Venice (2005) (caption opposite page 196).

346 The "two magnificent granite Columns" adorning "the *Piazzetta* of St. Mark" are said to be "among the trophies brought by Dominico Michieli on his victorious return from Palestine in 1125; and it is believed that they were plundered from some island in the Archipelago." 1 Sketches from Venetian History 78 (1831); *see also id.* ("It was long before any engineer could be found sufficiently enterprising to attempt to rear them, and they were left neglected on the quay for more than fifty years. In 1180, however, Nicolo Barattiero, a Lombard, undertook the task, and succeeded."). The columns later "made the scene of capital executions; and the bodies of countless malefactors were thus gibbeted under the very windows of the Palace of the chief magistrate." *Id.* at 79; *see also* Karen-edis Barzman, The Limits of Identity: Early Modern Venice, Dalmatia, and the Representation of Difference 73–74 (2017) ("Also legendary was the raising of the two remaining columns, prone for years on the *molo* (the walkway or wharf at the south end of the *Piazzetta*) due to their excessive height and weight. Their hoisting into place required the ingenuity of a leading architect from Lombardy, Nicolò Barattiero (d. 1181), and the machines he invented for the construction of the bell tower at the northwest corner of the *Piazzetta*, where the plaza converges with the Piazza San Marco.").

347 Thomas Okey & Nelly Erichsen, The Story of Venice 65 & n.2, 133–34, 136, 174, 216–17 (1905) (noting that "the 'two red columns'"—"[a]ctually one is of red, the other of grey granite"—"have a gruesome interest" in Venetian history; that "[t]he Council of Ten . . . were charged 'to preserve the liberty and peace of the subjects of the Republic and protect them from the abuses of personal power,'" and that "[t]he Ten dealt with," among other things, "criminal charges against nobles; treachery and conspiracy in the State; espionage; unnatural crimes; secret information likely to be of advantage to the Republic; . . . disobedient State officials; false coiners and debasers of the precious metals used in jewellery"; that the Council of Ten "could inflict pecuniary fines; corporal punishment; banishment, with power to compass his death if the prescribed one were found outside bounds; imprisonment for any period, and for life; the galleys; mutilation; death, secretly or publicly"; that "[t]he death sentence was generally carried out by decapitation or hanging from the columns of the palace or between the red columns in the Piazzetta"; that, for example, "[o]n May 5th, 1432, the unhappy soldier was led with a gag in his mouth to his doom between the red columns" and that "[a]fter three blows his head fell from his shoulders"; that "[f]our years later another enemy of the Republic lost his head between the red columns; the only surviving son of old Carrara had been convicted by the Ten of an attempt to plot an insurrection in Padua"; that "[o]n May 12, 1618, three Frenchmen in Venetian pay were arrested, strangled, and hung head downwards between the red columns").

348 Another historical account says this of the siege of Padua and the punishment of the discovered traitors:

> Although reduced to so great an extremity, and without hope of deliverance, Francesco da Carrara found friends in the Venetian camp, who were

historic red Egyptian granite columns, said to have arrived in Venice in the twelfth century and erected by Nicolo Barattieri (the designer of the first Rialto Bridge), "mark the spot"—one Venice walking tour guide notes—"where criminals were executed, either by hanging, decapitation or being buried alive."[349] Indeed, on page 287 of *The Generall Historie of the Magnificent State of Venice*, a printed marginal notation—in italics—reads "*A cruell and unusuall punishment*" at that location in the book.[350]

One source recounts that those sentenced to die in Venice "were condemned to the most excruciating tortures,"[351] while other sources record that while "[s]traightforward hanging or decapitation were the customary techniques" for public executions, "refinements were available for certain offenders, such as the three traitors who, in 1405, were buried alive," "head down," "between the two granite columns on the Molo, as this stretch of the waterfront is called."[352] The other two marginal notes for that paragraph of the Venetian history prepared by Fougasses and translated by Shute—also printed in italics, and summarizing how Massolerio the Venetian and Giovanni of Padau were executed—read, respectively, "*Massolerio the venetian being accused and convicted of treason is punished*" and "*Giovanni of Padua is punished for having secret conference with the enemie*."[353]

Histories of Venice were popular, with the Fougasses title appearing after the English-language version of Cardinal Gasper Contareno's *The Commonwealth and Government of Venice* (1599), published in London and translated into English from Italian by Sir Lewes Lewknor (a law-trained English courtier and MP who served as Master of the Ceremonies to King James I of England)[354] and before other

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> willing to aid him by conveying intelligence to him at the risk of the sure punishment which would be inflicted should they be discovered. The means they employed to send their communications were somewhat curious. Notes were fastened to the heads of arrows and shot into Padua. These traitors in the Venetian camp were found out; two of them were priests, and their punishment far exceeded their crime. Being sent to Venice, they were buried alive, their heads downwards, between the Red Columns.

68 Bentley's Miscellany 351 (London: Richard Bentley, 1860).

349 John Costella, The Four Seasons of Venice: 12 Historical Walking Tours 161 (2008); *see also* E. Cobham Brewer, The Historic Note-Book: With an Appendix of Battles 742 (1891) (noting in an entry for the "Red Columns of Venice" that "[t]he space between" the two columns "was the site of executions").

350 Fougasses, *supra* note 331, at 287 (italics in original).

351 27 The Modern Part of an Universal History, from the Earliest Account of Time Compiled from Original Writers 120 (London, 1761) (noting that "*Massolerio* having been detected tying a letter to the head of an arrow," "[s]ome others were arrested on suspicion of holding a correspondence, and sent to *Venice* to be tried, where they were condemned to the most excruciating tortures").

352 Jonathan Buckley & Charles Hebbert, The Rough Guide to Venice and the Veneto 64 (2013); *see also id.* (noting that "[t]he last person to be executed" between the two granite columns was "one Domenico Storti, condemned to death in 1752 for the murder of his brother").

353 Fougasses, *supra* note 331, at 287.

354 Edward Chaney & Timothy Wilks, The Jacobean Grand Tour: Early Stuart Travellers in Europe 35 (2014) ("Lewes Lewknor, prior to being appointed Master of Ceremonies, established his credentials as an authority on foreign states with the

Venetian histories such as James Howell's *Survey of the Signorie of Venice* (1651) and Amelot de La Houssaye's *History of the Government of Venice* (1677).[355] Readers of Venetian histories learn that, in the popular tourist destination, a variety of public and privately imposed punishments were once put to use.[356] On July 24,

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publication in 1599 of his translation of Cardinal Contarini's *Della republica, et magistrate di Venetia*."); John Casson & William D. Rubinstein, Sir Henry Neville Was Shakespeare: The Evidence (2016) (noting in a section on *Othello*: "Another source of *Othello* is Lewes Lewkenor's book *The Commonwealth and Government of Venice*, published in 1599."); 3 John Venn & J. A. Venn, comp., Alumni Cantabridgienses: A Biographical List of All Known Students, Graduates and Holders of Office at the University of Cambridge, from the Earliest Times to 1900, at 82 (1924) (in an entry for Sir Lewis Lewknor, noting these aspects of his biography: "M.A. of Cambridge"; "Student of the Middle Temple, 1579"; "M.P. for Midhurst, 1597–8" and "for Bridgnorth, 1604–11"; "Knighted, Apr. 22, 1603"; "Master of the Ceremonies to James I"; and "Died 1616"); *see also* Marco Nievergelt, Allegorical Quests: From Deguileville to Spenser 142-43 (2012):

> The son of the politician Thomas Lewknor (c. 1538–96), Lewes Lewknor (c. 1560–1627) entered the Middle Temple in 1579. The following year, however, he found himself forced to leave the country due to his Catholicism, and sought refuge in the Netherlands. He then earned a captaincy in Spanish service, but his military career appears to have been cut short by a serious arm injury. Severe financial problems ensued, due to the loss of his pension and litigation over his wife's dowry. These difficulties eventually forced Lewkenor to return to England, seeking a safe conduct through his relative Sir Robert Sidney in 1590. On returning to England he reported to Burghley on the English in Spanish service, and is generally accepted as the author of *A Discourse of the Usage of the English Fugitives, by the Spaniard* (pr. 1595, repr. 1596 – STC 15562–3, reprinted and expanded as The Estate of English Fugitiues vnder the King of Spaine and his Ministers, 1595, 1596 – STC 15564–5). Lewkenor's career seems to have finally taken off towards the end of the decade, as he was made a Gentleman pensioner in 1599, and become involved in supervising the reception of foreign diplomats and ambassadors. With the accession of James I in 1603 Lewkenor's efforts were finally rewarded. He was knighted in the same year and soon appointed Master of Ceremonies, thus continuing to supervise arrangements for the reception of foreign dignitaries until his death in 1627.

355 The Enduring Legacy of Venetian Renaissance Art 1 (Andaleeb Badiee Banta, ed. 2016); J. D. Mullins, Birmingham Free Libraries: Catalogue of the Reference Library, 1890, at 1205 (1890); 12 H. T. Folkard, Corporation of Wigan: Free Public Library – Catalogue of Books 4629 (1916); *see also* Thomas Coryate, Coryats Crudities: Selections 19-20 & n.1 (2017) ("Cardinal Cantarene's *Commonwealth of Venice*," "so elegantly translated in English," is "an English translation of an Italian version translated from his Latin original").

356 Edward Muir, Civic Ritual in Renaissance Venice 245–46 (1981) (noting that some people "condemned by the Inquisition" were "quietly drowned in the dead of night"; that "[o]ther miscreants became public examples, and an essential part of their punishment was a public humiliation, mutilation, or execution"; that "[l]east stringent was a public humiliation, sometimes seen as sufficient punishment in and of itself and sometimes enforced as a prelude to banishment"; that, "[t]ypically, a malefactor would be obliged to wear a crown painted with devils and to stand all day on a stage erected between the two Columns of Justice in the Piazzetta next to the Ducal Palace"; that "[t]he government reserved mutilation, sometimes followed by execution, for lower-class persons who in the eyes of society had committed the foulest crimes, who earned

1405, one history notes, three priests—after being tortured and found guilty of conspiring against the Venetian patriciate—were buried alive in three graves dug between the two imposing columns that stand in Venice's St. Mark's Square.[357]

The Republic of Venice—long known as *La Serenissima* (the Most Serene Republic)—has, in spite of its tranquil-sounding sobriquet, witnessed many executions and acts of violence and torture, with a variety of people—from its one-time leader, Marino Falier, to an array of conspirators and common criminals—executed in a variety of ways. While Falier, Venice's head of state, or *doge*, was beheaded for conspiring to overthrow the republic, his conspirator, a man named Calendaria, was strangled to death, "strung up"—as one modern history, *Venice Observed* (1963), puts it—"between the two red columns on the Doge's Palace loggia, on the side facing the Piazzetta." "In the upper balcony (*loggia*) between the two red columns (9th and 10th from left-corner)," one travel guide reports, "the Political Prisoners were put to death: here Calendaro and Bertuccio Israello, the leaders in Mario Faliero's conspiracy, were hanged, gagged, that they might not appeal to the populace, April 16, 1355, and many of the minor conspirators day by day following."[358] "From between the two columns of red marble, the ninth and tenth from the upper portal of 'La Loggia,'" another travelogue emphasizes, "the Republic anciently proclaimed its sentences of death, and there published them to the world."[359]

Those two marble columns on the Doge's Palace, Mary McCarthy's history, *Venice Observed*, stresses, "are supposed to have turned red from the blood that ran down them." The two red columns on the upper loggia or colonnade of the Doge's Place—columns that overlook the Piazzetta San Marco—were used by Venetian authorities not only as the place to read out death sentences[360] but to hang criminals, with gags sometimes placed in their mouths to prevent them from speaking.[361] "It

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their living with their hands, and who had no property worth confiscating"; that "[m]utilation and execution were carried out with great public solemnity and were ritualized through a judicial procession"; that "[t]he condemned was first transported to the scene of the crime, where the offending member, usually a hand, was cut off, or an eye gouged out"; that "[t]he severed hand was often hung around the criminal's neck to be displayed while he or she was transported to the Columns of Justice for execution"; that "[a]ll during the procession and at each stopping point a herald proclaimed the condemned person's crime"; and that "[a] penalty for crimes of violence, mutilation was also commonly meted out to those who had committed even relatively minor crimes against the state: in 1514 the Council of Ten ordered that in public view on a stage in the Piazzetta an eye be gouged out and a hand cut off of a collector of the wine tax who had made false seals, and in 1518 the Ten proclaimed that a counterfeiter, who had already lost an eye for his offense, must lose a hand after he had been caught in violation of his banishment").

357 Venice Secrets: Crime & Justice Exhibition 72 (Davide Busato, ed. 2018).

358 Practical General Continental Guide: France, Belgium, Holland, The Rhine, The Rhenish Spas, Parts of Germany, Austria, The Tyrol, and Venice, Switzerland, Savoy, Piedmont, Italy 208 (1866).

359 Edward L. Wilson, Lantern Journeys: A Series of Descriptions of Journeys at Home and Abroad 82 (5th ed. 1878).

360 Junius Browne, Sights and Sensations in Europe 498 (2023); John Murray, Handbook for Travellers in Northern Italy: Comprising Piedmont, Liguria, Lombardy, Venetia, Parma, Modena, and Romagna 375 (2022) (1866).

361 Horatio Brown, Studies in Venetian History 97 (1907); Europe for Dummies 473

was between these columns," one history notes, "that the state executed many of its political prisoners, in full view of the crowds which assembled on the Piazzetta; and, in many instances, gags were placed in their mouths, in order that their dying voices might not stimulate the vengeance of those angry citizens in whose cause they mostly died."[362] "There are," McCarthy notes, actually "*two* sets of 'fatal pillars,' the big granite ones on the Molo and the smaller, red ones of the Doge's Palace loggia." Both the smaller marble columns on the Doge's Palace and the two massive granite columns in the Piazzetta within view of those marble columns "were used for public executions and for the display of corpses," so that—as McCarthy emphasizes—"it is hard to tell, in any given account, which ones are meant."[363]

Naturally, whether a method of execution or a site of execution is usual or unusual depends upon the frequency of its use.[364] *Venice in the Thirteenth and Fourteenth Centuries* (1910) described the execution of Marin Bocconio and his conspirators for treason in 1300, giving this illustrative account: "The plot was betrayed to the doge, who had Bocconio and ten others arrested and 'hung between the two marble columns which are near the great gate of the doge's place,' the usual place of public executions." A footnote to that text clarifies: "The two columns are, of course, those of the Piazzetta."[365] "The practice of burying people alive was rare and almost unknown in Venice," David Busato writes in *Venice Secrets* (2018), with that compilation—published in both English and Italian—taking note not only of the three priests put to death in that manner in 1405 but of a monk buried alive on

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(6th ed. 2011); *see also* Alethea Wiel, Venice 214–15 (1894) ("Sentence was quickly passed on all the conspirators; some were exiled, some were hanged in couples from the arches of the outer gallery of the ducal palace, beginning with that arch supported by two red columns . . . ."); *id.* at 215 n.1 ("These two columns of red marble in the loggia looking on to the Piazzetta, and facing the royal palace, mark the spot from where the Doge assisted at any public festival. In later times all criminal sentences passed by the Austrians were proclaimed from that spot."); *see also* Practical General Continental Guide, *supra* note 358, at 208 (noting of the Doge's Palace: "In the upper balcony (*loggia*) between the two red columns (9th and 10th from left-corner) the Political Prisoners were put to death: here Calendaro and Bertuccio Israello, the leaders in Marino Faliero's conspiracy, were hanged, gagged, that they might not appeal to the populace, April 16, 1355, and many of the minor conspirators day by day following.").

362 Charles Henry Jones, Recollections of Venice 25 (1862).

363 Mary McCarthy, Venice Observed 42–43 (1963).

364 Thompson v. Oklahoma, 487 U.S. 815, 823 (1988) ("whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance"); *Harmelin*, 501 U.S. at 976 ("the word 'unusual"' means "[s]uch as is [not] in common use"); *Furman*, 408 U.S. at 309 (Stewart, J., concurring) ("these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare"); *see also* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1231 n.216 (2020) ("Older cases have explained that 'cruel' refers to the form of punishment and 'unusual' refers to its frequency."). The term "unusual" has been described as a "common synonym" of "uncommon." Miller v. Alabama, 567 U.S. 460, 501 (2012) (Roberts, C.J., dissenting).

365 F. C. Hodgson, Venice in the Thirteenth and Fourteenth Centuries: A Sketch of Venetian History from the Conquest of Constantinople to the Accession of Michele Steno. A.D. 1204–1400, at 200 & n.2 (1910).

April 3, 1561, and another priest buried alive on June 14, 1561.[366]

B. Methods of Execution as Cruel and Unusual Punishments

Many corporal punishments and methods of executions from ancient, medieval, Renaissance, or Enlightenment times would now be categorized as unusual, but in prior centuries, some societies used bizarre punishments or particular modes of execution that were not used at all in other locales or that were considered barbarous, strange, unjust or unusual by other societies. In parts of Europe, burying alive was variously reported to be "a common form" or "not unknown form" of capital punishment in prior centuries,[367] at least for certain categories of offenders,[368] though in certain locales, including Venice, that practice was rarely used in comparison to other methods.[369] "[B]urying alive as a specific method of

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366 Venice Secrets, *supra* note 357, at 72.

367 Charles H. Haskins, *Robert le Bougre and the Beginnings of the Inquisition in Northern France*, 7 Am. Hist. Rev. 631, 648 n.3 (1902) ("Tanon has shown that burying alive was not an unknown form of punishment in the thirteenth century"); The Gentleman's Magazine (Sylvanus Urban, ed. 1891), Vol. 270, pp. 366-67:

> Burying alive has always been a common form of the capital penalty among savage races, some of whom inflict it for no more grave offence than the involuntary one of growing old. Among the Romans it was applied to Vestals who had violated their vows of chastity. In France it was reserved principally for women, who frequently suffered for quite trivial offences. Thus, in 1302, by order of the Bailli of Sainte-Geneviève, a woman was buried alive for some petty thefts. A French historian relates that Philip Augustus put to death after this manner a provost of Paris who had committed perjury respecting a transaction in vineyards. In the thirteenth century, in the district of the Bigorre, it was customary to inter the murderer with the corpse of his victim.

368 Bret Boyce, *Sexuality and Gender Identity under the Constitution of India*, 18 J. Gender Race & Just. 1, 14 (2015) ("[M]edieval English law mandated that 'sodomites' should be tortured to death, but the authorities differed as to whether they should be burned to death, like '[t]hose who have connections with Jews,' as *Fleta* (ca. 1290) prescribed, or buried alive, like 'sorcerers' and 'heretics,' as *Britton* (early fourteenth century) demanded."); Ex parte De Ford, 168 P. 58, 59 (Okla. Crim. Ct. App. 1917) ("Hawkins tells us that 'all unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the ancient common law, and punished, according to some authors, with burning, according to others with burying alive.'") (citing 1 Hawk. P. C. 357); Arthur W. Campell, Law of Sentencing § 1:1 (Oct. 2023 Update) ("English petty thieves had their ears severed; blasphemers, their tongues excised. Illegally returning exiles had their eyes gouged out. The sentencing option for women who murdered their husbands was being either buried alive or tortured with red hot tongs and then hanged.").

369 Venice Secrets, *supra* note 357, at 72 ("The practice of burying people alive was rare and almost unknown in Venice. In other States, in particular that of the Church, the punishment was used mainly for heretics . . . ."); "Venice Secrets – Crime & Justice – Instruments of Death and Torture at Palazzo Zaguri," Venetian Cat – The Venice Blog, Mar. 31, 2018, https://venetiancat.blogspot.com/2018/03/venice-secrets-crime-justice.html ("The Venetian Republic wrote things down, and stored them in the State Archive. Today, the Archivio di Stato still exists. It is one of the largest in Italy, and preserves more than 1000 years of Venetian history covering about 80km (50 miles) of shelves. It

execution seems to have been but infrequently practised," George Ryley Scott writes in *The History of Torture Throughout the Ages* (2009), giving his own take on the practice, noting that burying alive was employed in France and that "in 1460, a woman named Perette, accused of theft, was condemned by the Provost of Paris to be 'buried alive before the gallows.'"[370]

England—along with a host of other obscenely cruel punishments—also made use of the practice in Tudor and ancient times.[371] "In the time of Bracton," George Crabb writes in *A History of English Law* (1831), "we read of various corporal punishments, as beheading and hanging, for the men, and drowning, for the women, denoted by the words *furca et fossa*; besides burning, burying alive, mutilations, imprisonment, punishment, abjuration of the realm, pillory, &c." "To these were added degradation, forfeitures, fines, and amercements," Crabb observes, adding: "Bracton also speaks of torture; but this does not appear to have been favored by the common law, although admitted by the civil law."[372] Dictionaries define *vivisepulture* as "[t]he burial of a person alive"[373] or "[b]urial of one who is alive,"[374] with other words—*defossion* and *taphephobia*—also used to describe, respectively, "[e]xecution by being buried alive" or "burial alive" and the fear of being buried alive.[375]

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is enormous, and located inside the former convent of Santa Maria dei Frari."); *id.* ("The total number of recorded executions carried out by the Venetian Republic from 810 to September 1791, and then by subsequent governments until 1804—nearly a thousand years—came to 691.").

370 George Ryley Scott, The History of Torture Throughout the Ages (2009), ch. XXII.

371 *See* Dirk Selland, *Will Maryland Enter the Twenty-First Century in the Right Direction by Rescinding Its Ancient Sodomy Statutes?*, 8 Law & Sexuality 671, 673 (1998) ("Henry VIII made sodomy a crime in England, punishable by 'burning at the stake, hanging, drowning, or being buried alive.'"); Gregory L. Ryan, Comment, *Distinguishing* Fong Yue Ting: *Why the Inclusion of Perjury as an Aggravated Felony Subjecting Legal Aliens to Deportation under the Antiterrorism and Effective Death Penalty Act Violates the Eighth Amendment*, 28 St. Mary's L.J. 989, 1021 n.125 (1997) (discussing instances of burying criminals alive in England, citing various sources to that effect, and emphasizing England "used this method of capital punishment during early times"); *see also id.* at 1020-23:

> Long before the Framers crafted the Eighth Amendment, there was little restraint on a government's ability to punish its citizens. In particular, early foreign governments employed a variety of punishments ranging from those intended to induce death to those that caused great pain and suffering. Popular forms of punishment included drowning, burying alive, hanging, drawing and quartering, mutilation, flaying, the wheel, the rack, scourging, blinding, cutting off the ears, plucking of the hair and multiple sentencing. Early commentators warned of the dangers of governmental imposition of such cruel and severe punishments.

372 George Crabb, A History of English Law; or an Attempt to Trace the Rise, Progress, and Successive Changes, of the Common Law; From the Earliest Period to the Present Time 313 (1st Am. ed. 1831); *see also id.* at 313 n.‡ (listing "Gallows and pit" as the meaning of *furca et fossa*).

373 10 The Century Dictionary: An Encyclopedic Lexicon of the English Language 6777 (William Dwight Whitney & Benjamin E. Smith, eds., rev. & enlarged 1914).

374 Death Dictionary: Over 5,500 Clinical, Legal, Literary and Vernacular Terms 160 (Christine Quigley, comp. & ed. 1994).

375 *Id.* at 53; David Grambs, The Endangered English Dictionary: Bodacious Words Your Dictionary Forgot 179 (1994).

Various locales have utilized various methods of executions—and varying sites for executions—over the centuries. "[F]or public executions," a Venetian history notes of the two large columns—popularly known as the Columns of San Marco and San Teodoro, and collectively as the "Red Columns"[376]—that still stand along the bustling waterway in Venice, "the usual site was the pavement between the two granite columns on the Molo, as this stretch of the waterfront is called." As that source explains of the place so many tourists now gather before touring the Doge's Palace or boarding gondolas or water taxis: "Straightforward hanging or decapitation were the customary techniques, but refinements were available for certain offenders, such as the three traitors who, in 1405, were buried alive here, head down."[377] "The Piazetta in front of the Piazza was the site for the city's public executions," another modern source states, adding of that much-visited locale: "Between the two columns the executioner hanged wrong-doers, or cut their heads off. Bored with the humdrum slaughter, he buried three traitors alive here in 1405, leaving only their legs visible."[378]

Live burials as punishments appear in various historical accounts. Jon Bondeson's *Buried Alive: The Terrifying History of Our Most Primal Fear* (2022) documents how live burials—never, admittedly, the most frequent method of execution in bygone centuries—were nevertheless once used as a particularly cruel and horrific method of execution.[379] "[I]n medieval Italy," another commentator explains, commenting on Bondeson's study of the practice, "murderers who refused to repent were buried alive, a practice referred to in Dante's *Inferno*."[380] This mode of capital punishment was, in prior centuries, just one of many horrific ways in which people were put to death. "Some of the ancient methods of execution," one source recalls, "include being burned, hanged, stoned, boiled in oil, beheaded, disemboweled, buried alive, thrown to wild beasts, crucified, drowned, crushed, impaled, shot, flayed alive, and torn apart."[381] The common denominator of all those methods: the death of the offender.

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376 1 W. Carew Hazlitt, The Venetian Republic: Its Rise, Its Growth, and Its Fall, A.D. 409–1797, at 73, 235, 409, 504, 640, 683, 708, 755, 783, 819, 901, 906 (1915) (discussing executions carried out between the Red Columns by beheading, hanging, and hanging and quartering after being dragged at horses' tails through the streets, and further observing that one man "was sentenced to lose his right hand" before being "hanged between the Red Columns" and that another man's body was left hanging there for three days "as a warning to traitors").

377 Jonathan Buckley, The Rough Guide to Venice and the Veneto 64 (2013).

378 Richard Platt, Stephen Biesty's More Incredible Cross-Sections 25 (2019); *see also* 1 Edward Smedley, Sketches from Venetian History 432 (1831) ("The traitors were discovered; two of them were Priests; and as if in imitation, or in refinement upon that death of lingering horror which the Romans inflicted, when called to punish those whom they esteemed the most holy among their Ministers of Religion, these miserable criminals, having been conveyed to Venice, were buried alive, with their heads downwards, between the fatal Columns.").

379 John Bondeson, Buried Alive: The Terrifying History of Our Most Primal Fear (2002).

380 John Henley, "What Is It Like to Be Buried Alive?", The Guardian, Dec. 7, 2011, https://www.theguardian.com/science/shortcuts/2011/dec/07/leeds-crown-court-buried-alive.

381 Cliff Roberson & Scott Mire, Ethics for Criminal Justice Professionals 233 (2009).

Although the U.S. Supreme Court has never cited *The Generall Historie of the Magnificent State of Venice* (1612), it has previously interpreted the U.S. Constitution's Eighth Amendment (at least in dicta) to bar certain methods of execution.[382] For instance, the Supreme Court, in discussing the "cruel and unusual punishments" prohibition, wrote that "if the punishment prescribed for an offense . . . were manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."[383] The Supreme Court has made such pronouncements even as the Court has approved the death penalty's use (at least in some contexts) and various other methods of execution, including death by electrocution, firing squad, and lethal injection.[384]

Citing precedents and a work of American history, Justice Neil Gorsuch's opinion for the Court in *Bucklew v. Precythe* (2019), specifically upheld the constitutionality of Missouri's lethal injection protocol, finding the death penalty's imposition to be constitutional. As the Court held in that case: "The Constitution allows capital punishment. In fact, death was 'the standard penalty for all serious crimes' at the time of the founding." "Nor did the later addition of the Eighth Amendment outlaw the practice," Justice Gorsuch's opinion continued, concluding: "On the contrary—the Fifth Amendment, added to the Constitution at the same time as the Eighth, expressly contemplates that a defendant may be tried for a 'capital' crime and 'deprived of life' as a penalty, so long as proper procedures are followed."

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382 *See, e.g.,* Gomez v. United States District Court for the Northern District of California, 503 U.S. 653, 658 n.10 (1992) (Stevens, J., dissenting) (noting that in *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1789), "we ruled that punishments of 'unnecessary cruelty' violated the Eighth Amendment, citing the ancient practices of drawing and quartering and 'public dissection' as examples"; that *in In re Kemmer*, 136 U.S. 436, 446 (1890), "we indicated that 'burning at the stake, crucifixion, [and] breaking on the wheel' were as well cruel and unusual"; and that "[t]o that list we might have added the garrote, a device for execution by strangulation developed and abandoned centuries ago in Spain"); Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51 Fla. St. U. L. Rev. 255, 263 (2024):

> [M]ost commentators believe that the drafters of the Virginia Bill of Rights—from which the Eighth Amendment derived—misunderstood this English history and instead understood the prohibition on cruel and unusual punishments to ban barbarous methods of punishments. The commentators apparently reached this conclusion from the scant drafting and ratification history surrounding the Eighth Amendment, as well as from writings at the time condemning torturous punishment methods.

383 In re Kemmler, 136 U.S. 436, 446 (1890); *see also* Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) ("The historic punishments that were cruel and unusual including 'burning at the stake, crucifixion, breaking on the wheel', quartering, the rack and thumbscrew, and in some cases even solitary confinement.") (citations omitted); Atkins v. Virginia, 356 U.S. 304, 349 (2002) (Scalia, J., dissenting) ("The Eighth Amendment is addressed to always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew.").

384 Bucklew v. Precythe, 587 U.S. 119 (2019) (rejecting challenge to use of injected chemicals to execute a condemned prisoner); Glossip v. Gross, 576 U.S. 863 (2015) (same); Baze v. Rees, 553 U.S. 35 (2008) (same); In re Kemmler, 136 U.S. 436 (1890) (upholding execution by electric chair); Wilkerson v. Utah, 99 U.S. 130 (1879) upholding constitutionality of firing squad).

"And the First Congress, which proposed both Amendments," Gorsuch added, "made a number of crimes punishable by death." "While the Eighth Amendment doesn't forbid capital punishment," Gorsuch wrote, "it does speak to how States may carry out that punishment, prohibiting methods that are 'cruel and unusual.'" "What does this term mean?" Justice Gorsuch asked before turning his attention to the eighteenth century—as an originalist, his happy place—when that phraseology, chosen for the Eighth Amendment, was lifted from the English Bill of Rights and the Virginia Declaration of Rights.[385]

In examining eighteenth-century sources in an attempt to divine what America's founders meant or understood in the Eighth Amendment by "cruel and unusual punishments," Justice Gorsuch compared English laws with then-existing American practices. "At the time of the framing," Gorsuch, quoting Sir William Blackstone's *Commentaries on the Laws of England* (1769), wrote of the period before the U.S. Constitution and its Bill of Rights came into force, "English law still formally tolerated certain punishments even though they had largely fallen into disuse—punishments in which 'terror, pain, or disgrace [were] superadded' to the penalty of death."[386] "These," Gorsuch stressed, "included such '[d]isgusting' practices as dragging the prisoner to the place of execution, disemboweling, quartering, public dissection, and burning alive, all of which Blackstone observed "savor[ed] of torture or cruelty.'"[387] "Methods of execution like these," Gorsuch opined, "readily qualified as 'cruel and unusual,' as a reader at the time of the Eighth Amendment's adoption would have understood those words."[388]

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385 *Bucklew*, 587 U.S. at 129–30 (citations omitted).

386 *Id.* at 130 (quoting 4 William Blackstone, Commentaries on the Laws of England 370 (1769)).

387 *Id.*

388 *Id.* "The interpretative trajectory of nineteenth-century American courts toward condemning vicious methods as 'cruel and unusual,'" one scholar, Laurence Claus, has written, "seems to have been guided by two developments." Claus, *Methodology, Proportionality, Equality, supra* note 162, at 41. As Claus explains:

> First, nineteenth-century American legislatures used, in a range of statutes regulating punishment, the phrase "cruel and unusual" divorced from its historic linkage to excessiveness in bail and fines. Second, the era was one of strengthening societal consensus against methods of punishment that inflicted acute physical suffering. Influenced by cases in which they had interpreted the phrase "cruel and unusual punishments" without having to account for its relation to prohibitions of excessiveness in bail and fines, courts naturally rode the zeitgeist of penological reform and held the phrase to condemn vicious methods of punishment. Such methods had mostly fallen into disuse and were contemporaneously being repealed from the statute books if they had not been already, so could plausibly be called unusual. Leading nineteenth-century cases that accorded the phrase a "vicious methods" connotation did so in the course of explaining why the prohibition had not been violated—that is, in the course of dismissing what were essentially discrimination or disproportionality claims. The prohibition of "cruel and unusual punishments" that restricts state governments through the Fourteenth Amendment might for this reason be held to prohibit both invidious discrimination *and* vicious methods. But proportionality analysis did not achieve prominence as a way to apply the Eighth Amendment's words until the end of the nineteenth century.

Citing the definitions of *cruel* from Samuel Johnson's and Nathaniel Webster's popular dictionaries, Justice Gorsuch then wrote of the methods of execution he identified: "They were undoubtedly 'cruel,' a term often defined to mean '[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting,' or '[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness."[389] "And by the time of the founding," Gorsuch continued, "these methods had long fallen out of use and so had become 'unusual.'"[390] "Contemporary evidence confirms that the people who ratified the Eighth Amendment would have understood it in just this way," Gorsuch wrote, adding of one prominent American revolutionary and early legal commentators: "Patrick Henry, for one, warned that unless the Constitution was amended to prohibit 'cruel and unusual punishments,' Congress would be free to inflict 'tortures' and 'barbarous' punishments. Many early commentators likewise described the Eighth Amendment as ruling out 'the use of the rack or the stake, or any of those horrid modes of torture devised by human ingenuity for the gratification of fiendish passion.'"[391]

Notably, the concept of torture is now understood much differently than in the eighteenth century[392] and the hortatory prohibition of "cruel and unusual punishments" in the English Bill of Rights did not, in and of itself, quell the use of barbarous methods of execution—as least in law. "As William Blackstone made clear to lawyers in the American Founding era," one Eighth Amendment scholar, Laurence Claus, observes, "the English Bill of Rights did not condemn *methods* of punishment—not even the grotesque practice of drawing and quartering traitors."[393] Sir Edward Coke had defended hanging, drawing, and quartering as "godly butchery,"[394] and that grotesque punishment[395] and others, including burning female felons to death, horrifically continued even after the adoption of the English

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389 *Bucklew*, 587 U.S. at 130 (quoting 1 Samuel Johnson, A Dictionary of the English Language (4th ed. 1773); 1 Noah Webster, An American Dictionary of the English Language (1828)).

390 *Id.*

391 *Id.* at 130-31 (citations omitted). "Consistent with the Constitution's original understanding," Justice Gorsuch wrote for the Court in *Bucklew*, "this Court in *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879), permitted an execution by firing squad while observing that the Eighth Amendment forbade the gruesome methods of execution described by Blackstone 'and all others in the same line of unnecessary cruelty.'" *Id.* at 131 (quoting *Wilkerson*, 99 U.S. at 135–36). In his opinion for the Court in *Bucklew*, Justice Gorsuch cited the work of Professor John Stinneford for the proposition that "Americans in the late 18th and early 19th centuries described as 'unusual' governmental actions that had 'fall[en] completely out of usage for a long period of time'." *Id.* at 130-31 (citing Stinneford, *The Original Meaning of "Unusual," supra* note 16, at 1770–71, 1814).

392 Bessler, The Death Penalty's Denial of Fundamental Human Rights, *supra* note 47.

393 Claus, *Methodology, Proportionality, Equality, supra* note 162, at 40 (italics in original).

394 Arthur Koestler, Reflections on Hanging 30-31, 38 (1957) (quoting Coke's defense of the practice and mentioning Blackstone's defense of barbaric punishments).

395 Gorman, *supra* note 37, at 465 n.205 ("The Stuarts were infamous for their punishment of criminals. During their reign, the punishment for treason involved dragging the condemned individual to the gallows, hanging him by the neck, cutting him down while still alive, beheading him, and finally drawing and quartering.").

Bill of Rights.[396] In that respect, some American courts got the relevant English history at least partially wrong, as England's Parliament—in making use of the "cruel and unusual punishments" language—did not intend (at least in 1689) to abolish extreme methods of execution,[397] although certain seventeenth-century English practices had certainly fallen out of favor in America before the Eighth Amendment's ratification.[398]

Judges are not Ph.D.-trained legal historians, so it is not entirely surprising that errors get made by American judges in recounting the history. "The language in its English origins," Professor Claus explains, "did not concern vicious methods at all;

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[396] Roderick Oxford, *Eighth Amendment ETS Claims: A Matter of Human Dignity*, 18 Okla. City U.L. Rev. 505, 509-10 (1993):

> Noting the connection between the Virginia Declaration of Rights and English Bill of Rights, legal historians have attempted to determine the type of punishments which the English Parliament attempted to prohibit and to derive the intentions of the American drafters from those of their forefathers. Most historians point to the treason trials of 1685, known as the "Bloody Assize," which followed the rebellion against King James II and the subsequent capture and execution of the Duke of Monmouth. At the time of the Bloody Assize, the penalty for treason included "drawing the condemned man by cart to the gallows, where he was hanged by the neck, cut down while still alive, disemboweled with his bowels burnt before him, then beheaded and quartered." Despite the passage of the English Bill of Rights in 1689, female felons were burned to death until the penalty was repealed in 1790; drawing and quartering continued until prohibited by statute in 1814; and beheading and quartering was allowed until 1870.

[397] *E.g.*, Adams v. State, 271 N.E.2d 425, 430 (Ind. 1971), *opinion superseded by* Adams v. State, 284 N.E.2d 757 (Ind. 1972):

> The English Parliament and the framers of our Constitution in this country used the language cruel and unusual punishment as a description of some of the punishment inflicted in the days of the early development of our law, such as burning at the stake, crucifixion, breaking on the wheel, draw and quartering, disembowelment alive, torture on the rack and other types of barbaric treatment. This language had a definite meaning and purpose when placed in the Constitution and in our opinion it does not eliminate the death penalty when the legislative body still sees fit to fix the same as a penalty in certain heinous crimes.

[398] Owens v. Stirling, 904 S.E.2d 580, 638 (S.C. 2024) (Kittredge, J., concurring in part) ("[A]lthough employed in the colonial era, brutal punishments historically used in England such as burning at the stake, drawing and quartering, and disembowelment fell out of use in the colonies by the middle of the eighteenth century . . . ."). Only over time did jurisdictions abandon corporal punishments. *See, e.g.*, Lawrence M. Friedman, Crime and Punishment in American History 38, 40 (1993) (discussing branding and shaming punishments used in colonial America); Peter C. Holloran, Historical Dictionary of New England 496 (2d ed. 2017) ("Boston last used the pillory in 1803."); Wayne A. Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103, 1106 (2013) ("Social stigma has long been recognized as a defining consequence of criminal conviction. While in the past opprobrium associated with criminal status visibly manifested in physical branding and mutilation, over time, societies, including early America, adopted a more forgiving outlook.").

the notorious punishments that Parliament called cruel and unusual were targeted, novel combinations of wholly accepted methods."[399] "Some of the participants in Bonnie Prince Charlie's eighteenth-century uprising were later drawn and quartered," Claus writes,[400] stressing—with citations to nineteenth-century English statutes—that "[f]ormal elimination of these official methods of punishment in Britain had to await the nineteenth century."[401] Of course, lawyers and judges are trained to interpret words and phrases—and *cruel* and *unusual* are everyday words that, like the concepts of cruelty and unusualness, have commonly understood meanings.[402]

IV. *Abuses Stript*, and *Whipt* and *Juvenilia*: The Popular Satire and Poetry of George Wither, an English Courtier

A. George Wither's Abuses Stript, and Whipt and Juvenilia

The cruel and unusual punishments concept also appeared in the 1610s in lines of satirical verse written by George Wither, then a young English courtier, satirist, and poet.[403] His book of satire—for which he was imprisoned for a time

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399 Claus, *Methodology, Proportionality, Equality, supra* note 162, at 40.

400 *Id.* at 40 n.22.

401 *Id.* (citing 54 Geo. 3, c. 146 (1814) (Eng.) (repealing drawing for traitors and providing that quartering could occur only after hanging or beheading had caused death); 33 & 34 Vict., c. 23, § 31 (1870) (Eng.) (repealing quartering and beheading for traitors)).

402 *E.g.*, DeBerry v. Board of Education, No. 1-23-2212, 2024 IL App (1st) 232212-U, *9 (Ill. App. Ct., 1st Dist. Aug. 27, 2024) ("'Cruelty' is commonly understood to mean 'the intentional infliction of mental or physical suffering on a living creature, especially a human.'") (citing Black's Law Dictionary (12th ed. 2024)); Bowers v. State, 389 A.2d 341, 347-48 (Md. Ct. App. 1978) (noting that *Webster's Third New International Dictionary* defines *cruel* as "disposed to inflict pain (especially) in a wanton, insensate, or vindictive manner: pleased by hurting others: sadistic', and that "the standard 'cruel or inhumane' has a settled and commonly understood meaning"); *see also* Henry F. Tepker, *Tradition & the Abolition of Capital Punishment for Juvenile Crime*, 59 Okla. L. Rev. 809, 814–15 (2006) ("The word 'cruel' connotes not 'extreme' punishments, but 'harsh,' 'inhumane' methods of criminal sanction that offend an unspecified moral sense. The word 'unusual' seems to refer to punishments that are 'rare,' 'freakishly rare,' 'unheard of,' or at least not common or ordinary. The words negate any idea that the framers intended a fixed meaning: what is 'unusual' refers to infrequency at a point in time—and times change.").

403 7 The Cambridge History of English Literature 432–33 (A. W. Ward & A. R. Waller, eds. 1911) ("To the reign of James I belong Wither's *Abuses Stript and Whipt* (1613) . . . ."). Wither's *Abuses Stript, and Whipt* would not be forgotten. For example, the American novelist Mary Johnston (1870–1936)—of Virginia—mentioned *Abuses Stript, and Whipt* in one of her books about colonial Virginia. Mary Johnston, Prisoners of Hope: A Tale of Colonial Virginia 196 (1899). Not everyone, however, was a fan of *Abuses Stript and Whipt*. Pope: Selected Poems; The Essay on Criticism; The Moral Essays; The Dunciad 177 (Thomas Arnold, ed., 4th ed. 1888) ("George Wither (not Withers), author of a dull satire called *Abuses Stript and Whipt*, is deservedly remembered as the author of the *Shepherd's Hunting*, and some other beautiful lyrics.").

in the Marshalsea[404] during King James I's reign for referencing the king's "evil

[404] 1 The Avenel Companion to English & American Literature 558 (David Daiches, ed. 1981) (noting of George Wither (1588–1667): "Poet. He was born at Bentworth in Hampshire and educated at Magdalen College, Oxford. In 1614 he was detained in the Marshalsea in consequence of a satiric poem, *Abuses Stript and Whipt* (1613), and while in prison he collaborated with William Browne in the composition of *The Shepherd's Pipe* (1614). His best work was produced in a similar pastoral mode, notably *The Shepherd's Hunting* (1615), *Fidelia* (1615) and *Fair Virtue* (1622). His love and pastoral poems were collected in *Juvenilia* (1622)."); 2 E. Cobham Brewer, The Reader's Handbook of Famous Names in Fiction, Allusions, References, Proverbs, Plots, Stories, and Poems 996 (new ed. 1899) (noting of *The Shepheard's Hunting*: "[F]our 'eglogues' by George Wither, while confined in the Marshalsea (1615). The shepherd Roget is the poet himself, and his 'hunting' is a satire called *Abuses Stript and Whipt*, for which he was imprisoned. The first three eclogues are upon the subject of Roget's imprisonment, and the fourth is on his love of poetry. 'Willy' is the poet's friend (William Browne of the Inner Temple, author of *Britannia's Pastorals*). He was two years the junior of Wither."). In *The Shepheards Hunting*, one finds these lines in Wither's version: "My bloud-hound *Cruelty*, as swift as wind, / Hunts to the death, and never comes behind."; "And oft I saw my *Bloud-Hound Crueltie*"; and "*Then though my Body here in Prison rot, / And my poor* Satyr*'s seeme a while forgot*." George Wyther, The Shepheards Hunting: Being Certain Eglogues Written During the Time of the Authors Imprisonment in the Marsahlsey (London: W. White, 1615) (listing George Wyther as a "Gentleman" on the title page).

counsellors,"[405] though his book had been officially licensed[406]—initially appeared

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[405] *See, e.g.*, Benjamin Woodford, Perceptions of a Monarchy Without a King: Reactions to Oliver Cromwell's Power 105-12 (2013):

> George Wither's literary career dates back to the reign of James I. His first major success was *Abuses, S[t]ript, and Whipt* in 1613, which, although popular, landed him in prison for its remarks regarding the king's "evil counsellors." Wither's problems with the printing authorities did not end there; he was arrested at least once more prior to the Civil War and came into conflict with the Stationers' Company over the printing of Psalms. When the war began, Wither, unlike Waller and Marvell, sided with Parliament and received the commission of captain for a Surrey troop of horse; he continued to gain government appointments throughout the Commonwealth and Protectorate. After the regicide, Wither was one of the trustees in charge of securing the goods and personal estate of Charles I, and in 1649 Cromwell ordered him to take charge of a convoy of ammunition heading for Ireland. Cromwell must have been pleased with his efforts, since he appointed Wither master of the statute office in July 1655, a position he held until October 1658.
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> Although Cromwell may have been satisfied with Wither in 1655, the poet's support for his patron was conditional. Wither's *The Protector. A Poem*, published in 1655, endorsed Cromwell, but only as lord protectors, not as king. In 1655 the offer of the crown was still two years away, but Wither wrote as though Cromwell was about to make a decision on kingship. The poem's complete subtitle—*A Poem briefly illustrating the supereminency of that dignity, and, rationally demonstrating, that the title of Protector, providentially conferred upon the supreme governour of the British repubike, is the most honorable of all titles, and that which, probably, promiseth most propitiousness to these nations; if our sins and divisions prevent it not*—reveals the author's intent.
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> . . . . God had removed kings from England, and Wither was angered that some MPs desired to restore a government that had kept England in "bondage." . . . Both Wither and the sects viewed the resurrection of kingship as defying God's providence; however, Wither was keen to distance himself from the radical sects. . . .
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> In 1657, after the kingship crisis, Wither produced another Cromwellian poem entitled *A Suddain Flash*. With this poem, Wither celebrated Cromwell's rejection of the crown and displayed remarkable insight into Cromwell's reasoning.
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> . . . .
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> . . . . George Wither could support Cromwell's monarchical power, but only if he retained the title and behavior of a lord protector. His interpretation of Cromwell's reasons for refusing the crown was closer to Cromwell's actual words than any other Cromwellian writer, suggesting that he either saw copies of the kingship speeches or had a profound understanding of the lord protector's mind.

[406] Leo Kirschbaum, Shakespeare and the Stationers 52 (1955) ("There are also cases of an author's being severely punished in spite of the fact that his book had been officially licensed. Wither's *Abuses Stript and Whipt* was entered under 'th[e] [h]andes of Master Taverner and master Harison Warden' on January 16, 1613: nevertheless the poet, as he put it in *The Schollers Purgatory*, 'unhappily fell into the displeasure of the state' and was committed to Marshalsea prison where he spent several unhappy months before being rescued by Princess Elizabeth.") (citation omitted); *see also* Stationers'

in 1611 as *Abuses Stript, and Whipt*, with his biting satirical poetry frequently reprinted[407] and even pirated thereafter.[408]

The first edition of *Abuses Stript, and Whipt* known to have survived was published in 1613—an edition containing a reference to "cruel'st and unusual'st punishment."[409] "[I]n 1611 came his first publication, and with unpleasant results,"

Register Online, https://stationersregister.online/entry/SRO6149 (last visited Apr. 5, 2025) (noting entry of "16 January 1613" for "A booke called. Abuses stript and Whipt. Or satyricall Essaies by George Wyther"; "Entred for his copie vnder th[e h]andes of master Taverner. and master Harison Warden"; "Fee: 6 pence").

407 One description of George Wither's *Abuses Stript, and Whipt*, "Printed by G. Eld for Francis Burton &c." in London in 1613, states:

> There are at least two editions of these celebrated Satires, &c. dated 1613. This is the first, and, although the text is substantially the same in both, they differ in several particulars. In the first edition, (besides literal variations) "The Scourge" and "Epigrams" are not mentioned on the title-page, and after "The Contents" is inserted a long list of Errata, which are corrected in the second impression. The separate satires also are called "Chapters" in the first edition, and differently numbered, as "The Occasion," "An Introduction," and a poem "of Man," are included. It has been said, (British Bibliogr. I. 180) that there was an impression in 1611; and, although no copy of that date has been discovered, circumstances, which it is not necessary to detail, seem to render it probable. The work was again published in 1614, 1615, 1617, 1622, 1626, and 1633, and no one of those re-impressions was exactly like any other that preceded it. The copy of 1617 has an additional poem, with a wood-cut of a Satire prefixed to "the Scourge."

J. Payne Collier, A Catalogue, Bibiographical and Critical; Forming a Portion of the Library at Bridgewater House, the Property of the Rt. Hon. Lord Francis Egerton, M. P. 336 (1837).

408 1 The British Literary Book Trade, 1475–1700, at 69 (James K. Bracken & Joel Silver, eds. 1996); *compare* Valerie Hotchkiss & Fred C. Robinson, English in Print: From Caxton to Shakespeare to Milton 204 n.1 (2008) (noting that Thomas Creed "was fined for pirating George Wither's *Abuses Stript and Whipt*, 1613") *with* Leo Kirschbaum, Shakespeare and the Stationers 81 (1955) ("There are four editions of Wither's *Abuses Stript and Whipt* (1613) all of which purport to have been printed by George Eld for Francis Burton: three are genuine, one is a forgery."); id. at 380 n.26 ("W. A. Jackson thinks that Creed may have been the printer of a counterfeit edition of Wither's *Abuses Stript and Whipt*, supposedly printed by George Eld for Francis Burton in 1613 ('Counterfeit Printing in Jacobean Times,' *Library*, 4th Series, XV [1934–35], pp. 365-67). But Jackson's case against Creede, built on the use of single tailpiece block, is very weak. And Jackson himself points to a Stationers' Court record for March, 1615, which shows four other stationers' being fined for pirating this book.").

409 George Wither's satire remained in libraries for many decades to come. *E.g.*, Bibliotheca Heberiana: Catalogue of the Library of the Late Richard Heber, Esq. – Part the Fourth, Removed from His House at Pimlico Which Will Be Sold by Auction, by Mr. Evans, at His House, No. 93, Pall Mall, on Monday, December 8, and Fourteen Following Days, Sundays Excepted 344 (1834) (listing for auction three 1613 editions of *Abuses Stript, and Whipt*, a 1614 edition, a 1615 edition, and two 1617 editions); Catalogue of the Choice Collection of Books, Forming the Library of Zelotes Hosmer, Esq., of Cambridge, Mass., Illustrative of Early English Literature and Standard Authors 111 (1861) (listing for sale by auction 1613 and 1617 editions of *Abuses Stript, and Whipt*); Catalogue of the Curious, Choice and

editor Frank Sidgwick writes in *The Poetry of George Wither* (1902), adding: "No copy of *Abuses Stript and Whipt* with a title-page bearing the date 1611 is now known. Thomas Park, in his elaborate bibliography of Wither's works, published in the first volume of the *British Bibliographer*, gives '*Abuses Stript and Whipt*, 1611,' with a note to this effect:—'This date is given from Dalrymple, who said in 1785,—Mr. Herbert has a copy of Abuses Stript and Whipt, wanting the title-page, with Wither's head, 1611 . . . so that 1611 must refer to the publication and not to Wither's age.'" Wither was just twenty-three years of age in 1611, the apparent date of the first edition of *Abuses Stript, and Whipt*.[410]

Abuses Stript, and Whipt proved controversial but popular in its day, and it was well known enough to be part of the public discourse. The reference to "cruel'st and unusual'st punishment" that appeared in that book later showed up in *Juvenilia* (1622), a collection of Wither's early verse.[411] *The Cruell Brother* (1627), a tragedy of the English poet and playwright Sir William Davenant, likewise contains an allusion to Wither's book, with one twentieth-century commentator giving this description: "In this play Castruchio, 'A satirical Courtier,' may be recognized as not too exaggerated a caricature of the puritan poet, George Wither, whose *Abuses Stript and Whipt* (first published in 1611) is actually mentioned in Act II where Dorido smartly says:—*You remember your Vices—strip'd, and whip'd.* / *Your trimme Eclogues, the Fulsome Satyr too,* / *Written to his Grace*."[412] The "cruel'st

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Valuable Library of the Late Sir Francis Freeling, Bart. F.S.A. . . . Which Will Be Sold by Auction by Mr. Evans, at His House, No. 93, Pall-Mall, on Friday, November 25, and Nine Following Days (Sundays Excepted) 127 (1836) (listing 1613 and 1615 editions of *Abuses Stript, and Whipt*); Catalogue of the Valuable Library of the Late Benjamin Heywood Bright, Esq. Containing a Most Extensive Collection of Valuable, Rate, and Curious Books, in All Classes of Literature Which Will Be Sold by Auction, by. Messrs. S. Leigh Sotheby & Co. 381 (1845) (listing 1614, 1615, and 1617 editions of *Abuses Stript, and Whipt* for sale); J. Herbert Slater, The Library Manual: A Guide to the Formation of a Library, and the Valuation of Books 314-15 (3d and enlarged ed. 1892). (listing 1613 and 1615 editions of Wither's *Abuses Stript, and Whipt*).

410 1 The Poetry of George Wither xxiii (Frank Sidgwick, ed. 1902).

411 George Wither, Juvenilia 138 (1970) (1622).

412 Montague Summers, The Playhouse of Pepys 10-11 (1935); *see also id.* at 11 ("The 'trimme Eclogues' are *The Shepherd's Hunting: Being, Certaine Eglogs . . . . By George Wither*, 1615 (two editions), a book composed during the author's imprisonment in the Marshalsea. The 'fulsome satire' is *A Satyre: Dedicated To His Most Excellent Maiestie. By George Wither*, 1614."); *see also* Howard S. Collins, The Comedy of Sir William Davenant 85 (1967) ("*The Cruel Brother*, another Fletcherian tragedy and Davenant's next effort, had more luck than its predecessor in securing a hearing. On January 12, 1626-7, Sir Henry Herbert licensed the play, and at an unspecified later date, it was produced at 'the private House, in the Blacke-Fryers: By His Maiesties Servants'."); *id.* at 86:

> Before his stage is strewn with the dead, Davenant has relieved the bloodshed with some desirable touches of comedy. The least successful of these, however, is Castruccio, a satirical Courtier, whose prototype has already been drawn in the person of Grimold. According to Davenant's editors this caustic gentlemen is meant to satirize George Wither, their theory being based on a speech in the play that obviously alludes to Wither's work *Abuses Stript and Whipt*. If this is true, then Davenant must have felt

and unusual'st punishment" reference in Wither's *Abuses Stript, and Whipt* has previously been overlooked by jurists and scholars.

The fact that a reference to "cruel'st and unusual'st punishment" appears in an early seventeenth-century satire—a book read by many in England—puts the origin story of the cruel and unusual punishments concept in a much different light. In *Abuses Stript, and Whipt*, Wither penned lines of verse referencing cruelty, torture, and—of particular relevance—the cruel and unusual punishment concept. For the sake of context, this is the relevant excerpt that appears in Wither's book:

> Such was his humour, who, out of desire
> To see how Troy burnt when it was on fire,
> Caus'd Rome in many a place at once to flame;
> And longing to behold from whence he came
> Ripp'd up his mother's womb. So in the height
> Was also his, that took so much delight
> In seeing men extremely tortured,
> That he out of his bounty promised
> A large reward to him that could invent
> That cruel'st and unusual'st punishment;
> Which Phalaris demanding, was therefore

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the greatest scorn for that dedicated Puritan. Castruccio is an ugly character, uglier than Grimold even, closer to Shakespeare's Thersites on whom he is certainly patterned.

> The first that made his brazen bull[413] to roar.[414]

B. The Life of George Wither (1588-1667)

A prominent Jacobean poet and satirist, George Wither sided with Parliament during the English Civil War and became an officer in Oliver Cromwell's army,[415] selling

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[413] The "brazen bull" was a horrifying method of execution in ancient times. *See* 2 Edward A. Freeman, The History of Sicily: From the Earliest Times 74-75 (1891) (noting that "brazen bull" was "the work of an artist named Perillos or Perilaos" and that "[t]he bull was hollow, with a door in the shoulder, through which the victim was pushed within"; that "[t]he brass was then heated, and by some ingenious device the cries of the sufferer were made to imitate the roaring of the bull"; and that "Phalaris first put the artist himself into the bull, and afterwards employed it as a means of punishment"); William Robson, The Great Sieges of History 158-59 (1855) (noting of "the tyrant Phalaris and his brazen bull": "Perillo, a goldsmith, by way of paying his court to Phalaris . . . made him a present of a brazen bull of excellent workmanship, hollow within, and so constructed, that the voice of a person shut up in it, sounded exactly like the bellowing of a bull. The artist pointed out to the tyrant what an admirable effect this must produce, were he to shut up a few criminals in it, and make a fire underneath. Phalaris, struck with the horror of this idea, and perhaps curious to try the experiment, told the goldsmith that he himself was the only person worthy of animating his bull, as he must have studied the notes that made it roar to the greatest advantage, and that it would be unjust to deprive him of any part of the honour of the invention. Upon which, he ordered the goldsmith to be shut up, and a great fire to be kindled round the bull, which immediately began to roar . . . ."); *see also* Erin Creegan, *Criminalizing Extrajudicial Killings*, 41 Denv. J. Int'l L. & Pol'y 185, 186–87 (2013) ("In the ancient world, torture was common. Practices ranged from stoning to crucifixion to disgusting devices such as the 'brazen bull' from Ancient Greece by which victims were burned and boiled to death while their screams were converted into music by a specially designed instrument."); *see also* Adrienne Mayor, Gods and Robots: Myths, Machines, and Ancient Dreams of Technology 184 (2018):

> > In 70 BC, Cicero (*Against Verres* 4.33) states that among the treasures recovered by Scipio from Carthage was the great Brazen Bull of Acragas, which "the most cruel of all tyrants, Phalaris, had used to burn men alive." Scipio took that occasion to observe that the bull was a monument to the barbarism of local Sicilian strongmen, and that Sicily would be better off ruled by the more kindly Romans. Diodorus goes on to affirm that one could still view the notorious Brazen Bull in Acragas, when he was writing his history, sometime in 60-30 BC.

[414] George Wither, Juvenilia; A Collection of Poems 141-42 (1622) ("Printed for T. S. for John Budge, Dwelling in St. Paul's Church Yard, at the Sign of the Green Dragon"); *see also Phalaris*, Britannica, https://www.britannica.com/biography/Phalaris (last visited Apr. 5, 2025):

> > Phalaris (died *c.* 554 BC) was the tyrant of Acragas (modern Agrigento), Sicily, notorious for his cruelty. He is alleged to have roasted his victims alive in a bronze bull, their shrieks representing the animal's bellowing. A statue of a bull of some kind seems to have existed, but the facts surrounding its use have been embellished. For example, the supposed designer of the bull, Perilaus, or Perillus, was said to have been the first man executed in it.

[415] The Pupil Teacher: Monthly Educational Journal for Pupil Teachers, &

a family estate at the commencement of the English Civil War in order to "raise a troop of horse for the Parliament."[416] After the country's civil war, he became part of a group of Cromwellian poets[417] and still regularly put pen to paper after the Restoration,[418] with interest in Wither's poetry and writings continuing after his death in 1667.[419] Oliver Cromwell (1599–1658) and, briefly, his son, Richard, led

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Assistant Masters 109 (H. Major, ed. 1876) (noting of George Wither: "Under the Commonwealth he became a Puritan, and also a captain and afterwards major under Cromwell.").

416 Handbook for Travellers - Hampshire 51 (5th ed. 1808) ("The little village of Bentworth is 4 m. N.W. of Alton. George Wither, the poet, was born here in 1588, his father having had an estate here, which the poet himself sold at the commencement of the civil war in order to raise a troop of horse for the Parliament. In his 'Abuses Stript and Whipt' he more than once alludes to the 'beechy shadows' of 'our Bentworth.'").

417 Benjamin Woodford, Perceptions of a Monarchy Without a King: Reactions to Oliver Cromwell's Power 17–18 (2013) (noting of "Cromwellian writers": "Although these men all were employed by the Protectorate, their opinions on Cromwell's power differed. While some of them criticized Cromwell's monarchical position, others praised him in monarchical terms. Several of these writers—namely, Marchamont Nedham and John Milton—are part of the republican movement that emerged in the 1640s and 1650s. . . . The prose writers include Marchamont Nedham, John Milton, and Michael Hawke, while the poets are Edmund Waller, Andrew Marvell, George Wither, and John Lineall."); *see also id.* at 89 ("[T]he Cromwellian poets were either employed by the Protectorate or sought employment while writing on the topic of Cromwell's power. The only difference between the two groups is the form their writing took. Edmund Waller and Andrew Marvell were the most famous Cromwellian poets, and both were eager to cast the lord protector as a monarch. Although not quite as renowned as Waller and Marvell, George Wither was a government employee whose poems specifically addressed the lord protector's decision to reject the royal title.").

418 Stephen Bardle, The Literary Underground in the 1660s: Andrew Marvell, George Wither, Ralph Wallis, and the World of Restoration Satire and Pamphleteering 12 (2012):

> Despite his advanced age, the prolific poet and pamphleteer George Wither (1588–1667) had no intention of retiring from writing at the Restoration. Perhaps the century's most productive writer, in terms of number of words, Wither had come close to attaining an influential political role at various points in his career. But ultimately nearly every seventeenth-century government had found his plain-speaking advice either unwelcome at best or seditious at worst, and imprisoned him. Wither was aware of the correlation between his verbosity and the length of his imprisonments, but he refused to lay down his pen and was a permanent literary presence: the only years in which he did not publish were years of extremely tight censorship. Frequently ridiculed by other writers for his verbosity, judging by the number of published editions many of his titles went through, Wither enjoyed a substantial readership, especially amongst the more radical sections of the population.

419 *Id.* at 160 (noting that Wither had predicted a future period of "love and peace and truth"; "Interest in Wither's prophecies revived in early 1680, with the republication of a prophecy Wither had first made in 1628 regarding the downfall of tyranny. The same prophecy was reprinted again in 1683."); *see also id.* at 92:

> Popular unrest seems to have reached a new high point in late 1666. Clarendon said 'the foulest imputations' were being directed at the

the Commonwealth of England, Scotland, and Ireland, before Richard renounced power, thus ending the Protectorate and leading to the restoration of the monarchy in 1660, with Charles I's son, Charles II (1630-1685), assuming the throne.[420]

As a "celebrated poet,"[421] George Wither was known to members of Parliament and—across the Atlantic—to colonial Americans,[422] with Wither's *Abuses Stript,*

> government in the coffee-houses, and Charles conferred with his Privy Council about a ban, but in the end they decided to keep them open because of their tax revenue. On the plus side for the government, George Wither died in the spring of 1667, which must have had the same effect on the public sphere as closing down a dozen coffee-houses. . . . Yet Wither's death did not put an end to his influence. Wither's works enjoyed a readership in the immediate years after his death, and booksellers continued to hold copies. A long-held misattribution that he was the author of the anonymous anti-government satire *Vox Et Lacrimæ Anglorum* (1668) demonstrates how strongly Wither was linked with opposition publications in the Restoration. A copy of Wither's *Three Private Meditations* (1665) was on sale in a bookshop in Oxfordshire in 1669, the seller perhaps attempting to take advantage of the high levels of public disenchantment that year. When researching a biographical entry on Wither in the 1670s, Anthony Wood used copies of Wither's works which he came across in bookshops. . . . [T]owards the end of his life Wither had collected together writings from the breadth of his extensive career to lay the foundations for a legacy which could be a source for political and religious reformation in the future, and this would come to fruition during the Glorious Revolution.

420 Ira Cohen, *Early History of South Carolina and Its Federal Court (1526–1886)*, 69 Fed. Law. 46, 48 (2022); Phillip D. Kline, *Imprisoning the Innocent: The "Knowledge of Law" Fiction*, 12 Liberty U. L. Rev. 393, 437 (2018); Bessler, *A Century in the Making*, *supra* note 7, at 1014–15; Rafael Alberto Madan, *The Sign and Seal of Justice*, 7 Ave Maria L. Rev. 123, 186 n.172 (2008); *see also* David Luban, *On the Commander in Chief Power*, 81 S. Cal. L. Rev. 477, 512 (2008):

> [I]n 1653, Cromwell led his troops to Westminster and dramatically dissolved Parliament. For the next six years he ruled England as a military dictator, including fifteen months of strict military rule in 1655 through 1657. When Oliver Cromwell's feckless son Richard became Lord Protector after Oliver's death, the army removed him, reinstalled the Rump Parliament (1659)—and then, when the Rump annoyed the army, dissolved Parliament again, leading within a year to the restoration of monarchy.

421 2 Alexander Brown, The Genesis of the United States: A Narrative of the Movement in England, 1605–1616, Which Resulted in the Plantation of North America by Englishmen, Disclosing the Contest Between England and Spain for the Possession of the Soil Now Occupied by the United States of America 1057 (1890).

422 On Monday, December 22, 1656, it has been reported, "*Colonel Whetham* offered a petition in the behalf of Colonel Wither" and that "*Mr. Speaker* said he had also a copy of very good verses from the same hand, to offer." 1 Diary of Thomas Burton, Esq.: Member in the Parliaments of Oliver and Richard Cromwell, from 1656 to 1659, at 197, 207 (John Towill Rutt, ed. 1828); *see also id.* at 207–08 n.* ("'George Wither was born June 11, 1588, and, in his younger years, distinguished himself by some pastoral pieces, that were not inelegant; but growing afterwards involved in the political and religious disputes in the times of James I. and Charles I., he employed his poetical vein in severe pasquils on the court and clergy, and was occasionally a sufferer for the freedom of his pen. In the civil war that ensued, he exerted himself in the service of the

and Whipt well-remembered in the 1680s. For example, Roger L'Estrange's *A Brief History of the Times* (1687) refers to "George Withers" and "*Abuses Stript, and Whipt*."[423] Likewise, *The Temple of Wisdom*—a collection authored by Daniel Leeds (1652–1720), intended for children, and printed by colonial printer William Bradford in Philadelphia in 1688,[424] just four years before Bradford was arrested and put on trial in colonial Pennsylvania for seditious libel[425]—contains excerpts of George Wither's *Abuses Stript and Whipt*, though not the specific passage containing the "cruel'st and unusual'st punishment" language.[426]

Parliament, and became a considerable sharer in the spoils.'") (quoting "Reliques of Ancient English Poetry" (1794)).

423 A Brief History of the Times, &c. in a Preface to the Third Volume of Observators 2 (1687).

424 In addition to excerpts from George Wither's *Abuses Stript, and Whipt*, this collection included *Divine Poems* from Francis Quarles and essays by Francis Bacon. Elizabeth Christine Cook, Literary Influences in Colonial Newspapers, 1704–1750, at 13 n.18 (1912).

425 Frederick D. Rapone, Jr., *Article I, Section 7 of the Pennsylvania Constitution and the Public Expression of Unpopular Ideas*, 74 Temp. L. Rev. 655, 662 (2001) ("[T]he proprietor of its first printing press, William Bradford, was arrested in 1692 on charges of seditious libel. Bradford printed a pamphlet railing against Pennsylvania officials who strayed away from Quaker tenets. Bradford would elude conviction as the result of a bumbling juror, who spilled the tray of printing type and destroyed the prosecution's evidence."); Alfred L. Brophy, *"For the Preservation of the King's Peace and Justice": Community and English Law in Sussex County, Pennsylvania, 1682–1696*, 40 Am. J. Legal Hist. 167, 20 (1996) ("[A] unique, if brief glimpse, inside the Philadelphia Quarter Sessions Court comes from the thirty page pamphlet report of the libel trial of Quaker dissidents George Keith, William Bradford, Peter Boss, and Thomas Budd in December 1692. The pamphlet, originally published in Philadelphia and then reprinted in London, provides detailed testimony and description of pleading and responses over the three day trial. From the trial testimony, one sees both sides citing law books."); Roger Roots, *The Rise and Fall of the American Jury*, 8 Seton Hall Circuit Rev. 1, 12 n.63 (2011) ("The famed trial of printer William Bradford in colonial Pennsylvania in 1692 illustrates that colonial judges sometimes violated almost every other protection in the zeal to convict dissidents, including denial of the prohibition against double jeopardy, denial of speedy trial, denial of the right to know the charges, but nonetheless recognized the right of jurors to judge both the law and the facts in criminal cases.").

426 Daniel Leeds, The Temple of Wisdom for the Little World, in Two Parts (1688), *available at* https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;rgn=main;view=text;idno=N00365.0001.001; Jon Butler, Christianizing the American People: Awash in a Sea of Faith 313 (1990); George J. Marshall, comp., Angels: An Indexed and Partially Annotated Bibliography of Over 4300 Scholarly Books and Articles Since the 7th Century B.C. 238 (1999); 1 Charles R. Hildeburn, The Issues of the Press in Pennsylvania 1685–1784, at 10 (1885); M. Katherine Jackson, Outlines of the Literary History of Colonial Pennsylvania 11 (1906); *compare* 6 Transactions and Collections of the American Antiquarian Society 329 (2023) (1874) (noting that *The Temple of Wisdom* contains "Abuses Stript and Whipt, by *Geo. Wither*," that was "Printed and sold" in Philadelphia by William Bradford and that it is "Said to be the first *book* printed in Philadelphia"), *with* Hildeburn, A Century of Printing, *supra*, at 11 ("It has been asserted that the 'Temple of Wisdom' was the first book printed by Bradford. This honor is now due, if not to Budd's 'Good Order,' to Penn's 'Excellent Privilege of Liberty and Property.'").

As one twentieth-century source published in Boston notes, Wither's *Abuses Stript, and Whipt* no doubt "intrigued those austere Puritans and Quakers, who took their pleasures so sadly; one can, in imagination, hear some old Puritan complain that there were still abuses to be stript and neighbors to be whipt . . . ."[427] "This book came from the press of William Bradford," that source points out, referring to *The Temple of Wisdom*.[428] According to another history, "George Wither . . . may have appealed to the Quakers because of his misfortunes in prison and his loss of property, as well as for any qualities in the satire." As that history observes: "*Abuses Stript and Whipt* (1613), which sent him to the Marshalsea prison, contained many things nearest the Quaker heart, *e.g*., the attacks on the follies and abuses of society."[429] "Starting with the small personal libraries (consisting usually of a Bible and a few 'Friends' books') brought over in the baggage of the first immigrants," one history emphasizes, "the Philadelphia Quakers were supplied with an increasing flow of reading matter from the mother country and presently from colonial presses." Such books included Wither's *Abuses Stript, and Whipt* as well as Puritan lawyer William Prynne's *Histriomastix*.[430]

Before the Revolution of 1688–1689, William Penn and William Bradford had collaborated on publicizing English liberties. In 1687, William Bradford—then Pennsylvania's only colonial printer and who had, himself, spent time training as an attorney, making him well versed in England's common law—had been entrusted by William Penn with printing a lengthy pamphlet about those English liberties.[431]

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427 A. Edward Newton, This Book-Collecting Game 82–84 (1928).

428 *Id.* at 84; *see also id.* ("But two copies are known—one of them in the safe-keeping of our own Dr. Montgomery of the Historical Society of Pennsylvania."). William Bradford—a colonial printer in Pennsylvania and New York—was born in 1663 in England and apprenticed to Andrew Sowle, a prominent printer of books for the Society of Friends in London. Bradford knew both George Fox and William Penn, emigrated with William Penn to Pennsylvania, and was selected as a printer for the Quaker colony. After a long and productive career, Bradford died in 1752. Alexander J. Wall, Jr., *William Bradford, Colonial Printer: A Tercentenary Review*, 73 Am. Antiquarian Society 361, 361-83 (1963), https://www.americanantiquarian.org/proceedings/44604985.pdf. A different William Bradford (1755–1795), part of a later generation, later served in the Revolutionary War, became Pennsylvania's attorney general and a judge of the state's supreme court, and served as the attorney general of the United States from 1794 to 1795. 3 The Encyclopædia Britannica: A Dictionary of Arts, Sciences, Literature & General Information 370 (13th ed. 1926); *see also Furman*, 408 U.S. at 336 (Marshall, J., concurring) ("In 1793, William Bradford, the Attorney General of Pennsylvania and later Attorney General of the United States, conducted 'An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania.' He concluded that it was doubtful whether capital punishment was at all necessary, and that until more information could be obtained, it should be immediately eliminated for all offenses except high treason and murder.").

429 M. Katherine Jackson, Outlines of the Literary History of Colonial Pennsylvania 11 n.24 (1906).

430 Frederick B. Tolles, Meeting House and Counting House: The Quaker Merchants of Colonial Philadelphia, 1682–1763 (1948).

431 *See, e.g*., Brophy, *supra* note 425, at 198; *see also id.* at 171:

> In writing the *Laws Agreed Upon in England*, Pennsylvania's first laws, Penn had the opportunity to put his ideas into practice. The *Laws* were simple, precatory rules prescribing appropriate behavior, such as "all Courts shall be

The booklet, *The Excellent Priviledge of Liberty and Property: Being the Birth-right of the Free-born Subjects of England*, reprinted the Magna Carta and included Sir Edward Coke's comments on it.[432] "The Comment on Magna Charta" takes up many pages, emphasizing of the Magna Carta at the outset: "[t]his excellent Law holds the first place in our Statute Books . . . not in respect of its bulk, but in regard of the great importance and weight of the matters therein contained."[433] "The twenty-ninth chapter, NO FREEMAN SHALL BE TAKEN, &c., deserves to be written in letters of gold," the comment on the Magna Carta declares.[434]

In an opening section, titled "To the Reader," one finds these words in William Penn's booklet on English liberties: "*I do here present thee with that ancient Garland, the Fundamental Laws of England, bedecked with many precious privileges of* Liberty *and* Property, *by which every man that is a Subject to the Crown of England, may understand what is his right, and how to preserve it from unjust and unreasonable men*."[435] In the opening paragraphs of the "Introduction,"

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open, and Justice shall neither be sold, denyed or delayed." Simplicity was a central concern of the substance as well as form of early Pennsylvania laws. The criminal laws proscribed behavior in general, simple terms. Instead of technical definitions, for example, the laws merely stated that "all Briberies and Extortions whatsoever shall be severely punished."

To make the laws accessible, they were to be read each year at the county courts. In order to educate the people further—and in response to concerns raised that the judges did not know enough law—Penn requested William Bradford, the colony's only printer, to prepare a pamphlet that included excerpts from key documents of English liberties. The result was a 67-page pamphlet entitled *Excellent Privileged of Liberty and Property*, which included the *Magna Charta* and commentaries on it, the Petition of Right, the Habeas Corpus Act, the Charter to Pennsylvania, and the Second Frame of Government. It was probably important in popularizing Penn's ideas about liberty.

[432] The Excellent Priviledge of Liberty and Property: Being a Reprint and Fac-simile of the First American Edition of Magna Charta Printed in 1687 under the Direction of William Penn by William Bradford ix (John Thomson, ed. 1897) (1687); *see also id*. at x (noting that "[i]t was printed by William Bradford, who, in 1685, had introduced the art of printing into the Middle Colonies of North America" but that "it was undoubtedly prepared for the press by William Penn, then in England").

[433] *Id.* at 43-68.

[434] *Id.* at 40.

[435] *Id.* at 3–4 (italics in original). Signed "Philopolites," the booklet's "To the Reader" section—addressing the aim of the publication—ended with these words:

> *The chief end of the publication hereof is for the information and understanding (what is their native right and inheritance) of such who may not have leisure from their Plantations to read large volumes: and beside, I know this Country is not furnished with Law-Books, and this being the root from whence all our wholesome English Laws spring, and indeed the line by which they must be squared, I have ventured to make it public, hoping it may be of use and service to many Freemen, Planters and Inhabitants in this Country, to whom it is sent and recommended, wishing it may raise up noble resolutions in all the Freeholders in these new Colonies, not to give away any thing of* Liberty *and* Property *that at present they do, (or of right as loyal English Subjects, ought to) enjoy, but take up the good example of our ancestors, and understand, that it is easy to part with or give away great*

Penn contrasted "the Law" of England, where "each man" had "a fixed Fundamental Right born with him, as to freedom of his person and property in his estate, which he cannot be deprived of, but either by his consent, or some crime, for which the law has imposed such a penalty or forfeiture,"[436] with life in "*France*" and "other nations" where "the mere will of the Prince is Law, his word takes off any man's head, imposeth taxes, or seizes any man's estate, when, how and as often as he lists; and if one be accused, or but so much as suspected of any crime, he may either presently execute him, or banish, or imprison him at pleasure . . . ."[437]

Invoking Sir John Fortescue and Henry Bracton, William Penn emphasized that "[t]he King of England cannot alter nor change the laws of his realm at his pleasure."[438] Calling Bracton "a learned Judge and Law-Author, in the Reign of King Henry the Third," Penn quoted that treatise writer as saying, "*Rex in Regno suo superiores habet Deum et Legem*" (i.e., "The King in his Realm hath two superiors, God and the Law; for he is under the directive, though not coercive Power of the Law."[439] After saying that "[t]his original happy Frame of Government is truly and properly called *an Englishman's Liberty*, a Privilege not exempt from the law, but to be freed in person and estate from arbitrary violence and oppression," Penn also invoked "Judge Coke"—a reference to Sir Edward Coke, the Chief Justice of the Common Pleas from 1606 to 1613 and the Chief Justice of the King's Bench from 1613 to 1616.[440] "Much of Penn's writing—to say nothing of that of the common law giant Coke on whom Penn relied—concerned the importance of preservation of English liberty, which historians have called common law constitutional thought,"

> *privileges, but hard to be gained, if once lost. And therefore all depends upon our prudent care and actings to preserve and lay sure foundations for ourselves and the posterity of our loins.*

Id. at 5–6 (italics in original).

436 *Id.* at 7–8; *see also id.* at 8 ("For (1) all our Kings take a solemn oath at their Coronation to observe and cause the laws to be kept: (2) all our Judges take an oath wherein among other points they swear, to do equal Law and Right to all the King's subjects, rich and poor, and not to delay any person of Common Right for the Letters of the King, or of any other Person, or for any other cause . . . .").

437 *Id.* at 7–8 (italics in original). Speaking of an accused's potential fate in France and those other nations, Penn added: "[O]r if he will be so gracious as to proceed by form of their laws, if any two villains will but swear against the poor party, his life is gone; nay, if there be no witness, yet he may be put on the rack, the tortures whereof make many an innocent person confess himself guilty, and then, with seeming justice, is executed." *Id.*

438 *Id.* at 8–9 & 133 nn.1-2.

439 *Id.* at 9–10; *see also id.* at 10 (italics in original):

> Tis true, the Law itself affirms, *the King can do no wrong*, which proceeds not only from a presumption, that so excellent a Person will do none, but also because he acts nothing but by Ministers, which (from the lowest to the highest) are answerable for their doings; so that if a King in passion should command A. to kill B. without process of law, A. may yet be prosecuted by Indictment or upon an Appeal (where no royal pardon is allowable) and must for the same be executed, such command notwithstanding.

440 *Id.* at 10. "[T]his Birth-right of Englishmen shines most conspicuously in two things," Penn wrote, listing them as "1. Parliaments" and "2. Juries." *Id.* at 11.

one legal historian, Alfred Brophy, explains.[441]

Because of his literary fame, George Wither—though deceased since 1667—was clearly still a topic of conversation in the period of England's Revolution of 1688–1689. In 1688, in London, some of Wither's poetry from 1652 and 1660 was reprinted as a pamphlet titled *Predictions of the Overthrow of Popery, and the Landing of the Prince of Orange in the West Written by George Wither Esquire, in the Year 1660; and Some Proposals for Perpetual Parliament Written by the Same Author in 1652*.[442] In addition, *The Grateful Acknowledgment of a Late Trimming Regulator* (1688) appeared around the same time, said to be "written in the time of the late wars by that famous and divine poet of our age, Captain George Wither."[443] George Wither's daughter, Elizabeth, married to Londoner Adrian Barry, also "prepared for publication in 1688 her father's 'Divine Poems by way of a paraphrase on the Ten Commandments;' she wrote under the initials 'E. B.,' and dedicated the work to her father's friends."[444]

The Dictionary of National Biography (1922) describes George Wither (1588–1667) as a "poet and pamphleteer" who spent two years studying at Magdalen College, Oxford, without taking a degree and who "about 1610 settled in London in order to study law." "Almost as soon as Wither settled in London," that biographical entry observes, "he devoted his best energies to literature, and proved himself the master not only of a lyric vein of very rare quality, but also of a satiric temper which could often express itself in finely pointed verse." "His friends soon included the most notable writers of the day," the entry continues, stressing that he entered one of the Inns of Court—Lincoln's Inn—in 1615. "In 1611," Wither's biographical entry notes, "he first, according to his own account, took notice of 'public crimes'

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441 Brophy, *supra* note 425, at 197; *see also id.* at 197-98:

> Penn's writings demonstrate his facility with common law arguments. His tracts written in the 1670s and 1680s urging religious toleration relied heavily upon Coke for arguments based on English history to establish the importance of respect for property and liberty. Moreover, in the late 1680s, Penn prepared a pamphlet, which was published by William Bradford in Philadelphia, *Excellent Privileges of Property and Liberty*. In the preface, Penn wrote that the pamphlet was designed to make up for the lack of law books in Pennsylvania and to help teach the value of the ancient common law.

442 Predictions of the Overthrow of Popery, and the Landing of the Prince of Orange in the West Written by George Wither Esquire, in the Year 1660; and Some Proposals for Perpetual Parliament Written by the Same Author in 1652 (London); *see also* Stephen Bardle, The Literary Underground in the 1660s: Andrew Marvell, George Wither, Ralph Willis, and the World of Restoration Satire and Pamphleteering 162 (2012) ("Another pamphlet which republished earlier Wither material, *Predictions of the Overthrow of Popery* (1688), includes the same prophecy from Wither's *Speculum Speculativum* (1660) as had been reprinted in *An Exact Collection*, but it then republishes a passage from Wither's *The Perpetual Parliament* (1653), a work influenced by James Harrington which had outlined plans for a rotating electoral system, to counteract private interests and increase political transparency.").

443 2 Egerton Brydges & Joseph Haslewood, The British Bibliographer 378 (1812).

444 62 Dictionary of National Biography 266 (Sidney Lee, ed. 1900).

(*Warning Piece to London*, 1662), and gave proof of his quality as a satirist."[445]

In *A History of the Wither Family* (2007), it is reported of George Wither that when he was "'thrice five years and three,' he went to London and entered at 'one of the Inns of Chancery,' where for the next five years we hear very little of him."[446] "From early on," law professor Judith Maute explains, "the Inns of Chancery served as preparatory schools for the Inn of Court with which it was affiliated."

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[445] 21 The Dictionary of National Biography 730 (Leslie Stephen & Sidney Lee, eds. 1922); *see also id.* at 730–31 ("No publication by Wither dated in 1611 is known, but in 1613 appeared his 'Abuses stript and whipt. Or Satiricall Essayes by George Wyther. Divided into two Bookes' (London, printed by G. Eld for Francis Burton, 1613, 8vo). The dedication ran: 'To Him-self G. W. wishest all happiness.' The satires are succeeded by a poem called 'The Scourge,' and a series of epigrams to patrons and friends, including his father, mother, cousin William Wither, and friend Thomas Cranley. A portrait by William Hole or Holle [q. v.] is dated 1611, and erroneously gives Wither's age as twenty-one. The book was popular (there were at least five editions in 1613, and others in 1614, 1615, and 1617, the last 'reviewed and enlarged'), but it gave on its first appearance serious offence to the authorities for reasons that are not apparent. Each of the twenty satires discloses the evils lurking in abstractions like Revenge, Ambition, Lust, Weakness, and the like, and, although some of the anecdotal digressions may have had personal application, the clue is lost. Wither declared that he had, 'as opportunity was offered, glanced in general tearmes at the reproofe of a few thinges of such nature as I feared might disparage or prejudice the Commonwealth . . . [but] I unhappily fell into the displeasure of the state: and all my apparent good intentions were so mistaken by the aggrauations of some yll affected towards my indeauours, that I was shutt up from the society of mankind' (The Schollers Puratory, Spenser Soc. pp. 2–3). Wither was committed to the Marshalsea prison, but the Princess Elizabeth is reported to have intervened on his behalf, and her intervention, supported by a poetic appeal to the king from Wither himself, procured his release after a few months. The poet's appeal was entitled 'A Satyre: Dedicated to His Most Excellent Maiestie' (London, printed by Thomas Snodham for George Norton, 1615, sm. 8vo; in some copies 'written' is found for 'dedicated').").

[446] Reginald F. Bigg-Wither, A History of the Wither Family 95 (Tom Withers, ed. 2007); *see also* 2 Athenæ Oxonienses: An Exact History of All the Writers and Bishops Who Have Had Their Education in the Most Ancient and Famous University of Oxford from the Fifteenth Year of King Henry the Seventh, Dom. 1500, to the End of the Year 1690, at 274 (1692) (noting in the biographical entry for George Wither: "educating in Gram. learning under the noted Schoolmaster of those parts called *Job. Greaves* of *Colemore*, sent to *Magd. Coll.* in the year 1604 or thereabouts, where being put under the tuition of *Job. Warner*, (afterwards B. of *Roch.*) whom, if I mistake not, he serv'd, made some proficiency with much ado in academical learning; but his genie being addicted to things more trivial, was taken home after he spent about three years in the said house, and thence sent to one of the Inns of *Chancery* in *London*, and afterwards to *Lincolns* Inn, to obtain knowledge in the municipal Law. But still his genie hanging after things more smooth and delightful, he did, at length, make himself known to the world (after he had taken several rambles therein) by certain *Specimens* of Poetry; which being dispersed in several hands, became shortly after a publick Author, and much admired by some in that age for his quick advancement in that faculty. But so it was, that he shewing himself too busie and satyrical in his *Abuses stript and whipt*, was committed Prisoner to the *Marshalsea*, where continuing several months, was then more cried up, especially by the puritanical Party, for his profuse powring forth of English rime, and more afterwards by the vulgar sort of people for his prophetical Poetry, in regard that many things were fancied by them to come to pass, which he pretended to predict.").

As Maute observes of the relationship between the Inns of Court and the Inns of Chancery: "Benchers elected by the Inn of Court provided in-house education, focusing on common law writs, at the Inn of Chancery. The greater inns tended to give preferential treatment to applicants from their affiliate chancery inn. The lesser Inns of Chancery typically consisted of a dining hall and living chambers, whereas the Inns of Court also had a library and chapel for the use of members."[447]

George Wither's father, from Hampshire, was "a gentleman of good connexions," and he initially had sent his son to Magdalene College, Oxford, at age fifteen, only to call him home three years later. As Wither himself later described his father's plea in verse: *"Come home, I pray, and learn to hold the plough. / For you have read philosophy enowe."* Although Wither dutifully returned home, the plough plainly did not suit him, and after writing "some pastorals," he had gone to London to enter at one of the Inns of Chancery before finding his place at Lincoln's Inn.[448] It was Wither's *Abuses Stript, and Whipt*, however, that initially brought Wither so much notoriety, especially after he was imprisoned for words he had written in the satire that apparently offended Henry Howard, the Earl of Northampton.[449] One source suggests that "[t]he arrest and imprisonment of George Wither in March 1614" most likely occurred because "Wither had fallen foul of leading members of the Privy Council" and had "become embroiled in the scramble for office and the unsettled anticipation of the new parliament."[450]

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[447] Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000–1900 A.D.)*, 71 Fordham L. Rev. 1357, 1366–67 (2003); *see also* Charles M. Gray, *Readings and Moots at the Inns of Court in the Fifteenth Century*, 69 Harv. L. Rev. 1523 (1956) ("To prepare for practice in the English courts, it was necessary to gain admittance to one of the four great Inns, though this might be preceded by attendance at one of the lesser Inns, called Inns of Chancery."); Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the* Commentaries, 104 Va. L. Rev. 1359, 1376 (2018) ("Some wealthy colonists . . . sought a formal education in the English Inns of Court or Inns of Chancery in London. These ancient institutions had, for centuries, provided both a robust education in the law and, more importantly, an excellent social network for personal and professional advancement.").

[448] 29 The Monthly Packet of Evening Readings for Younger Members of the English Church 163–64 (1865); 3 S. Austin Allibone, A Critical Dictionary of English Literature and British and American Authors Living and Deceased from the Earliest Accounts to the Latter Half the Nineteenth Century 2805 (1871).

[449] J. Milton French, *George Wither in Prison*, 45 PMLA 959, 959 (1930) (noting that Wither was imprisoned in the Marshalsea from March 20, 1614 until July 26, 1614). Of the lead up to England's 1614 Parliament, one scholar has written: "In anticipation of it, George Wither published a verse satire entitled *Abuses Stript and Whipt*, which particularly offended Henry Howard, the Earl of Northampton, who with other members of the Privy Council signed a warrant for Wither's imprisonment in the Marshalsea." Cyndia Susan Clegg, "Print in the Time of Jacobean Parliaments," *in* Negotiating the Jacobean Printed Book 72-74 (Pete Langman, ed. 2016).

[450] Stephen Clucas & Rosalind Davies, "Introduction," *in* The Crisis of 1614 and The Addled Parliament: Literary and Historical Perspectives 24 (Stephen Clucas & Rosalind Davies, eds. 2003); *see also id.* ("O'Callaghan argues that Wither's arrest was probably organised by Henry Howard, Earl of Northampton, who had been the object of a defamation campaign to hinder his ambitions to become Lord Treasurer.").

This was a time of rapid growth in legal publishing in England and of the English legal profession itself. "The number of lawyers in Elizabethan and early Stuart England grew sharply, both in the 'upper branch' of the profession (the serjeants,[451] benchers,[452] and utter barristers[453] of the Inns of Court) and the 'lower branch' (the court officers, clerks, attorneys, and solicitors)," one historical source notes, giving these telling statistics: "Admissions to the Inns of Court rose from about 100 per year in the 1550s to about 300 per year in the 1620s. Between 1570 and 1640, the four Inns matriculated almost 16,000 students and called about 2800 barristers." Whereas Lincoln's Inn recorded "164 bar calls in the five decades between 1520 and 1569," it recorded "628 calls between 1590 and 1639." During term time, that study's author, University of Chicago law professor Richard Ross, explains, residents of the Inns of Chancery "mingled with the 'upper branch' of the profession and attended the royal courts, developing a sharper sense of the legal arguments current in the capital and an exposure to popular lawbooks." The number of attorneys practicing before the courts of King's Bench and Common Pleas was approximately 200 in 1560, but roughly 1,050 by 1606 and 1,750 by 1640.[454]

The Inns of Chancery—as one American court has explained, quoting a source on English law—"'were designed as places for elementary studies,' where students 'learned the nature of original and judicial writs, which were then considered as the first principles of the law.'"[455] Of the eight Inns of Chancery, the four Inns of Court, and the two Inns of Sergeants, one English history recalled in describing London's legal education system: "The Colledges of Municipal, or Common-Law Professors and Students, are 14, called still Inns, the old *English* word, for Houses of Nobleman, or Bishops, or men of extraordinary Note, and which is of the same signification with the French Word Hostel at Paris." "The Inns of *Chancery*," that source notes, "were probably so named, because there dwelt such Clerks, as did

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451 *See* Judith L. Maute, *Revolutionary Changes to the English Legal Profession or Much Ado about Nothing?*, 17 Prof. Law. 1, 4 (2006) (noting that "[u]ntil the late sixteenth century, Serjeants—the Order of the Coif—were unrivaled in their stature among legal practitioners"; that "[s]erjeants were special servants of the Crown" and "had exclusive rights of audience to appear before the Common Pleas Court sitting en banc, and generally had rights of audience to appear in other courts"; that "[o]nly Serjeants could become common-law judges"; and that "[r]anking beneath Serjeants were the predecessors of barristers, known at various times as 'apprentice-at-law' and 'utter barristers'").

452 Rachel Ellenberger, *"Doubly Damned Attornies": Lessons on Professional Regulation from Eighteenth-Century England*, 32 Geo. J. Legal Ethics 577, 592 (2019) ("A bencher, or Master of the Bench, was a senior member of an Inn of Court, many of whom held positions of authority within the Inn."); *id.* ("If made a judge, a barrister automatically became a bencher within his Inn, and one of the prerogatives of the benchers was to choose the best students to argue the moot trials at their Inns.").

453 *See* Paul Raffield, *The Ancient Constitution, Common Law and the Idyll of Albion: Law and Lawyers in Henry IV, Parts 1 and 2*, 22 Law & Literature 18, 28 (2010) ("Utter barristers from the Inns of Court gave readings on particular statutes or cases at the Inns of Chancery, and students there participated in moots, similar to those at the Inns of Court.").

454 Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520–1640*, 146 U. Pa. L. Rev. 323, 405–06 (1998).

455 Gage v. Gage, 29 A. 543, 549 (N.H. 1890) (quoting 4 Reeve, Eng. Law, 120); *see also* In re Ricker, 29 A. 559, 562–63 (N.H. 1890) (discussing the English Inns of Chancery and Inns of Court).

chiefly study the forming of Writs, which regularly appertain to the Curfitors, that are Officers of Chancery." "The first of these," that history continued, naming them, "is called *Thavis Inn*, begun in the Reign of *Edward* the Third, and since purchased by *Lincolns-Inn*, as was also *Furnivals Inn*; then there is *Bernards Inn*, *New Inn*, *Clements Inn*, *Cliffords Inn*, antiently the House of the Lord *Clifford*; *Staple Inn*, belonging to the Merchants of the Staple; and *Lions Inn*, antiently a common Inn, with the sign of the *Lion*."[456] "In his long career," another source notes of Wither's diverse interests in law, music, politics, and poetry, "George Wither (1588–1667) wrote upwards of one hundred books in an extraordinary range of styles and genres: Spenserian pastorals, prose satires, amatory lyrics, emblematic poetry, instruction manuals, political diatribes, moral tracts, and hymns."[457] "Known as 'A Puritan Poet' and also as a major in the English Parliamentary army," one early twentieth-century source later succinctly—if a bit too succinctly—summarized Wither's professional life.[458]

In England and Wales, those studying the law, precedents, and legal customs organized themselves into Inns of Court—the original fourteen of which gradually coalesced into four: Lincoln's Inn, Gray's Inn, Inner Temple, and Middle Temple. "The Inns originally served as hostels and schools for student lawyers in the thirteenth and fourteenth centuries," one scholar, Nadia Shamsi, explains. "The legal apprentices," another scholar, James Hart, writes, "lived, ate, and learned the law together." "Historically, Lincoln's Inn has had the strongest links to the Courts of Chancery," English Lord Justice Scott Baker points out.[459] The library at Lincoln's Inn is first mentioned in its records in 1471.[460] "There are," Charles

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[456] Edw. Chamberlayne, The Second Part of the Present State of England: Together with Divers Reflections upon the Antient State Thereof 259 (London: 12th ed. 1684); *see also* 2 Henry B. Wheatley, London Past and Present: Its History, Associations, and Traditions 390 (1891) ("Lincoln's Inn, an Inn of Court, with two Inns of Chancery attached, *Furnival's Inn* and *Thavie's Inn*, situate between Chancery Lane and Lincoln's Inn Fields.").

[457] John Spalding Gatton, *Catalog of the Peal Exhibition: English Literature before 1800*, 4 Ken. Rev. 99 (1982), *available at* https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1258&&context=kentucky-review&&sei-redir=1&referer=https%253A%252F%252Fscholar.google.com%252Fscholar%253Fhl%253Den%2526as_sdt%253D0%25252C24%2526q%253D%252522abuses%252Bstript%252522%252B%252522George%252Bwither%252522%252B%252522library%252Bof%252522%2526btnG%253D#search=%22abuses%20stript%20George%20wither%20library%22.

[458] American Patriots and Statesmen, from Washington to Lincoln: Patriotism of the Colonies, 1492–1775, at 61 (Albert Bushnell Hart, ed. 1916).

[459] James Hart, *Our Conflicting Liberty Heritage from England and France*, 54 Creighton L. Rev. 19, 24 (2020); Scott Baker, *Middle Temple, the Inns of Courts and the Present Structure of the English Legal System*, 31 Okla. City U. L. Rev. 81, 84 (2006); Nadia Shamsi, *The Search for Truth: A Comparative Look at Criminal Jury Trials in the United States and England*, 22 U.C. Davis J. Int'l L. & Pol'y 203, 210 n.45 (2016); *see also* Danaya C. Wright, *"Well-Behaved Women Don't Make History": Rethinking English Family, Law, and History*, 19 Wis. Women's L.J. 211, 300 n.376 (2004) ("The Middle Temple, the Inner Temple, Gray's Inn, and Lincoln's Inn are the four Inns of Court, surviving since the medieval period, that originally served as law schools and professional associations for barristers . . . .").

[460] *Collections*, The Honourable Society of Lincoln's Inn, https://www.lincolnsinn.org.uk/library-archives/collections/.

William Heckethorn wrote in *Lincoln's Inn Fields and the Localities Adjacent* (1896), "three ranks or degrees among the members of the Inns of Court: benchers, barristers, and students." "The benchers are the superiors of each house, to whom the government of its affairs is committed," Heckethorn explained,[461] noting that, in the fifteenth and sixteenth centuries, the benchers of Lincoln's Inn excluded—and then greatly restricted—Irishmen from membership.[462]

Each of England's Inns of Courts has a storied history. "The early history of Lincoln's Inn as a legal institution is involved in much obscurity," Heckethorn observed, pointing out of the Inn's history: "The man to whom it owed its rising celebrity was Sir John Fortescue (b. 1395, d. 1485), one of the benchers, and one of the fathers of English law, who held the Great Seal under Henry VI. Fortescue wrote a work entitled 'De Laudibus Legum Angliæ,' in which occurs the first mention of the four Inns of Court, viz., the Inner and Middle Temple, Lincoln's Inn and Gray's Inn." A fifteenth-century "Black Book" of the Inn itself lists Fortescue as one of its governors. A section of Heckethorn's book, titled "*Eminent Students, Members, and Residents*," lists Sir Thomas More as connected with Lincoln's Inn and identifies as "[o]ther eminent members" Puritan lawyer William Prynne; poet George Wither; Sir Matthew Hale, "who contributed a large collection of MSS. to the library of this society—'a treasure,' he says in his will, 'not fit for every man's view"; Lord Shaftesbury; Lord Mansfield; William Pitt; William Penn; John Rushworth, "in 1640 appointed assistant clerk at the House of Commons"; and Sir John Denham, "the poet who, in a drunken frolic, blotted out all the signs between Temple Bar and Charing Cross."[463]

V. Prerogative Courts, the Oath Ex Officio, and Draconian Corporal Punishments: The Star Chamber, the Court of Castle Chamber, and the Grand and Ulster Remonstrances

A. English History and Prerogative Courts

England has a complex constitutional history, of which the Magna Carta, the Petition of Right, and the English Bill of Rights are major slices. The Petition of Right (1628)—part of a storied English tradition of Parliament petitioning the

461 Charles William Heckethorn, Lincoln's Inn Fields and the Localities Adjacent: Their Historical and Topographical Associations 8 (1896).

462 *Id.* at 10–11.

463 *Id.* at 11–12; *see also* 66 Dublin University Magazine: A Literary and Political Journal 38 (1865) (discussing prominent students of Lincoln's Inn).

monarch[464] that included the Millenary Petition of 1603[465] and King James I's 1622 proclamation granting "the Right of his subjects to make their immediate Addresses to him by Petition"[466]—has been described as "the first significant modification of the royal prerogative."[467] "[I]t was James's refusal to grant leeway to Puritan

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464 *E.g.*, Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. Davis L. Rev. 965, 975–76 (1999) (noting that "[b]y the Stuart period petitioning was an important institution in England" though "it was still not always legally protected"; that "several of the men who presented the Millenary Petition to James I in 1603 found themselves imprisoned for it by the Court of Star Chamber because it was considered 'an offense fineable at discretion, and very near to treason and felony, as it tended to sedition and rebellion'"; that "[t]his was typical of the high-handed attitude of the early Stuart kings, which ultimately led to the English Civil War"; that "in 1622, James I officially proclaimed 'the Right of his subjects to make their immediate Addresses to him by petition'"; that "[d]uring the tense period leading up to the English Civil War, petitions became very numerous"; and that some petitions, such as the Grand Remonstrance (1641), "were of constitutional importance").

465 The Millenary Petition (1603), *in* The Stuart Constitution 1603–1688: Documents and Commentary 132 (J.P. Kenyon ed. 1966); *see also* Bachmann, *supra* note 95, at 200 ("In 1603, Elizabeth died and her councilmen invited James Stuart (King of Scotland) to assume the throne. As James traveled south, Puritan clergymen presented James with the 'Millenary Petition', requesting tolerance for certain Puritan predilections. James preferred Elizabethan Anglicanism to the Presbyterianism he endured in Scotland, and in 1604, he informed the Puritans they were to conform to all existing rules of Church service or lose their licenses. Three hundred refused and were evicted."); *id.* at 241 ("In 1603, the Millenary Petition of the Puritans urged 'that the oath ex officio, whereby men are forced to accuse themselves, be more sparingly used . . . ."); *id.* at 241–42 ("In 1640, the Root and Branch Petition by Presbyterians remarked 'that the said government [of archbishops and bishops] with all its dependencies, roots and branches, may be abolished. . . . The exercising of the oath ex officio, reaching even to men's thoughts . . . .'); *id.* at 242 ("In 1640, Pym's Speech on Grievances declared, 'I observe as a great grievance . . . the encroaching upon the King's authority by ecclesiastical courts, as namely the High Commission, which takes upon it to fine and imprison men, enforcing them to take the oath ex officio, with many of the like usurpations . . . .'").

466 Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1157–58 (1986) (discussing King James I's 1622 proclamation; noting that "[h]is successor, Charles I, as late as 1644, invited any subjects with grievances to freely address themselves by petitions"; that "John Pym's speech in the House of Commons in 1640 explained the constitutional necessity of frequent sessions of parliament for providing subjects with an opportunity to present their petitions"; that "[t]he Root and Branch petition from London, said to have been signed by 15,000 people, was presented in December 1640"; that "[a]lso in 1640, several counties complained of the injustice of ship money, monopolies, the Star Chamber, and other matters"; and that "[t]he Grand Remonstrance, drawn up in 1641 by a committee that had received numerous petitions, contained two revolutionary features: the idea of appealing to the people rather than the king, and the concept of parliamentary control over the executive").

467 Christopher Hill, The English Bible and the Seventeenth Century Revolution 18–19 (1994) (noting that "[i]n 1628 Charles I was outraged when the Commons called for the Petition of Right—the first significant modification of the royal prerogative—to be printed, because he did not want ordinary people to read or discuss it," and that the Grand Remonstrance (1641), "a list of the Commons' grievances against Charles I's government," resulted in an "uproar in the House, in which swords were drawn for the only recorded time in its history").

preachers that set off a migration of frustrated preachers to New England, which did not stop until 1640," one source recalls. "As early as 1610," that source adds, "Parliament was protesting the suppression of speech" and Parliament's Root and Branch Petition of 1640—concerning itself with the dissemination of religious books and the freedom of ministers to preach[468]—contained this grievance: "The restraint of many godly and able men from the ministry, and thrusting out of many congregations their faithful, diligent and powerful ministers, who lived peaceably with them, and did them good, only because they cannot in conscience submit to and maintain the bishops' needless devices; nay, sometimes for no other cause but for their zeal in preaching or great auditories."[469]

The Petition of Right reflected a loss of confidence in the monarchy.[470] As the U.S. Supreme Court once put it, the Petition of Right "drew upon centuries of tradition and Magna Carta as a model for the Parliament to issue a plea, or even a demand, that the Crown refrain from certain actions." As the Supreme Court emphasized of the petition presented by Parliament in the reign of King Charles I following a series of disputes: "The Petition of Right stated four principal grievances: taxation without consent of Parliament; arbitrary imprisonment; quartering or billeting of soldiers; and the imposition of martial law."[471] But the Petition of Right did not effectively rein in, let alone put a stop to, Stuart abuses, with Charles I—in the wake of the Petition of Right—choosing to disrespect and disregard his subjects and to rule without the aid of Parliament, leading to what has been called the period of "Personal Rule" and to further abuses of power.[472]

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468 Steve Bachmann, *The Politics of the First Amendment*, 6 Cardozo Arts & Ent. L.J. 327, 336 n.62 (1988).

469 Bachmann, *supra* note 95, at 218–19.

470 Laura R. Ford, *Prerogative, Nationalized: The Social Formation of Intellectual Property*, 97 J. Pat. & Trademark Off. Soc'y 270, 296–97 (2015) (noting that "[i]n the Parliaments of 1625 and 1628, leaders in the House of Commons (prominent among them Edward Coke) began to lose confidence in the monarchy"; that "Parliament began to conceive of itself as the primary guardian of citizens' rights, especially their property rights and personal liberties"; that "Parliamentary speeches, bills, and negotiations with the king began to focus also on the establishment of Parliament's constitutional privileges and roles"—"privileges and roles . . . not presented as new" but "as having been established and continued through ancient precedents, traceable ultimately to the Great Charter (Magna Carta) of 1215"; and that "[f]or Parliament, especially the Commons, it became increasingly important to establish that these privileges could not be retracted, that they existed as a matter of ancient 'rights,' vested in Parliament, independent from and of equal weight with the royal Prerogative").

471 Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 395 (2011); *see also id.* ("After its passage by both Houses of Parliament, the Petition received the King's assent and became part of the law of England. The Petition of Right occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right[s] of 1689.").

472 Liam Seamus O'Melinn, Note, *The American Revolution and Constitutionalism in the Seventeenth-Century West Indies*, 95 Colum. L. Rev. 104, 129 n.124 (1995) ("Charles I did not call a single Parliament between 1629 and 1640. This is the period known as his 'personal rule.'"); Paul Raffield, *A Discredited Priesthood: The Failings of Common Lawyers and Their Representation in Seventeenth Century Satirical Drama*, 17 Law & Literature 365, 376 n.56 (2005) (discussing Charles I's period of personal rule; his ordering of the levying of "ship-money"—a tax—from his subjects; how "in 1637 John Hampden, an eminent Member of Parliament and opponent of the personal rule of Charles

B. The Punishment of Puritans Alexander Leighton, William Prynne, Henry Burton and John Bastwick

Complaints about cruelty and excessive bail and fines were commonplace in 1630s England. "The problem of excessive bail grew, along with the problem of excessive fines, particularly in the 1630s during Charles I's reign as religious and political dissidents were repressed," Wendell Bird explains in *Religious Speech and the Quest for Freedoms in the Anglo-American World* (2023). "Examples," Bird notes, "include John Lilburne, Dr. John Bastwick, William Prynne, and Rev. Henry Burton," whose "perpetual imprisonments and enormous fines" drew attention. An "excessive fine," Blackstone pointed out, "amounts to imprisonment for life." It was "Leveller leaders" who "decried those injustices," Bird writes, adding that "[a]ll of them personally experienced imprisonment without bail for treason . . . ." Referencing Richard Overton's writings, Bird further observes: "Earlier, Overton condemned the 'most unreasonable fines upon [Puritans], as of 2000*l.* or the like,' and later, Lilburne complained of his 'unheard-of fine as 7000*l.*' They and other Levellers insisted that reasonable bail should be allowed for all but the serious nonbailable offenses and that reasonable amounts should be set for fines."[473]

In the tumultuous 1630s, Puritans and pamphleteers—as well as Irishmen who faced consequences and judgments of their own in Dublin, Ireland's Court of Castle Chamber—risked or endured arbitrary punishments and physical mutilation of the kind that befell Dr. Alexander Leighton (1570-1649), a Scottish medical doctor and Puritan preacher, and William Prynne (1600-1669), an English lawyer and author. "The case against Dr. Alexander Leighton in 1630 provides an apt illustration," one legal historian notes, pointing out that, in 1629, Leighton had published *An Appeal to Parliament, or Sion's Plea Against the Prelacie* vilifying Anglican bishops and one of them, William Laud,[474] in particular. As that legal historian, Daniel Vande Zande, explains: "Leighton's punishment was severe, even for its day." When Dr. Leighton "addressed the Long Parliament years later," Vande Zande stresses,

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I, was prosecuted for refusing to pay ship-money on his lands in Buckinghamshire and Oxfordshire"; and observing that "[t]he Long Parliament abolished ship-money in July 1641").

473 Wendell Bird, Religious Speech and the Quest for Freedoms in the Anglo-American World 170 (2023); *see also id.* at 129 ("Soon after his religious conversion, Lilburne met Dr. John Bastwick, who was being prosecuted by the High Commission for Puritan writings. They remained on friendly terms during Bastwick's Star Chamber trial in 1637, which was held jointly with William Prynne and Rev. Henry Burton for seditious libel."). William Prynne, Henry Burton and John Bastwick were eventually freed from their imprisonment in November 1640, with their release accompanied by popular demonstrations in their favor in London. *See* Mark Greengrass, Christendom Destroyed: Europe 1517–1648 (2014).

474 Paul Finkelman, *School Vouchers, Thomas Jefferson, Roger Williams, and Protecting the Faithful: Warnings from the Eighteenth Century and the Seventeenth Century on the Danger of Establishments to Religious Communities*, 2008 B.Y.U. L. Rev. 525, 545 n.58 (noting that "William Laud, Bishop of London (1628-1633) and Archbishop of Canterbury (1633-1645), was the intolerant supporter of King Charles I"; that Laud was "a member of the King's Privy Council" and "notorious for his use of the Star Chamber for prosecuting religious dissidents"; and that he "was largely responsible for the prosecution, torture, and execution of many Puritan leaders in the 1630s, including John Lilburne, William Prynne, Henry Burton, and John Bastwick").

its members "were moved to tears when hearing of the barbaric nature of his punishment." The Star Chamber had sentenced him to pay a fine of £10,000 and to serve a life sentence; he was taken to the pillory at Westminster and whipped; and he had one side of his nose slit, one ear cut off, and the mark "SS" branded on his cheeks to signify "Sower of Sedition." Several days thereafter he had been taken to the pillory at Cheapside where he was whipped again, then had the other side of his nose slit and his other ear cut off.[475]

William Prynne, the English lawyer, was also a fierce opponent of William Laud's mandated and highly ritualistic religious practices. As Duke University historian William Thomas Laprade writes of Prynne's first stint in the pillory: "Prynne, whose extravagant pamphlet, *Histriomastix*, contained the extreme Puritan views of the stage, was brought before the Court of Star Chamber on a charge of insulting the Queen. The court imposed a fine of five thousand pounds, sent him to the pillory, and ordered his ears cropped."[476] *Histriomastix* (1632), a blistering critique of English Renaissance theater, masques, balls, dancing, and the decking of houses with evergreens at Christmas, was viewed as a scurrilous attack on King Charles I's Catholic wife, Queen Henrietta Maria, a drama lover and patron who had herself performed in a pastoral, with Prynne's more than 1,000-page book denouncing stage actresses as "notorious whores."[477]

The Star Chamber garnered a notorious reputation in England. "It was a cruel age," Thomas Barnes, a Professor of History and Law at the University of California at Berkeley wrote in an introduction to William Hudson's *A Treatise of the Star Chamber*—a treatise written in 1621 but not published until 1792. "Emphatically, Star Chamber did not use torture, as had been laid at its door," Barnes observed, explaining of how English law and criminal procedure differed from the law of continental European countries that systematically made use of judicial torture as part of their criminal justice systems: "Torture was occasionally used in England, though it was not a matter of course as in Continental criminal procedure where it was aimed at eliciting a confession amounting to moral certainty that the accused had committed the crime." "In England," Barnes stressed, "torture was an extra-

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475 Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 Am. J. Legal Hist. 326, 342 (2008–2010); *see also id.* at 342–43 (discussing William Prynne's punishment—to be fined £5,000, deprived of his university degree and expelled from the Inns of Court, to stand in the pillory at both Westminster and Cheapside where he was to bear a sign declaring his book to be an infamous libel, to have an ear cut off at each place, to have his books recalled and burned publicly at the pillory before him, and then to be imprisoned—and the "similar example" of "the case of Lodovick Bowyer, convicted in 1633 of publishing false tales and scandals about Archbishop Laud" and fined £3,000, sentenced to have both of his ears cut off, and imprisoned for life).

476 William Thomas Laprade, British History for American Students 304 (1926).

477 Randy Robertson, Censorship and Conflict in Seventeenth-Century England: The Subtle Art of Division (2009), ch. 1; W. F. Dawson, Christmas: Its Origin and Associations, Together with Its Historical Events and Festive Celebrations during Nineteen Centuries 199 (1902); 2 Adolphus William Ward, A History of English Dramatic Literature to the Death of Queen Anne 372-73 (1875); *see also id.* at 373 n.2 ("At Lincoln's Inn (see dedication in *Histriomastix*) the practice of masks at Christmas had been discontinued before the publication of Prynne's diatribe. The other Inns of Court however kept up the practice, especially the Middle Temple, where the old custom of electing a 'Prince d'Amour' to preside over the Christmas revels prevailed both in James' and in Charles' reign.").

judicial procedure inflicted by warrant of the Privy Council only to discover the names of suspected accomplices; the evidence obtained could not be used against the defendant tortured." "Torture, though contrary to the law of England," another history observes of how that practice ran afoul of England's common law tradition but was nonetheless employed by English kings and queens to gather information, "was frequently employed during the Middle Ages by the exercise of the prerogative of the Crown, more especially for the purpose of manufacturing evidence, and extorting confessions."[478]

The critique of the Court of Star Chamber when it was abolished in 1641: its judges had "undertaken to punish where no Law doth warrant and to make Decrees for things having no such authoritie and to inflict heavier punishments then by any Law is warranted." Such decrees had "by experience beene found to be an intollerable burthen to the subjects and the meanes to introduce an Arbitrary Power and Government." "The abrupt legislative destruction of the Court of Star Chamber in the summer of 1641," Nathaniel Earle writes in his Clemson University graduate thesis focused on the court's history from 1625 to 1641, "is generally understood as a reaction against the perceived abuses of prerogative government during the decade of Charles I's personal rule." "The conception of Star Chamber as an 'extra-legal' tribunal (or, alternatively, as a legitimate court that had exceeded its jurisdictional mandate)," Earle explains, "emerged from the constitutional debate about the limits of executive authority that played out over the course of the seventeenth century in Parliament, in the press, in the pulpit, in the courts, and on the battlefield." For instance, after Dr. Alexander Leighton—the Scottish physician and Puritan preacher and pamphleteer—had called for the abolition of episcopacy in *An Appeal to the Parliament: or, Sions Plea Against the Prelacie*, he was charged "with framing, publishing, and dispersing a scandalous book against King, Peers, and Prelates" and thrown into Newgate prison to await his fate in the Star Chamber.[479]

By today's standards, the punishments ordered by the Court of Star Chamber were clearly torturous in nature. For example, in the 1630s, on the Star Chamber's

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[478] H. St. Clair Feilden, A Short Constitutional History of England 80 (3d ed. rev. W. Gray Etheridge, ed. 1895); *see also id.* at 81 (discussing instances of torture in England through the rack, known as "the Duke of Exeter's daughter"; noting how Jesuits and Catholics were tortured during Queen Elizabeth I's reign; observing that, in 1571, "Timothy Penredd, charged with forging the seal of the King's Bench," was ordered to have his ears "nailed on successive days to the pillory 'in such a manner that he . . . shall, by his own proper motion, be compelled to tear away his two ears from the pillory'"; that "[t]he conspirators in the Gunpowder Plot of 1605 were all tortured, and Edmund Peacham was severely racked (1615)"; that "[t]orture was declared illegal by Sir Edward Coke, and this opinion was expressed by all the Judges when it was proposed by the Privy Council to put John Felton, the assassin of the Duke of Buckingham, to the rack, in 1628"; that "[t]he last instance of torture in England occurred in May, 1640, although it was not forbidden by Statute until 7 Anne, c. 21, § 8, 1709, which, however, provides for the continuance of the *peine forte et dure*"; and that "[t]he usual modes of torture were the rack, the *Scavenger's* daughter (an instrument invented *temp.* Henry VIII by William Skeffington, Governor of the Tower of London), the thumb-screws, and the boot").

[479] Nathaniel A. Earle, "This Court Doth Keep All England in Quiet": Star Chamber and Public Expression in Prerevolutionary England, 1625–1641, M.A. Thesis, Graduate School of Clemson University (Aug. 2018), https://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=3957&context=all_theses, pp. 3, 10, 70-71.

orders, Dr. Alexander Leighton and other gentlemen—most notably, William Prynne, John Bastwick, and Henry Burton—were accused by information of seditious libel, ignominiously sentenced to be whipped, and then had their ears nailed to the pillory and cut off.[480] The administration of their punishments—carried out in public to shame, mutilate, and forever maim them—has been recounted by historian Robert Ross[481] and legal historian Daniel Vande Zande.[482] In that era, subjecting someone to the pillory was a relatively common punishment meted out by the Star Chamber, as records of its judgments make clear.[483]

Reverend George Gerrard—present for the infliction of such punishments in 1637 upon William Prynne, John Bastwick, and Henry Burton—reported of what he saw that day, giving this report: "In the palace-yard two pillories were erected, and there the sentence of the Star Chamber against Burton, Bastwick, and Prynne was executed. They stood two hours in the pillory." "The place was full of people, who cried and howled terribly, especially when Burton was cropped," Gerrard observed, adding: "Dr. Bastwick was very merry; his wife, Dr. Poe's daughter, got on a stool and kissed him. His ears being cut off, she called for them, put them in a clean

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480 *Id.* at 15–16, 19–20.

481 Robert Ross, An Analysis of the Stuart Period of English History: Constructed from the Best Authorities 85 (1860) (discussing the "Cases of Prynne, Burton, and Bastwick"; how the Star Chamber adjudged Prynne "to be deprived of his Oxford degree, to be excluded from Lincoln's Inn, to stand in the pillory at Westminster and Cheapside, losing an ear at each place, to pay a fine of £5,000, and to suffer perpetual imprisonment"; and discussing the punishments of John Bastwick, "a physician of Colchester, who had been committed for a book against episcopacy, became the coadjutor of Prynne, and sent forth some tracts," and Henry Burton, "a clergyman, and formerly a chaplain to Charles"); *id.* at 85-86 (noting of Prynne, Burton and Bastwick: "At the suggestion of Laud, a criminal information was filed in the Star-chamber against these three men, for attempting to bring the government in church and state into disrepute, and to excite sedition among his majesty's subjects. When called upon to answer, they defended their position at great length, but could not ward off a cruel sentence. These three persons were condemned to stand two hours in the pillory, to lose both ears, to be branded, to pay a fine of £5,000, and to be imprisoned for life. When the sentence was executed in Palace-yard, the multitude expressed their disappropation by groans and hisses, and when they were removed from London to distant prisons, the roads were filled with sympathisers. Those who presumed to entertain Prynne on the road, were put to heavy fines and compelled to make a public acknowledgement of their offence. The prisoners were subsequently sent to prisons out of England; Prynne to Jersey, Bastwick to Scilly, and Burton to Guernsey, where they remained rigidly immured till released by the Long Parliament.").

482 Vande Zande, *supra* note 475, at 344 (discussing the punishment of William Prynne and how he was pitied; observing that "[r]esistance to the Crown's coercive manipulation increased dramatically in the late 1630s, directly resulting in increased opposition to the Star Chamber"; that "[w]hile some supporters were present to witness Prynne's punishment in 1634, there was a great assembly on hand to observe the punishment of Burton, Bastwick and Prynne in 1637—just three years later"; and that, in 1637, "[t]he vast multitude was present, not to give heed to the moral lesson the Court intended, but to instead support the convicted offenders").

483 *See generally* John Southerden Burn, The Star Chamber: Notices of the Court and Its Proceedings: With a Few Additional Notes of the High Commission (1870).

handkerchief, and carried them away with her."[484] Prynne himself was branded with the letters "S.L." (for "seditious libeler") on both cheeks,[485] though in a reference to his nemesis, Archbishop William Laud, he reportedly "preferred to think of it as 'stigmata Laudis.'"[486] In the end, the barbarous punishments engendered much sympathy for Prynne, Burton and Bastwick and vehement opposition to the Star Chamber's abuses.[487]

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484 Vande Zande, *supra* note 475, at 344.

485 *See* Calendar of State Papers, Domestic Series, of the Reign of Charles I, 1637, Preserved in Her Majesty's Public Record Office 214 (John Bruce, ed. 1868) (noting Wiliam Prynne's sentence in a June 14, 1637 notation "taken by Sec. Windebank in the Star Chamber on the hearing of the cause of the Attorney-General *versus* John Bastwick, Henry Burton, and William Prynne" and reporting: "Lord Cottington moved the sentence, which was adopted by the Court with an addition suggested by Lord Chief Justice Finch. Lord Cottington's speech is thus noted by Sec. Windebank:—'Perpetual imprisonment in remote places. Bastwick, in Cornwall, Lostwithiel Castle; Burton, Lancaster Castle; Prynne, Carnarvon Castle. To communicate with none but such as shall be permitted. 5,000*l*. apiece fine. All three to lose their ears in Westminster. Burton, degradation, being in orders. Bastwick, the like.' Sir John Finch's addition is thus reported:—'The neglect of the [previous] execution upon Prynne. Prynne's ears cut close, and stigmatised with S.L. on his cheeks.' The Lord Treasurer and Archbishop Laud did not join in the sentence."); *see also* Catalogue of Prints and Drawings in the British Museum – Division I. Political and Personal Satires (No. 1 to No. 1235), at 87 (1870) (noting that "[i]n February, 1633, William Prynne was, in the Star Chamber, with other punishments, condemned to lose his ears, and on June 14, 1637, he was again, with Dr. Bastwick and the Rev. Henry Burton, condemned"; that, on the latter occasion, "Sir John Finch (Lord Finch of Fordwich)" added "branding" of "S.L." on the cheeks to Prynne's sentence, an addition "agreed to by the other judges then present"; that "the execution of the sentence" occurred on June 30, 1637; and that "Prynne averred that 'S.L.' stood on his cheeks for 'Stigmata Laudis,' or 'Laud's Scars.'").

486 Michael Ferris, From Tyndale to Madison: How the Death of an English Martyr Led to the American Bill of Rights 158 (2007).

487 *See* Vande Zande, *supra* note 475, at 344–45 (discussing the sympathy for Prynne, Burton and Bastwick; noting that "by 1637 the tide was beginning to turn against the Star Chamber"; emphasizing that "[w]hen opposition did take hold, it was rather uniformly distributed, arising from Parliament, Puritans, common law judges and lawyers, and a large segment of the population comprising the various classes"; pointing out that "with the convening of the Long Parliament in November of 1640, the Star Chamber became a focal point of opposition to the Crown"; that "[o]n the first day the Long Parliament was in session, representatives of Burton, Bastwick and Prynne introduced petitions complaining of the injustices against them, particularly as to the severity of their punishment"; that "[t]he Commons ordered their immediate release so that they might plead their cause"; that "[s]imilar petitions were soon received from other prisoners, and this led to various highly emotional speeches attacking the Privy Council and the Star Chamber"; that "[a] committee of the House was formed to review prisoner petitions and reconsider the Court's jurisdiction, and many sentences were thereafter reversed"; that "John Lilburne's sentence, for example, was overturned as 'bloody, wicked, cruel, barbarous, and tyrannical'"; that "[i]n reporting its findings the Committee recommended the Court's abolition, rather than modifications to its jurisdiction"; and that "[e]ven though the House of Lords desired to retain the Court, 'with limitations,' the Commons objected and Charles signed the bill abolishing the Court on July 5, 1641").

The Court of Star Chamber had its own unique criminal procedures that differed from those of common-law courts—and there was an intimidation factor, too. "The Star Chamber," one prominent legal historian, Donald Dripps, notes, "did not permit the accusation to be answered without the signatures of two attorneys, which were not to be had because the answers drafted by the defendants might, if endorsed by counsel, expose counsel to prosecution." Such procedures had dire consequences for many people and engendered much cruelty. "Stripped of the most contrarian matters," Dripps writes, "the plea in defense was so sparse that the court judged the defendants guilty by confession."[488] The punishments inflicted on Prynne, Bastwick, and Burton—prominent members of the professions of law, medicine, and theology—were described in *A History of the Criminal Law of England* (1883), with an extended excerpt later reprinted in the U.S. Supreme Court's *Faretta v. California* (1975) decision.[489]

The punishments meted out by the Star Chamber shaped public sentiment in England—and, many decades later as they were remembered through the lens of history, in the newly formed United States of America as part of the American Revolution. Although it is impossible to get into the minds of America's founders or the framers of early American state constitutions and the U.S. Constitution, they had studied English history and knew about the Star Chamber, if only through written sources. That knowledge would have materially shaped their understandings of the Eighth Amendment's text to the extent Americans had Stuart abuses in mind (as they almost certainly did) during the late eighteenth century—a period when America's leading thinkers were also reading Enlightenment texts.[490] In or about December 1769, Thomas Pownall attempted to formulate general principles of law applicable to the issues in dispute between Britain and her colonies. One of the corollaries he deduced from them: "[T]hat the rights of the subject as declared in the Petition of Right, the act abolishing Star Chamber, the Habeas Corpus Act, the Bill of Rights, etc., extend to the colonists of common right."[491] Likewise, in a letter

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488 Dripps, *supra* note 307, at 160.

489 *Faretta* reprinted multiple paragraphs from that nineteenth-century history about the Star Chamber punishments imposed upon William Prynne, John Bastwick, and Henry Burton. Faretta v. California, 422 U.S. 806, 822 n.18 (1975) (quoting 1 James Fitzjames Stephen, A History of the Criminal Law of England 340–41 (1883)).

490 *See* Wade v. McDade, 106 F.4th 1251, 1268 n.3 (11th Cir. 2024) (Rosenbaum, J., concurring) ("[T]he Eighth Amendment incorporates an '*anti-discretion* norm,' stretching back to the 1689 English Bill of Rights.") (citing Dripps, *supra* note 307, at 143) (emphasis in original); *see also* Beth A. Colgan, *The Burdens of the Excessive Fines Clause*, 63 Wm. & Mary L. Rev. 407, 426 (2021) ("The abuses of the Star Chamber were mirrored in later practices despite additional recognition of constitutional limitations on excessive sanctions. The prohibition against the imposition of excessive fines in the English Bill of Rights arose out of reactions to the Star Chamber, and was in turn adopted verbatim, first in the Virginia Declaration of Rights, and ultimately in the Eighth Amendment."); Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 Regent U. L. Rev. 215, 255 (1995) (noting that "[t]he objections to the Star Chamber that led to its abolition read like the direct antitheses of the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments to the United States Constitution," and that "[t]he evils of this court were fresh in the memories of the Framers as evidenced by the unmistakable correlation between the protections, checks and balances enumerated in the Constitution and the offenses of the Star Chamber").

491 "Observations upon [Thomas Pownall], *State of the Constitution of the Colonies*,

to James Madison dated June 21, 1784, John Blair Smith wrote of "Star-chamber tyranny."[492]

Even centuries later, the Star Chamber remained an infamous court. For example, in *Negrich v. Hohn* (1965), a federal district court in Pennsylvania stated that the Eighth Amendment prohibition on cruel and unusual punishments "was directed against the English experiences that loomed large in the minds of the framers of our government, such as branding, mutilation, and cutting off the ears in Star Chamber." Citing the U.S. Supreme Court's rulings in *Wilkerson v. Utah* (1879) and *Weems v. United States* (1910), that federal district court emphasized of the American take-away from all that recalled cruelty as the Eighth Amendment was debated and ratified: "Disembowelment, being drawn and quartered, and all the gory incidents of the punishment for treason in England were banned. Torture, boiling in oil, and other unnecessary forms of cruelty are forbidden."[493]

C. The Oath Ex Officio and John Lilburne

Many suffered at the hands of England's prerogative courts. John Lilburne (1615–1657), known as "Freeborn John" in London, was just one of many in the seventeenth century who were imprisoned and subjected to highly coercive practices because of his beliefs.[494] An apprentice to a cloth merchant in London

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[1769?]," *Founders Online,* National Archives, https://founders.archives.gov/documents/Franklin/01-16-02-0181. [Original source: *The Papers of Benjamin Franklin,* vol. 16, *January 1 through December 31, 1769*, ed. William B. Willcox. New Haven and London: Yale University Press, 1972, pp. 298–303.]

492 "To James Madison from John Blair Smith, 21 June 1784," *Founders Online,* National Archives, https://founders.archives.gov/documents/Madison/01-08-02-0043. [Original source: *The Papers of James Madison*, vol. 8, *10 March 1784–28 March 1786*, ed. Robert A. Rutland and William M. E. Rachal. Chicago: The University of Chicago Press, 1973, pp. 80–83.]

493 Negrich v. Hohn, 246 F. Supp. 173, 175 (W.D. Pa. 1965) (citing 3 How. State Trials 561, 711, 735; Wilkerson v. Utah, 99 U.S. 130, 135–36 (1879); *Weems*, 217 U.S. at 368–73); *see also* Ralph C. Chandler, Richard A. Enslen & Peter G. Renstrom, Constitutional Law Deskbook § 6:4 – *Development* (noting in chapter 6, devoted to the Eighth Amendment, that the English Bill of Rights (1689) "was directly the result of the cruel punishments imposed during the days of the infamous Court of Star Chamber"); Vande Zande, *supra* note 475, at 330 ("Representative of many Puritan views, Parliament's *Abolition Act* cited three fundamental respects in which the Star Chamber had failed in its administration of justice; (1) it had exceeded its authority under the law by overreaching its jurisdiction; (2) its proceedings had become arbitrary, resulting in unjust convictions; and (3) it had inflicted cruel and excessive punishment."). The Star Chamber's abuses also inspired, and led to the adoption of, the Eighth Amendment's Excessive Fines Clause. Austin v. United States, 509 U.S. 602, 624 (1993) (Scalia, J. concurring in part) ("[F]or the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives . . . ."); Colgan, *supra* note 490, at 426 ("The prohibition against the imposition of excessive fines in the English Bill of Rights arose out of reactions to the Star Chamber, and was in turn adopted verbatim, first in the Virginia Declaration of Rights, and ultimately in the Eighth Amendment.").

494 *See generally* John Lilburne and the Levellers: Reappraising the Roots of English Radicalism 400 Years On (John Rees, ed. 2018).

and a Church of England critic, Lilburne—a Puritan "thwarted from studying law at the Inner Temple"[495] who later led the Leveller movement[496]—became politically engaged and a disciple of the "Puritan martyrs" William Prynne, John Bastwick, and Henry Burton. In 1637, Lilburne was first hauled before the Court of Star Chamber on a charge of importing seditious books from Holland. Scholar John Rees, in an anthology titled *John Lilburne and the Levellers: Reappraising the Roots of English Radicalism 400 Years On* (2018), notes that "it was an attempt to smuggle copies of John Bastwick's *Letany* into England from a press in the

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[495] Bird, *supra* note 473, at 127–28; *see also id.* at 129 (noting that Lilburne "held a burning religious faith that began with a religious conversion in his separatist Puritan church, around the year 1636, and that continued as a member of an Independent Puritan congregation and at the very end of his life as a member of a Quaker church"); *id.* ("During his Star Chamber prosecution, he told the court that 'the Word of God . . . ought to be the director of me in all things that I do.' Like other Puritans, he decried the 'wickedness and cruelty of the prelates.'"). Despite his lack of formal legal training, "Lilburne identified and claimed rights for people accused of crimes that no lawyer or highly educated person had collected in the seventeenth century or before, both by 'pioneering use of English common law throughout his political career' to promote justice and by pathbreaking efforts to identify rights that were the 'birthright' of the English people and particularly of criminal defendants, based on Magna Carta and statutes, common law, natural law, and classical antiquity." *Id.* at 126.

[496] "The Levellers were seventeenth-century English radicals who favored legal and political equality, religious tolerance, and natural rights. Levellers were prominent participants in the English Civil War . . . ." Howard Schweber, *Constitutional Revolutions: The People, the Text, and the Hermeneutic of Legitimation*, 81 Md. L. Rev. 226, 232 n.25 (2021). "The Levellers were the first mass-based pro-democracy movement in Anglo-American history." Michael Kent Curtis, *Judicial Review and Populism*, 38 Wake Forest L. Rev. 313, 337 (2003). "They emerged during the Civil War of the 1640s and supported the Parliament against the King." *Id*.; Bird, *supra* note 473, at 121 ("The ideas advocated by Lilburne and the other Leveller leaders were broadly discussed and widely known in mid-seventeenth-century England. They published hundreds of pamphlet titles, and were opposed by hundreds more. Their petitions were signed by thousands of people. Some of their proposals such as the first *Agreement of the People* influenced the army . . ., and others such as the final *Agreement of the Free People* received 'constant mention . . . in the pamphlets and newspapers of the day,' as Don M. Wolfe noted."); *id.* at 126–27 (noting that John Lilburne "is best known as a Leveller leader during the peak years of that cause [the English Civil War], 1647–49" and that "[t]hat period, and most of his life, was focused on what Michael Braddick's splendid biography calls his fights against 'the threat of liberties posed by the tyrannous potential' of 'the bishops, then the House of Lords, thirdly the Lords and Commons together,' and then the Council of State and the Commonwealth government"); *id.* at 127 ("Lilburne's own self-description of his life was that he fought with 'zeal against all tyrannous practices' and with 'faithful affections to the liberties' of England. As part of that fight, he filled in the accepted notion that the English people are 'free-born' with a number of freedoms and rights . . . which were their 'birth-right.'"); *id.* at 136 ("Lilburne's shift to more radical positions and abandonment by the Independents introduced his Leveller phase. He wrote nearly forty tracts from early 1646 to late 1649, calling for abolition of the House of Lords, criticizing tyranny by the House of Commons and various officials, protesting religious persecution particularly of Independents and Sectaries, and ultimately challenging the execution of Charles I and the tyranny of the Interregnum governments. By contrast, he maintained that government should be based on the consent of the people . . . .").

Netherlands that led to Lilburne's first arrest."[497] In the 1640s, English Levellers—seeking protection of legal rights and more equality—proposed the adoption of *An Agreement of the People* to constrain governmental power.[498]

For refusing to answer the Star Chamber's questions, John Lilburne—recognized by constitutional scholars and American jurists as a driving force behind the recognition of the privilege against self-incrimination[499]—paid a hefty price.[500] Along with another publisher, Lilburne was sentenced to pay a fine, to be whipped through the streets and pilloried,[501] and to be imprisoned until conforming to the

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497 JOHN LILBURNE AND THE LEVELLERS, *supra* note 494.

498 Goldberg v. Kelly, 397 U.S. 254, 273 n.2 (1970) (Black, J., dissenting) ("The goal of a written constitution with fixed limits on governmental power had long been desired. Prior to our colonial constitutions, the closest man had come to realizing this goal was the political movement of the Levellers in England in the 1640's. In 1647 the Levellers proposed the adoption of *An Agreement of the People* which set forth written limitations on the English Government. This proposal contained many of the ideas which later were incorporated in the constitutions of this Nation.") (citations omitted).

499 BIRD, *supra* note 473, at 118 ("Scholars of the Bill of Rights commonly ascribe a central role to John Lilburne and the other Levellers in bringing popular demand and legal recognition for the privilege against self-incrimination (and an end to the oath *ex officio*) . . . ."); *id.* at 118–19 ("[T]he United States Supreme Court has given Lilburne and the Levellers major billing for the privilege against self-incrimination . . . ."). Lilburne sought to legitimate rights, speaking of "the birthright of Englishmen" or of rights of "free-born Englishmen." *Id.* at 120; *see also id.* ("For example, in Lilburne's 1649 trial, the second sentence out of his mouth was a claim of the benefit of 'the liberty of every free-born Englishman, viz. [t]he benefit of the Laws and Liberties thereof, which by my birth-right and inheritance is due unto me' and to all." He often reiterated that assertion of his 'birth-right,' . . . and of a 'common right.'").

500 For one account of the Star Chamber's treatment of John Lilburne, see Laurence A. Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 78–79 (1988) (noting that "no individual did more to launch the right against compulsory self-incrimination than Lilburne"; that "[i]n 1637 Lilburne, a Puritan, was arrested for smuggling certain heretical and seditious books into England in violation of a Star Chamber decree banning the importation of unlicensed books"; that Lilburne refused to answer questions on the ground that the examination was an attempt to "ensnare" him; that "[t]wo weeks later Lilburne was brought before the Court of Star Chamber, and ordered to take the oath *ex officio*"; that the Star Chamber did not specify the charges against him and did not provide him with an opportunity to consult counsel or prepare a written response; that Lilburne refused to take the oath, asserting: "before I swear, I will know to what I must swear"; that Lilburne was returned to prison and "twice more brought before Star Chamber where twice again he refused the oath, each time reiterating his claim that the Star Chamber was adopting the practices of the High Commission (recently declared illegal by Coke) in an attempt to 'ensnare' him"; that the Star Chamber found Lilburne in contempt, ordered him imprisoned indefinitely, fined him 500 pounds, and sentenced him to be whipped and placed in the pillory; that "Lilburne's whipping during the two mile march from Fleet prison to the pillory was a public spectacle"; and that he was "[a]lmost beaten to death by over 200 strokes of the lash" yet "arrived at the pillory and gave an impassioned speech condemning the oath *ex officio*"—an event that "helped to spark a public outcry against the oath *ex officio* that ultimately led to the prohibition of the oath and the abolition of both the High Commission and the Court of Star Chamber in 1641").

501 "From the pillory," one scholar writes of Lilburne, "his 'preaching' (as a lawyer termed it), quoting dozens of Bible verses, supported the separatist Puritan movement, called

Star Chamber's procedure and taking the oath. As Rees explains of Lilburne and his stoicism in the face of horrendous abuse: "When he was punished by being tied to the back of a cart and dragged from the Fleet prison to Westminster Yard, beaten 500 times with a three-pronged, knotted leather whip on the way, he remained defiant, even when he was put in the stocks at the end of the ordeal. He was still throwing copies of Bastwick's pamphlet from his coat and making speeches until his goalers gagged him."[502]

The Star Chamber oversaw the licensing of prospective publications, but Lilburne—insisting on a privilege against self-incrimination—refused to take the oath *ex officio* and answer interrogatories under oath.[503] "The procedure used in the Court of Star Chamber was a compound of Continental and common law," one scholar writes in the *Harvard Law Review*, emphasizing that "[e]lements of the former may be seen in the examination of witnesses and the accused in secret,

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for repentance and salvation based on God's 'sacred Book,' urged spiritual warfare as 'soldiers of Jesus Christ' using 'spiritual armour,' and professed to be brought to the pillory by 'Divine Providence' in order to deliver that message." Bird, *supra* note 473, at 129.

502 John Rees, "Introduction: John Lilburne, the Levellers, and the English Revolution," *in* John Lilburne and the Levellers, *supra* note 494; *see also* Bird, *supra* note 473, at 134 (noting that the Star Chamber unanimously found Lilburne "guilty of a very high contempt and offence" that was deemed worthy of "very sharp, severe, and exemplary censure," with the Star Chamber ordering that Lilburne be indefinitely imprisoned in the Fleet until confirming himself to "obedience to the orders of the court," pay a £500 fine, and "be whipt through the streets, from the prison of the Fleet unto the pillory" (a distance of about a mile), and then be "returned to the Fleet"); *id.* ("When the sentence was executed, Lilburne was whipped with a knotted cord with more than 500 lashes, and then his head was locked in the pillory for two hours, with Lilburne's lacerated, bloody back fully exposed to the scorching sun. Lilburne gave what amounted to a sermon to the crowd, until the executioner gagged him so tightly that blood flowed out of his mouth, and he continued his protest by pulling copies of the illegal pamphlets out of his pocket and tossing them to the crowd.").

503 Dripps, *supra* note 307, at 161; *see also* Bird, *supra* note 473, at 132 (noting that Lilburne "refused to take an oath that obligated him to answer" questions, with Lilburne asserting in part: "I am not willing to answer you to any more of these questions, because I see you go about by this Examination to ensnare me; for seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination. . . . I am unwilling to answer to any impertinent questions, for fear that with my answer I may do myself hurt. . . ."); *id.* ("Lilburne gave a religious reason and then a legal reason for his claim. 'I know it is warrantable by the law of God, and I think by the law of the land.'"). In refusing to take the oath *ex officio*, Lilburne "noted its long use by the High Commission persecuting religious dissidents." *Id.*; *see also id.* (noting that Lilburne said: "Now this oath I refused as a sinful and unlawful oath: it being the High-Commission oath, with which the prelates ever have, and still do, so butcherly torment, afflict and undo, the dear saints and servants of God. It is an oath against the law of the land. . . . Again, it is absolutely against the law of God; for that law requires no man to accuse himself; but if any thing be laid to his charge, there must come two or three witnesses at least to prove it. It is also against the practice of Christ himself, who, in all his examinations before the high priest, would not accuse himself, but upon their demands, returned this answer, 'Why ask you me? Go to them that heard me.'"); *id.* at 133 ("This was far from the first time that anyone had refused to take the oath *ex officio* in High Commission prosecutions, but has been called 'the first time that anyone had refused the Star Chamber oath.'").

in the *ex officio* oath administered to the accused, and in the very large influence of the written depositions at the trial."[504] Lilburne later complained that he was treated in "a most cruel manner" after the Star Chamber ordered that he "should be laid alone, with irons on his hands and legs," day and night, in the worst area of a prison ship and his friends were denied access.[505] Following Lilburne's petitions to Parliament,[506] Parliament ordered Lilburne's release in November 1640 and remitted his fine.[507] Half a year later, one history notes, "the House of Commons passed a resolution that the Star Chamber sentence was 'bloody, wicked, cruel, barbarous & tyrannicall" and "illegal, and against the Liberty of the subject.'"[508]

That English history grounds the U.S. Constitution's Fifth Amendment's privilege against self-incrimination—as well as other legal rights—is clear.[509] "Although no records exist that shed light on James Madison's reasoning when he drafted the language that eventually became the Fifth Amendment self-incrimination clause," one scholar has written, "the doctrine of *Nemo tenetur*[510] and its abhorrence

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504 Morris Ploscowe, *The Development of Present-Day Criminal Procedure in Europe and America*, 48 Harv. L. Rev. 433, 457 (1935).

505 Bird, *supra* note 473, at 134; *see also id.* (noting that Lilburne "was 'most cruelly beaten and wounded'" putting him in "'danger of his life'"; that he "remained in the prison ship for nearly three years"; that Lilburne's treatment caused Lilburne "eleven months of dangerous sickness"; that "[h]is friends were denied access until they bribed the guards"; and that Lilburne "was 'kept from any food' for more than ten days, until his friends paid off guards to carry it in").

506 *Id.* at 134–35 (noting that in his first petition to Parliament, Lilburne—in asking for his release from prison—asserted: "[H]e was prosecuted and censured in the said [Star Chamber] court most heavily, being fined 500£. to the king, and sent prisoner to the Fleet. And in Easter Term following, was whipped from the Fleet to Westminster, with a three-fold knotted cord, receiving at least 200 stripes; and then at Westminster, he was set on the pillory the space of two hours, and . . . was gagged about an hour and a half; after which most cruel sufferings, was again returned to the Fleet close prisoner . . . where in a most cruel manner he hath been put into iron fetters, both hands and legs, which caused a most dangerous sickness. . . . And besides all this, they have most cruelly beaten and wounded him."); *id.* at 135 (noting that Lilburne's "next petition" charged that he suffered "barbarous cruelty, by virtue of an illegal Decree made against him in the Star-Chamber, 1637," which was "bloody, wicked, cruel, barbarous, and tyrannical").

507 Bird, *supra* note 473, at 135.

508 *Id.*; *see also id.* ("That resolution granted reparations of an unspecified amount, and Parliament ultimately awarded him £3,000, though he never received about half of that.").

509 *E.g.*, State v. Davis, 259 P.3d 1075, 1079–80 (Ore. 2011) (en banc) (discussing the historical roots of the Fifth Amendment, including objections "to the infamous *ex officio* oaths administered by the Star Chamber and the ecclesiastical Court of High Commission, which had required suspects to swear in advance to answer truthfully to questions about their religious and political beliefs"; noting that "[t]he practice forced the suspects either to lie under oath and thereby risk eternal damnation or to refuse to take the oath and thereby risk less eternal, but no less objectionable, temporal punishment (for example, being whipped and pilloried)"; and emphasizing that "Puritans, in particular, claimed the benefit of the ancient maxim *nemo tenetur prodere seipsum* ('no man is obligated to accuse himself') and refused either to swear or to testify").

510 *See* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 Calif. L. Rev. 465, 479–80 (2005) (noting that *nemo tenetur prodere seipsum* means "no one is bound to bring forth (i.e. accuse) himself"; that "tribunals such as the Star Chamber and the Court of

of the government use of torture and coercive interrogation techniques drove the self-incrimination clause's ultimate inclusion in the Bill of Rights."[511] Many Englishmen, sympathizing with Lilburne's plight and deploring inquisitorial procedures, rightfully detested the Star Chamber's coercive tactics, with Lilburne claiming various rights that later appeared in the U.S. Bill of Rights.[512] At trial and even while in the pillory, Lilburne railed against the Star Chamber's attempt to coerce his testimony. After his arrest, imprisonment, and refusal to take the Court's inquisitorial oath *ex officio*, Lilburne protested: "I am not willing to answer you to any more of these questions, because I see you go about by this examination to

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High Commission drew condemnation from outspoken civil libertarians of their era and later from the American colonists for having used imprisonment, exile, and physical torture to punish silence and to provoke suspects to confess to heresy and other crimes against the church and state"; and that "[f]oremost among these methods of extracting confessions was the oath ex officio, which required suspects to take an oath to God that they would respond truthfully to all questions"; "a suspect under interrogation in certain ecclesiastical tribunals effectively had a choice of remaining silent and facing physical penalties, such as torture or imprisonment; taking the oath and incriminating himself, also resulting in penalties based on admitted guilt; or taking the oath and committing perjury, which was a mortal sin").

511 *Id.* at 480; *see also* Erin Sheley, *Substantive and Procedural Silence*, 84 Tenn. L. Rev. 447, 464 (2017):

> The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Many scholars attribute the origin of this right to the Framers' antipathy to two European and English abuses: judicial torture . . . and the ex officio questioning of witnesses before the courts of the High Commission and the Star Chamber.

512 Bird, *supra* note 473, at 135 ("Remarkably, in this first major prosecution, Lilburne claimed and tried to put into practice six of the thirteen rights of criminal defendants that later appeared in America's Bill of Rights: protection against self-incrimination including against the oath *ex officio* (central issues in the case), the rights to be notified of the accusation and to confront the accusers, the right to due process, and protections against cruel and unusual punishments and against heavy and punitive fines."); *id.* ("Equally remarkably, he was just twenty-two or twenty-three years of age at the time. Lilburne's arguments, along with descriptions of his prosecution, were widely publicized. The Star Chamber had created a martyr, by its cruel and unjust treatment, and that particular martyr was one with quill in hand."); *id.* at 136 ("After his release from the prison ship, Lilburne joined the parliamentary army in July 1642, ultimately becoming a lieutenant colonel. He had the misfortune to be captured by the royalist army in November and was charged with treason and sentenced to death. His life was saved by a parliamentary warning that it would execute its royalist prisoners if Charles executed his parliamentary prisoners, and by release in a prisoner exchange."). John Lilburne (at his 1638 trial) and Levellers, through their publications, "helped popularize" the right to be free from excessive bail and fines and cruel and barbarous punishments decades before Parliament's passage of the English Bill of Rights (1689). *Id.* at 169–70; *see also id.* at 170 ("The problem of excessive bail grew, along with the problem of excessive fines, particularly in the 1630s during Charles I's reign as religious and political dissidents were repressed. Examples include John Lilburne, Dr. John Bastwick, William Prynne, and Rev. Henry Burton, whose perpetual imprisonments and enormous fines was as grave as the problem of excessive bail; 'an excessive fine,' as Blackstone wrote, 'amounts to imprisonment for life.'").

ensnare me . . . ."[513]

In fact, John Lilburne called the inquisitorial oath *ex officio* "an oath against the law of the land." "[I]t is," he said, "absolutely against the law of God, for that law requires no man to accuse himself." On the Westminster pillory, Lilburne cried out: "no man's conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so."[514] "Stripped to his waist," one source recalls of his painful journey to the pillory, "Lilburne absorbed as many as five hundred lashes from a three-thonged, corded whip while an admiring crowd cheered him on." "Although he nearly passed out before being locked in the pillory," that source reports, "[h]e nonetheless bowed toward the Star Chamber, bent down into the pillory, and gave a stem-winding speech defending his conduct."[515] John Lilburne's part in the history of privilege against self-incrimination has been recounted extensively elsewhere.[516] Other legal

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513 Anthony X. Mcdermott & H. Mitchell Caldwell, *Did He or Didn't He? The Effect of* Dickerson *on the Post-Waiver Invocation Equation*, 69 U. Cin. L. Rev. 863, 873 (2001).

514 Asherman v. Meachum, 957 F.2d 978, 990 (2d Cir. 1992) (Cardamone, C.J., dissenting); Isaac Amon, *The Enduring Lesson of John Lilburne's Saga: Self-Incrimination in the Criminal Justice System*, 78 J. Mo. B. 16 (2022); Andrew J. M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre*-Miranda *Silence*, 98 Va. L. Rev. 897, 911 (2012). This would not be John Lilburne's last assertion of his right against self-incrimination. *See id*. at 911–12 ("While the oath ex officio remained a tool of the Star Chamber after Lilburne's plea, his case precipitated the oath's decline. And in 1649, the oath came to a spectacular end. In that year, Oliver Cromwell brought charges against Lilburne for high treason. At the trial, Judge Prideaux inquired if Lilburne had written a certain treasonous pamphlet. When Lilburne demurred, Prideaux told the jury, '[Y]ou may see the valiantness of this champion for the people's liberties, that will not own his own hand; although I must desire you, gentlemen of the jury, to observe that Mr. Lilburne implicitly confesseth it.' Lilburne retorted that he had no duty to answer questions 'against or concerning' himself. When the jury delivered a not guilty verdict, the assembled crowd 'gave such a loud and unanimous shout, as is believed was never heard in Guildhall . . . .'"); *id.* at 912 ("After Lilburne's trial, acceptance of the right grew quickly. In 1656, the book *Examen Legum Angliae: Or the Laws of England* noted that the oath ex officio violated 'the Law of Nature.' Moreover, it recognized that the maxim *nemo tenetur* was 'agreed [upon] by all men.' Thus, Lilburne's impassioned plea won Englishmen their right to remain silent once and for all.") (citing Examen Legum Angliae: Or the Laws of England Examined by Scripture, Antiquity, and Reason (1656), *reprinted in* Readings in American Legal History 86, 91 (Mark Howe ed., 1949)); *see also* In re Oliver, 333 U.S. 257, 266 n.14 (1948) ("In 1649, a few years after the Long Parliament abolished the Court of Star Chamber, an accused charged with high treason before a Special Commission of Oyer and Terminer claimed the right to public trial and apparently was given such a trial.") (citing Trial of John Lilburne, 4 How. St. Tr. 1270, 1274).

515 Robb A. McDaniel, "The Self-Incriminator: John Lilburne, the Star Chamber, and the English Origins of American Liberty," *in* Prison Narratives from Boethius to Zana (Philip Edward Phillips, ed. 2014), ch. 3; *see also id.* ("After half an hour, the court demanded his silence; when Lilburne refused, he was gagged, at which point he somehow grabbed pamphlets from his pockets and hurled them out into the audience.").

516 Jeffrey M. Feldman & Stuart A. Ollanik, *Compelling Testimony in Alaska: The Coming Rejecting of Use and Derivative Use Immunity*, 3 Alaska L. Rev. 229, 233–34 & n.30 (1986); Ullmann v. United States, 350 U.S. 422, 446–47 (1956) (Douglas, J., dissenting) (citing The Trial of Lilburn and Wharton, 3 How. St. Tr. 1315, 1332).

historians have likewise noted Lilburne's role in the demise of the Star Chamber[517] and in solidifying the law's privilege against self-incrimination.[518]

The oath *ex officio*, as once used in England, required "a sworn statement by the defendant promising to give honest answers to all questions asked of him."[519] When a defendant refused to take the oath, the court could coerce the accused into taking it "by threatening contempt of court, conviction, or even torture."[520] "Out of these egregious actions by authorities," one legal commentator writes, "came the

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[517] George W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. Crim. L. & Criminology 402, 417–18 (1994) (discussing the prosecutions of John Lilburne and his refusal to take the oath or answer any "impertinent questions, for fear that with my answer I may do myself hurt"; noting that "[i]n 1639 the Star Chamber found Lilburne guilty of contempt for his refusal to take the oath, jailed him until he agreed to do so, and sentenced him to corporal punishment"; observing that "[a]t his flogging, Lilburne preached to a large and sympathetic crowd about the injustice of the inquisition" and that "within two years of his flogging, Lilburne's arguments against the oath began to gain the upper hand"; emphasizing that, "[i]n 1641, Parliament ruled Lilburne's sentence illegal, abolished the Star Chamber and the High Commission, and barred the use of the oath in penal cases"; pointing out that "[o]ne year later, the right to silence was invoked and recognized in an impeachment trial of twelve Anglican bishops prosecuted before the Puritan-controlled Long Parliament for petitioning the King to protest their exclusion from the House of Lords"; and recalling that "[t]he right to silence was firmly in place by 1688, when King James II prosecuted seven bishops for defying his edict abolishing all laws against nonconformists").

[518] *E.g.*, Scott Michael Solkoff, *Judicial Use Immunity and the Privilege against Self-Incrimination in Court Mandated Therapy Programs*, 17 Nova L. Rev. 1441, 1444–45 (1993):

> While there are earlier references, the privilege against self-incrimination is most often traced to the English Court of Star Chamber. In that court, individuals, who stood accused of crimes were given the choice of taking their legal oath or of being whipped and pilloried. In 1637, "Freeborn John" Lilburne was haled before the Star Chamber on a charge of sedition. When charged by the Council, he refused to take the oath officio and was condemned to torture. But Lilburne was a stubborn man and petitioned the newly convened Long Parliament for relief. In 1641, the House of Commons freed Lilburne and abolished the Council and Court of Star Chamber.
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> Thirty-six years after the House of Common's decree, the Virginia House of Burgess declared that "noe law can compell a man to sweare against himselfe in any matter wherein he is lyable to corporall punishment." Yet as the Salem witch trials of 1692 so sadly proclaimed, the privilege was far from ingrained in the colonial fabric. Mindful of the Star Chamber and of the incidents at Salem, by 1776, eight colonies had adopted the right to remain silent within their own constitutions. And when the Bill of Rights was ratified in 1791, it included James Madison's draft that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In 1964, the privilege was incorporated to the states by way of the Fourteenth Amendment.

[519] Aaron R. Pettit, Comment, *Should the Prosecution Be Allowed to Comment on a Defendant's Pre-Arrest Silence in Its Case-in-Chief?*, 29 Loy. U. Chi. L.J. 181, 183 (1997) (citing Leonard W. Levy, Origins of the Fifth Amendment 46–47 (1968)).

[520] *Id.* at 184.

'cruel trilemma' of 'self-incrimination, perjury, or contempt.'"[521] Lilburne took a principled stand in the face of the oath *ex officio*, and his refusal to take the oath inspired Parliament to abolish both the Star Chamber and the High Commission.[522] Only in time did Lilburne's risky, potentially life-threatening protest bear fruit with the law's development of the privilege against self-incrimination[523]—but not

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[521] Karen M. Brindisi, Comment, *Pre-Arrest Silence and Self-Incrimination Rights: Why States Should Adopt an Implied Invocation Standard under Their State Constitutions in the Wake of* Salinas v. Texas, 84 Miss. L.J. 431, 436 (2015); *see also id.* ("The Star Chamber's use of the *'oath ex officio'* went on for many years until the seventeenth century when John Lilburne fought for men's right not to answer questions or incriminate oneself. Possibly in response to the actions of the Star Chamber and religious councils in Europe, the colonists included the Fifth Amendment's Self-incrimination Clause in the Constitution to help prevent citizens from being forced into the 'cruel trilemma.'"); *Ullmann*, 350 U.S. at 446 (Douglas, J., dissenting) ("Some of those who came to these shores were Puritans who had known the hated oath ex officio used both by the Star Chamber and the High Commission. They had known the great rebellion of Lilburn, Cartwright and others against those instruments of oppression.") (citation omitted); Kimm v. Rosenberg, 363 U.S. 405, 410 (1960) (Douglas, J., dissenting) ("Imputation of guilt for invoking the protection of the Fifth Amendment carries us back some centuries to the hated oath ex officio used both by the Star Chamber and the High Commission. Refusal to answer was contempt. Thus was started in the English-speaking world the great rebellion against oaths that either violated the conscience of the witness or were used to obtain evidence against him.").

[522] Bird, *supra* note 473, at 125 ("[R]efusal to take the oath was treated as a confession of the offenses charged, and that treatment was formalized in a 1637 order. Ultimately, widespread outrage at the oath was a major factor in bringing abolition of the High Commission and Star Chamber in 1641, soon after the Long Parliament was finally convened and just before the English civil wars raged during 1642–48."). Even in common law courts, the accused had few legal rights in mid-seventeenth-century England. *Id.* Sir James Fitzjames Stephen summarized the accused's plight as follows: (1) "The prisoner was kept in confinement more or less secret till his trial, and could not prepare for his defence. He was examined, and his examination was taken down."; (2) "He had no notice beforehand of the evidence against him, and was compelled to defend himself as well as he could when the evidence, written or oral, was produced on his trial."; (3) "At the trial . . . witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of documents required to be produced."; and (4) "It does not appear that the prisoner was allowed to call witnesses on his own behalf; but it matters little whether he was or not; as he had no means of ascertaining what evidence they would give, or of procuring their attendance." *Id.*

[523] De Luna v. United States, 308 F.2d 140, 146–48 (5th Cir. 1962):

> It may be historically true, and Professor Wigmore documents it, that in the first few hundred years of its growth the resistance to the oath ex officio as compulsory self-accusation represented mainly a jurisdictional struggle between State and Church, and between common law courts and ecclesiastical courts; it was 'not to protect from answers in the king's court of justice'. But the struggle against the inquisitio and oath ex officio on the ground that a man is entitled to be formally accused eventually transcended the jurisdictional questions. It may be that Sir Edward Coke, the first to use the maxim, *nemo tenetur prodere seipsum*, objected to the oath, not because of his interest in protecting the individual against the state, but because he objected to the intrusion of the clergy into the field of criminal law; the Court of High Commission and the Court of Star Chamber had

before he suffered mightily, paying with his own flesh and blood, due to the Star Chamber's severe treatment of him.[524]

Imprisoned for two years and fined, whipped, and placed in a pillory after refusing to take the oath three times, Lilburne paid a heavy—though not the ultimate—price for his refusal to cooperate,[525] as the Star Chamber had no authority to impose a death sentence.[526] An ardent Puritan, Lilburne—lashed but still alive—petitioned for his release after the so-called "Long Parliament" convened in 1640.[527] Itself composed principally of Puritans, the Long Parliament obliged, with

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> no business putting an accused to the oath except in cases concerning marriages and wills. Nevertheless, the association of the prerogative courts with heresy and treason (crimes having to do with the individual's beliefs), the association of the Star Chamber with the rack, the opposition to the oath from Lollards, Puritans, Levellers, and other non-conformists led directly to the abolition of the High Commission and the Star Chamber, the prohibition of the oath, and the ultimate triumph of the accusatorial system, all in the general direction of the freedom to speak and the freedom not to speak.

524 Jan Martin Rybnicek, *Damned If You Do, Damned If You Don't?: The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre*-Miranda *Silence*, 19 Geo. Mason U. Civ. Rts. L.J. 405, 409–10 (2009):

> The most famous of the trials credited with the creation of the right against self-incrimination was that of John Lilburn, who directly challenged the Star Chamber in 1637 after being charged with printing heretical and seditious books. Lilburn refused to participate in the Star Chamber, arguing "[t]hat no man's conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so." Ultimately the Star Council held Lilburn in contempt and ordered him to be whipped for his refusal to take the oath. Lilburn's protest, however, was not in vain. The Lilburn trial spurred public outcry against both the Star Chamber's and the Court of High Commission's coercive tactics. By 1641 the steady protest reached a tipping point, leading the Parliament to finally outlaw the Courts' use of the oath ex officio. The abolition of the oath firmly secured the right against self-incrimination in the English common law and established the maxim *nemo tenetur seipsum accusare* ("no man is bound to accuse himself").

525 Jeremy Miller, *Client Perjury: An Ever Present, Multidimensional Problem*, 106 Com. L.J. 349, 379 (2001); *see also* C. Albert Bowers, Comment, *Divining the Framers' Intentions: The Immunity Standard for Criminal Proceedings Under the Utah Constitution*, 2000 Utah L. Rev. 135, 142 (noting that authorities arrested John Lilburne in 1637 on charges of shipping seditious books and that Lilburne refused to take the oath *ex officio*; that the authorities imprisoned Lilburne "for several months and then brought him back before the Court of Star Chamber where he again refused to take the oath ex officio"; that the Court of Star Chamber found him in contempt and imprisoned him; that Lilburne was whipped and fined; and that Lilburne's case "gained popular attention and support and soon others refused to take the oath ex officio").

526 Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 Suffolk J. Trial & App. Advoc. 1, 33 n.159 (2003) (noting that the Court of Star Chamber "did not have the power to impose the death sentence").

527 Asherman v. Meachum, 957 F.2d 978, 990 (2d Cir. 1992) (Cardamone, C.J., dissenting); *see also* John H. Wigmore, *The Privilege against Self-Crimination: Its History*, 15 Harv. L. Rev. 610, 625–26 (1902):

both houses finding that the Star Chamber had unlawfully sentenced him.[528] The House of Commons labelled Lilburne's sentence "illegal and against the liberty of the subject," and the House of Lords concurred.[529] While most of the agitation about the oath *ex officio* had initially been directed at ecclesiastical courts, after Lilburne's case the privilege began to be regularly asserted in common law trials that no person was bound to incriminate himself on any charge or in any court.[530] "Lilburne emerged from prison to play a leading role in the street protests that resulted in Charles I's decision to flee his capital in 1642," John Rees wrote of the outset of the English Civil War, with legal commentators crediting Lilburne for the rise of the privilege against self-incrimination.[531]

D. The Grand Remonstrance (1641)

The Grand Remonstrance listed exponentially more grievances than the Petition of Right—and in much greater detail.[532] Among other things, the Grand Remonstrance—voted on one paragraph at a time by members of Parliament led by MP John Pym,[533] who had given a rousing speech in the House of Commons in 1640 about the constitutional necessity of frequent sessions of Parliament for providing

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> Lilburn's case, together with those of Prynne and Leighton (whose grievances were of another sort), were sufficiently notorious to focus the attention of London and the whole country. The Long Parliament (after eleven years of no Parliament) met on Nov. 3, 1640. Lilburn was on the spot that day with his petition for redress. In March, 1641, a bill was introduced to abolish the Court of Star Chamber, as well as (then or shortly after) a bill to abolish the Court of High Commission for Ecclesiastical Causes. These were both passed July 2-5 of the same year; and in the latter statute was inserted a clause which forever forbade, for any ecclesiastical court, the administration *ex officio* of any oath requiring answer as to matters penal. This clause was in substance reënacted as soon as the Restoration of the Stuarts was effected.

528 Angela Roxas, *Questions Unanswered: The Fifth Amendment and Innocent Witnesses [Ohio v. Reiner, 532 U.S. 17 (2001)]*, 93 J. Crim. L. & Criminology 259, 261 (2002); Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. Tol. L. Rev. 209, 219–20 (1998).

529 Ryan McLennan, *Does Immunity Granted Really Equal Immunity Received?*, 91 J. Crim. L. & Criminology 469, 470–71 (2001).

530 Asherman v. Meachum, 957 F.2d 978, 990 (2d Cir. 1992) (Cardamone, C.J., dissenting).

531 "John Lilburne, the Levellers, and the English Revolution," in John Lilburne and the Levellers, *supra* note 494, at 1-2.

532 *Timbs*, 586 U.S. at 152:

> Despite Magna Carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. *E.g.*, The Grand Remonstrance ¶¶ 17, 34 (1641), in The Constitutional Documents of the Puritan Revolution 1625–1660, pp. 210, 212 (S. Gardiner ed., 3d ed. rev. 1906); *Browning-Ferris*, 492 U.S., at 267, 109 S. Ct. 2909.

533 Robert E. Hall, *Remonstrance—Citizen's Weapon Against Government's Indifference*, 68 Tex. L. Rev. 1409, 1428 (1990).

the king's subjects with an opportunity to present their petitions[534]—complained that Charles I had disregarded the Petition of Right by unjustly imprisoning people. "The Petition of Right . . . was granted in full Parliament," paragraph 11 of the Grand Remonstrance pointed out, adding that the Petition of Right had been "made of no use but to show the bold and presumptuous injustice of such ministers as durst break the laws and suppress the liberties of the kingdom, after they had been so solemnly and evidently declared."[535]

The Grand Remonstrance's next grievance, in paragraph 12, wrote of the dissolution of "[a]nother Parliament," and how "the privilege of Parliament" had been "broken" by the imprisonment of "members of the House, detaining them close prisoners for many months together, without the liberty of using books, pen, ink or paper; denying them all the comforts of life, all means of preservation of health, not permitting their wives to come unto them even in the time of their sickness." "And for the completing of that cruelty," paragraph 13 of the Grand Remonstrance lamented, "after years spent in such miserable durance, depriving them of the necessary means of spiritual consolation, not suffering them to go abroad to enjoy God's ordinances in God's House, or God's ministers to come to them to minister comfort to them in their private chambers." "And," paragraph 14 read, "to keep them still in this oppressed condition, not admitting them to be bailed according to law, yet vexing them with informations in inferior courts, sentencing and fining some of them for matters done in Parliament; and extorting the payment of those fines from them, enforcing others to put in security of good behavior before they could be released."[536]

One grievance at a time, the Grand Remonstrance methodically laid out the case against Charles I's absolute rule. "The imprisonment of the rest, which refused to be bound, still continued, which might have been perpetual if necessity had not the last year brought another Parliament to relieve them, of whom one died by the cruelty and harshness of his imprisonment," paragraph 15 asserted, adding that the death had occurred "notwithstanding the imminent danger of his life did sufficiently appear by the declaration of his physician, and his release, or at least his refreshment, was sought by many humble petitions." The man's "blood," paragraph 15 stressed,

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534 *See* Smith, *supra* note 466, at 1157–58 (1986):

> In 1622, King James I issued a proclamation that granted "the Right of his subjects to make their immediate Addresses to him by Petition." His successor, Charles I, as late as 1644, invited any subjects with grievances to freely address themselves by petitions and promised that their complaints would be heard. John Pym's speech in the House of Commons in 1640 explained the constitutional necessity of frequent sessions of parliament for providing subjects with an opportunity to present their petitions. Petitions of unprecedented number and size, often accompanied by tumultuous crowds, were laid before parliament. The Root and Branch petition from London, said to have been signed by 15,000 people, was presented in December 1640. The following month, petitions of a similar nature, all asking for abolition of episcopacy, were presented from several districts of the country.

535 The Grand Remonstrance, Harper's Encyclopedia of United States History (Benson Lossing, ed.), https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0132%3Aentry%3Dgrand-remonstrance-the, ¶ 11.

536 *Id.* at ¶¶ 12, 13, 14.

"still cries either for vengeance or repentance of those Ministers of State, who have at once obstructed the course both of His Majesty's justice and mercy."[537] It was Sir John Eliot, an MP for the county of Cornwall, who was imprisoned for his conduct in Parliament and died of "consumption" in 1632 in the Tower of London—the castle on the north bank of the River Thames in central London.[538]

Along with complaints about unjust imprisonment, harassment and vexation, breach of parliamentary privilege, and denial of bail or unjust bail amounts, the Grand Remonstrance made excessive fines a major focus almost fifty years before Parliament's adoption of the English Bill of Rights. Paragraph 17 of the Grand Remonstrance complained about "the great sums exacted through the whole kingdom for default of knighthood" that were seen by the House of Commons "to be against all the rules of justice, both in respect of the persons charged, the proportion of the fines demanded, and the absurd and unreasonable manner of their proceedings." Likewise, paragraph 34 of the Grand Remonstrance, in response to the king's various monetary extractions, protested: "Great numbers of His Majesty's subjects for refusing those unlawful charges, have been vexed with long and expensive suits, some fined and censured, others committed to long and hard imprisonments and confinements, to the loss of health in many, of life in some, and others have had their houses broken up, their goods seized, some have been restrained from their lawful callings."[539]

Whereas paragraph 44 of the Grand Remonstrance complained about "excessive fines," paragraph 37 emphasized: "The Court of Star Chamber hath abounded in extravagant censures, not only for the maintenance and improvement of monopolies and other unlawful taxes, but for divers other cause where there hath been no offence, or very small, whereby His Majesty's subjects have been oppressed by grievous fines, imprisonments, stigmatisings, mutilations, whippings, pillories, gags, confinements, banishments . . . ." Paragraph 159 of the Grand Remonstrance also referred to "great fines" imposed by the prerogative Court of Star Chamber, while the next grievance—in paragraph 160—said this about another royal prerogative court, the ecclesiastical High Commission: "The fines of the High Commissioner were in themselves unjust . . . ."[540]

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537 *Id.* at ¶ 14.

538 R. B. Mowat, A New History of Great Britain 315–16 (1922).

539 The Grand Remonstrance (1641), Harper's Encyclopedia of United States History (Benson Lossing, ed.), https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0132%3Aentry%3Dgrand-remonstrance-the, ¶¶ 17, 34.

540 *Id.* at ¶¶ 37, 44, 159, 160; *see also* Frank Riebli, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 Hastings Const. L.Q. 807, 826 n.149 (2002) ("The Act for the Abolition of the Court of Star Chamber listed several abuses of which Star Chamber was guilty. Among them were that Star Chamber's judges 'have undertaken to punish where no law doth warrant, and to make decrees for things having no such authority, and to inflict heavier punishments than by any law is warranted . . . .'") (quoting 16 Car. I c. 10 (July 5, 1641) (Eng.)). It was observed decades ago that the English people's experience with barbarous corporal punishments "loomed large in the minds" of America's framers. As a U.S. District judge, citing *Wilkerson v. Utah* (1879) and *Weems v. United States* (1910), wrote of the Eighth Amendment's Cruel and Unusual Punishments Clause in 1965:

> That provision was directed against the English experiences that loomed

Prior to the Grand Remonstrance, King Charles I had ruled without Parliament for more than ten years, angering his subjects.[541] In 1640, following intense religious discord[542] between the Church of England and Puritans and Scots,[543] Scottish forces

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> large in the minds of the framers of our government, such as branding, mutilation, and cutting off the ears in Star Chamber. 3 How. State Trials 561, 711, 725. Disembowelment, being drawn and quartered, and all the gory incidents of the punishment for treason in England were banned. Torture, boiling in oil, and other unnecessary forms of cruelty are forbidden.

Negrich v. Hohn, 246 F. Supp. 173, 175 (W.D. Pa. 1965); *see also* Austin v. Harris, 226 F. Supp. 304, 308 (W.D. Mo. 1964) (citations omitted):

> Historically the prohibition against cruel and unusual punishment in the Eighth Amendment referred to such punishment as amounted to torture, involved unnecessary cruelty or shocked the mind of the community, such, for instance, as drawing and quartering the culprit, burning him at the stake, cutting off his nose, ears or limbs, or disemboweling him. Later it was said that a punishment out of all proportion to the offense might bring it within the prohibition. But it is now established that, apart from historical precedent, what constitutes cruel and unusual punishment within the prohibition of the Eighth Amendment is to be judged in the light of developing civilization, so that what might not have been cruel and unusual yesterday may well be so today.

[541] Liam Seamus O'Melinn, Note, *The American Revolution and Constitutionalism in the Seventeenth-Century West Indies*, 95 Colum. L. Rev. 104, 129 n.124 (1995) ("Charles I did not call a single Parliament between 1629 and 1640. This is the period known as his 'personal rule.'").

[542] Witte, *supra* note 85, at 1532:

> Upon his succession to the throne in 1625, Charles had stepped up his father's already stern Anglican establishment laws and began persecuting Calvinists (often called Puritans) and other religious dissenters with a vengeance, driving them by the boatload to the Netherlands and to America—some 20,000 in 1632 alone. In 1633, he appointed William Laud as Archbishop of Canterbury, who began purging English pulpits of Calvinist sympathizers and packing them with conservative clerics, loyal to the Crown and to the textbooks of established Anglicanism—the Book of Common Prayer, the Thirty-Nine Articles of the Faith, and the Authorized, or King James, Version of the Bible. Charles and Laud strengthened considerably the power and prerogatives of the Anglican bishops and the ecclesiastical courts. They also tried to impose Anglican bishops and establishment laws on Scotland, triggering an expensive and ultimately futile war with the Scottish Presbyterians. English dissenters who criticized these religious policies were pilloried, whipped, and imprisoned, and a few had their ears cut off and were tortured. When the Parliament was finally called in 1640, it let loose a massive torrent of protests, including the famous Root and Branch Petition and The Grand Remonstrance that called for the abolition of much that was considered sound and sacred in the Church and Commonwealth of England.

[543] Robert Aitken & Marily Aitken, *The King Who Lost His Head: The Trial of Charles I*, 33 Litigation 53 (2007); *see also* Kasia Solon Cristobal, *From Law in Blackletter to "Blackletter Law"*, 108 Law Libr. J. 181, 199–200 (2016):

> One demonstration of how synonymous Gothic had become with English

invaded England, compelling Charles I to call Parliament into session to raise needed revenue.[544] "On 3 April 1640," one account summarizes, "Parliament met and immediately made known that it considered the 'Scottish invasion . . . less important than the invasion of English liberties in the name of Prerogative.'"[545] As that account emphasizes: "Parliament saw the Scottish war and Charles' need for money as an opportunity to rectify grievances building during the past eleven years of extra-parliamentary rule."[546]

In a speech to the House of Commons on April 17, 1640, in what became known as the "Short Parliament," John Pym, the House's leader, outlined Parliament's long list of grievances.[547] Among them: "Extrajudicial Judgments and Impositions of the Judges without any cause before them, whereby they have anticipated the judgment which is legal and publik and circumvented one of the parties of just remedies, in that no writ of Error lyes, but only upon the Judicial proceedings."[548] After Charles I dissolved that Parliament only three weeks after it convened,[549] his effort to

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> identity is shown by the Scottish reaction to the sight of it in 1637. In that year, Charles I's infamously tone-deaf Archbishop Laud oversaw the printing of a "crypto-Anglican" prayer book for the Scottish church. The archbishop, who had insisted that England's 1611 version be in Gothic, arranged for a printer "to repair to Scotland and ready the printing of the book, and to take with a suitable 'blacke letter'"—a decision "of great metaphorical significance." The Scottish opposed the efforts of Charles I to "Laudianize" Scotland, preferring their religious works in "Geneva print," Roman type so-called because of the influential Bible printed in Geneva. (Scotland's great reformer, John Knox, had studied in Geneva.) When the order came to read Laud's new prayer book, printed in telltale blackletter, a riot broke out in Edinburgh. This riot triggered a series of events culminating in the downfall of Charles's government in Scotland during the Bishops' War. The printer who had been sent up from England "was forced to flee" back across the border.

544 Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 37 (1998).

545 *Id.*

546 *Id.*

547 *Id.*; *see also id*. at 37–38:

> Dividing the grievances in three parts, Pym spoke out against wrongs committed by the Crown against the privileges and liberties of Parliament; wrongs in matters concerning religion; and wrongs in connection with unlawful taxation. Pym condemned in detail extra-parliamentary taxation, including import duties; sales of knighthoods, monopolies, and public nuisances; ship-money; and military charges and impositions upon counties. Parliament refused all supply until its grievances were addressed. The King dissolved Parliament on 5 May 1640, three weeks after it had convened, thus ending the so-called "Short Parliament."

548 Speech of John Pym (Parliament, April 17, 1640), *reprinted in* 4 Historical Collections 1135 (J. Rushworth ed. 1721); *accord* Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Judges*, 38 Am. J. Legal Hist. 117, 144 n.100 (1994).

549 *See* Robert Aitken & Marilyn Aitken, *The King Who Lost His Head: The Trial of Charles I*, 33 Litigation 53, 54–55 (2007):

> In 1640, the Short Parliament was called by Charles, who hoped Commons would help subdue the Scots. John Pym, who controlled Commons, smothered

fight Scotland without parliamentary sources of revenue "proved disastrous" and "Charles had no choice but to call Parliament again," resulting in the convening of what became known as the "Long Parliament."[550] "The Long Parliament," as one source notes, "was convened in November 1640, under the leadership of John Pym." "The purpose of Parliament in those days," that source observes, "was advisory, summoned on an ad hoc basis principally to raise funds, which Charles I needed to fund various wars."[551]

During its first session (1640–1641), the Long Parliament—now acting with purpose and leverage over the king—took many actions. It impeached the king's most trusted advisor, Thomas Wentworth, and he was put to death;[552] enacted the Triennial Act, requiring that Parliament be summoned at least once every three years and restricting the king's authority to prorogue or dissolve Parliament without the consent of both houses; prohibited certain prerogative powers to raise revenue without the consent of Parliament; and abolished the Court of Star Chamber and the Court of High Commission for Ecclesiastical Causes—prerogative courts known for their many abuses, including horrific corporal punishments and the dreaded and inquisitorial oath *ex officio*.[553]

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that hope, and Parliament was dissolved. Charles summoned the English peers, who reluctantly provided a motley army. The Scots easily won at Newburn and marched into England. Charles agreed to an armistice in which the Scottish troops would occupy England's northern counties and be paid 860 pounds per day until a peace treaty was signed. Charles was humiliated.

550 Rosen, *supra* note 544, at 38.

551 1 William F. Patry, Patry on Copyright § 1.8 n.16 (Sept. 2024 Update); *see also id.*:

> The Long Parliament proved quite skillful in its negotiations with Charles I, obtaining his agreement that Parliament would not be dissolved without its consent, as well as an abolition of the Star Chamber and the Court of the High Commission. The Long Parliament was forcibly disbanded by Oliver Cromwell in 1653, with Cromwell then becoming "Lord Protector": king in all but name. The Long Parliament was reinstated in 1659, but dissolved itself in 1660, leading to the Convention Parliament and the restoration under Charles I's eldest son, Charles II.

552 Matthew Steilen, *Bills of Attainder*, 53 Hous. L. Rev. 767, 812–13 (2016):

> In the spring of 1641, Thomas Wentworth, earl of Strafford, was impeached, attainted, and put to death. Wentworth had enjoyed a remarkable career. In 1628 he had supported the Petition of Right as a member of Commons. Shortly after, he famously switched sides and entered royal service; the King made him Lord Deputy of Ireland, where he developed a reputation for being harsh and autocratic. It was Strafford's service in Ireland that became the focus of articles of impeachment against him, but probably more important was a general sense that he sought "to reject legal restrictions, and consequently to obviate the need to secure other people's co-operation for his actions."

553 Rosen, *supra* note 544, at 38; John H. Wigmore, *The Privilege Against Self-Crimination: Its History*, 15 Harv. L. Rev. 610, 625-26 (1902); *see also* Miranda v. Arizona, 384 U.S. 436, 458–59 (1966) (citations omitted):

> We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with

The individual Star Chamber cases drew considerable public attention, and those cases fueled the drive to abolish the prerogative courts. In 1639, the Court of Star Chamber had examined John Lilburne, an opponent of absolute Stuart rule whose last name was also spelled Lilburn but who was popularly known as "Freeborn John." It had done so on a charge of printing or importing heretical and seditious books, with Lilburne refusing to answer questions "concerning other men, to [e]nsnare me, and to get further matter against me." The Star Chamber had then ordered that he be whipped and pilloried for refusing to take the oath *ex officio*. "The whip that lashed 'Freeborn John' smashed the Court of the Star Chamber as well," a California Supreme Court justice once succinctly emphasized of the relevant English history, pointing out how England's Parliament voted to abolish the Court of Star Chamber and the Court of High Commission for Ecclesiastical Causes in mid-1641.[554]

John Pym, a leader of Parliament, is said to have "literally risked his life to defend the powers of Parliament and guard against the dangerous enlargement of the King's power."[555] With Pym at the apex of his power in the House of Commons, Parliament had a stern reaction to what it viewed as tyrannical and arbitrary rule, though Archbishop Laud—one subject of Parliament's ire—lived a little longer than the Earl of Strafford. In the seventeenth century, the use of impeachments by Parliament came back into vogue—and like the Earl of Strafford, Archbishop Laud became a target. "In Great Britain," University of Missouri law professor Frank Bowman writes, "impeachment reemerged from its long dormancy during

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> which it was defended. Its roots go back into ancient times. Perhaps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315 (1637). He resisted the oath and declaimed the proceedings, stating:
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> 'Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so.'
>
> On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England. These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights. Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty.

[554] *See* First Unitarian Church of Los Angeles v. Los Angeles County, 311 P.2d 508, 532 (Cal. 1957) (Carter, J, dissenting); *see also id.* at 532-33:

> In July, 1641, Parliament abolished the Court of the Star Chamber, the Court of High Commission for Ecclesiastical Causes, and provided by statute that no ecclesiastical court could thereafter administer an ex-officio oath on penal matters. In 1645 the House of Lords set aside Lilburn's sentence and in 1648 Lilburn was granted 3000 reparation for the whipping which he had received.

[555] Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. Chi. L. Rev. 2057, 2067, 2100 (2002).

the reigns of the Stuart kings—King James I (1603-1625), his son Charles I (1625-1649), and his grandson Charles II (1649-1651, 1660-1685)."[556] The end result of many impeachments, sometimes converted into bills of attainder to avoid the need to actually prove the charges: death, imprisonment or a hefty fine.[557]

The mechanism of impeachment had first emerged in England during the Parliament of 1376 when it was put to use as a means of initiating criminal proceedings. Although a set of impeachment procedures had been established by 1399 during Henry IV's reign, impeachment fell out of use after the mid-fifteenth century, only to be revived and used repeatedly by Parliament in the seventeenth century to an effort to rein in the king's power. "From 1621 to 1679, Parliament wielded impeachment against numerous high level ministers to the Crown," one legal commentator writes, noting that those facing impeachment proceedings included the 1st Duke of Buckingham, the Earl of Strafford, Archbishop William Laud, the Earl of Clarendon, and Thomas Osborne, Earl of Danby.[558] "It was Pym also who carried up to the Lords the articles of impeachment against archbishop Laud, a mischievous and cruel prelate," one mid-nineteenth-century account observes, noting that Pym died before Archbishop Laud was brought to trial.[559] Ultimately, both the Earl of Strafford and Archbishop Laud got beheaded; Strafford in 1641 and Laud in 1645.[560]

After Parliament, in the Earl of Strafford's case, had resorted to the expedient of a bill of attainder, the king—Charles I—had at first refused to give his assent. When informed of the royal assent later given to that bill, which sealed the earl's fate, a dejected Thomas Wentworth exclaimed in words drawn from scripture: "Put not your trust in princes, nor in the sons of men!" "In three days he was brought to block, passing to which he stopped under the window of Laud's prison to receive his blessing," one history notes, recording of what transpired thereafter: "The prelate raised his hand to pronounce it; but grief choked his utterance, and he fell senseless

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556 Bowman, *supra* note 30, at 760.

557 Timothy D. Lanzendorfer, Note, *When Local Elected Officials Behave Badly: An Analysis and Recommendation to Empower State Intervention*, 82 Ohio St. L.J. 653, 667 n.109 (2021) ("In England, an impeached and removed official was liable to be punished, sometimes harshly with exile or death, for acts that were not themselves criminal in nature."); *see also* Raoul Berger, *Impeachment of Judges and Good Behavior Tenure*, 79 Yale L.J. 1475, 1518 (1970):

> Although the Lords referred sundry matters to committees, the function of hearing and trial was never delegated, and with good reason. The notable impeachments were chiefly treason trials involving peers, and the trial of a great nobleman "for blood" could scarcely be shunted to a Committee, let alone to a "Master." Conviction would be followed by death, fine or imprisonment, and although the governing law was the "course of parliament" rather than ordinary criminal law, English impeachment was therefore clearly criminal in nature. Said Blackstone, "The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords."

558 Scott S. Barker, *An Overview of Presidential Impeachment*, 47 Colo. Law. 30, 31 (2018).

559 English Prose, Being Extracts from the Works of English Prose Writers, with Notes of Their Lives 342 (1844).

560 Karl Baedeker, London and Its Environs: Handbook for Travellers 159 (1898).

on the floor. Strafford acted on the scaffold with great dignity and composure. His execution took place in the presence of a vast multitude, who subsequently expressed their joy by illuminations and bonfires (May 12th, 1641)."[561]

Before his own execution took place on January 10, 1645, at age seventy-one, Archbishop William Laud was accused by the House of Commons of having "*Trayterously endeavored to subvert the Fundamental Laws and Government of the Kingdom*," having "*traitorously endeavored to alter and subvert God's true Religion by Law established in this Realm*," and—similar to Thomas Wentworth, the Earl of Strafford—with introducing "*an Arbitrary and Tyrannical Government against Law*." The House of Commons also accused him of setting up "Popish *Superstition and Idolatry*" and "*to that end hath declared and maintained in Speeches and Printed Books divers* Popish *Doctrines and Opinions*, *contrary to the* Articles of Religion *established by Law*." "*He hath*," the charges stated, "*urged and injoyned divers* Popish *and Superstitious Ceremonies, without any warrant of Law, and hath cruelly persecuted those who have opposed the same, by Corporal Punishment and Imprisonment; and most unjustly vexed others who refused to conform thereto, by Ecclesiastical Censures of Excommunication, Suspension, Deprivation, and Degradation; contrary to the Law of the Kingdom*." Laud denied the allegations, stating: "I never endeavored to alter or subvert God's true *Religion* established by *Law* in this Kingdom; or to bring in *Romish* Superstition." "[A]ll that laboured for . . . was, that the external Worship of God in this *Church*, might be kept up in Uniformity and Decency, and in some Beauty of Holiness." "And for the Censures which I put upon any," Laud contended, "I presume they will to all indifferent Men, which will Understandably and Patiently hear the Cause, appear to be just, Moderate, and according to Law."

In a later printed defense of his conduct as regards the Court of Star Chamber's June 1637 censure and punishment of Henry Burton, John Bastwick, and William Prynne "for notorious *Libels*, Printed, and Published by them against the *Hierarchy of the Church*," Laud wrote: "Among, and above the rest, there were three Men, *Mr. Henry Burton*, a Minister Benificed in *Friday-street* in *London*, *Dr. John Bastwick*, a Phisician, and *Mr. William Pryn*, a Common Lawyer, who were censured *Junii* 14. 1637. in the *Star-Chamber*, for notorious *Libels*, Printed, and Published by them against the *Hierarchy of the Church*." In attempting to explain himself, Laud further observed: "They were then and there Sentenced to stand in the Pillory, and lose their Ears; and because they should not stay farther to infect *London*, they were sent away by Order of that Court; *Mr. Burton* to *Garnsey*, *Dr. Bastwick* to *Silly*, and *Mr. Pryn* to *Jersy*." "In the giving of this Sentence," Laud offered, "I spake my Conscience; and was after commanded to Print my *Speech*." "But," Laud added, "I gave no Vote; because they had fallen so personally upon me, that I doubted many Men might think Spleen, and not Justice, led me to it. Nor was it my Counsel that advised their sending into those remote Parts." "This Censure being past upon these Men," Laud complained that he nonetheless had "*Libel* upon *Libel*, scattered in the Streets," hurled against him.

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[561] John J. Anderson, A School History of England, Illustrated with Many Engravings, and a Series of Colored Progressive Maps Showing the Geographical Changes of the Country at Different Periods 231–32 (1891).

In attempting to justify the men's corporal punishments, Laud—accused of orchestrating the cruel treatment at the hands of the Star Chamber[562]—stressed: "And most certain it is, that howsoever the Times went then, or go now, yet in Queen *Elizabeth*'s Time," men were "Hanged," "Condemned," and "Dyed in Prison" for "less than is contained in *Mr. Burton*'s Book; as will be evident to any Man that compares their Writings together." Noting how Burton, Bastwick and Prynne had been "set at Liberty by the *House of Commons*, and brought into *London* in great Triumph," and how he (Laud) had, in his view, been subjected to "all manner of Scurrility, and more Untruth, both against my Person, and my Calling" (with the "spreading of *Libellous, Base Pamphlets*," said to be continuing "to this Day without controul"), Laud contended of his Puritan foes who the Star Chamber had previously ordered to lose their ears and stand in the pillory for libels: "these *Saints* would have lost their Lives, had they done that against any other State *Christian*."[563]

As the Archbishop of Canterbury, William Laud was subordinate only to King Charles I in the Church of England's hierarchy. Laud shared the Earl of Strafford's unpopular brand of authoritarianism, and he—like the Earl of Strafford—had regularly made use of cruel practices in an effort to get his way. Before Parliament abolished the Courts of Star Chamber and High Commission in 1641, Laud—most infamously—had made use of royal prerogative power to prosecute and punish Willian Prynne, John Bastwick, and Henry Burton for libeling the Church of England's bishops.[564] "Friday last," London writer Edward Rossingham wrote of the horrific series of punishments inflicted on June 30, 1637, "Dr. Bastwick, Mr. Burton, and Mr. Prynne stood in the pillory in the palace of Westminster." As Rossingham's account recorded, noting the compassion and openly expressed

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562 Nicholas Robert Charles Forward, The Arrest and Trial of Archbishop William Laud, Master of Philosophy thesis, University of Birmingham, Department of Modern History (Mar. 2012), pp. 27–28 (noting that Bastwick was "tried and found guilty in Star Chamber and consequently fined, pilloried, imprisoned, and suffered the abscission of his ears"; that "Laud was seen as responsible for securing the prosecution and sentence against Bastwick, a sentence described as especially cruel, and harsher than that given to 'Turkes and heathens'"; that "[s]imilar accusations were brought by Prynne who also believed that Laud led the campaign, through legal action in the High Commission, to sentence him to mutilation, the pillory, a fine, and life imprisonment"; that in Prynne's petition "he denounced the 'malicious Practices' of Laud" and that "[t]he Commons committee assessing Prynne's claims, on 15 December, came to the same conclusion that Laud was personally involved"; and that "Burton also pointed towards Laud for the treatment that he received").

563 William Laud, The History of the Troubles and Tryal of the Most Reverend Father in God, and Blessed Martyr, William Laud, Lord Archbishop of Canterbury 144–45, 150, 156–57, 310 (London, 1695) (noting on the title page: "Wrote by Himself, during his Imprisonment in the Tower" / "To which is prefixed The Diary of His Own Life Faithfully and entirely Published by the Original Copy"; with the book's preface penned by "Hen. Wharton" and noting at the outset: "*That the Reader may be satisfied, how it came to pass, that an History wrote of, and by, a Person of so great a Character in this Nation, and by him designed for the Publick, hath lain hid, and been suppressed for near Fifty Years; through whose Hands it hath passed; and by what means, and by whose Labour it is at Last Published; he may be pleased to take the following Account*.").

564 Bowman, *supra* note 30, at 767–70.

public support for the punished men in the face of Archbishop Laud's wicked determination to make examples of religious dissenters: "As Dr. Bastwick came from the gate-house towards the palace the light common people strewed herbs and flowers before him, Prynne and he stood upon one scaffold and Mr. Burton upon another by himself. They all three talked to the people." "After two hours," that account notes, "the hangman began to cut off their ears."[565]

The infliction of these corporal punishments—the result of the Star Chamber's June 14, 1637, joint prosecution of Bastwick, Burton, and Prynne—proved to be highly consequential and a seminal event in English history that would be studied for centuries to come, including by Americans who familiarized themselves with the history.[566] "Reactions," historian David Cressy explains in *Travesties and*

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[565] As Edward Rossingham's extended account reads:

> Bastwick said they had collar days in the king's court, and this was his collar day in the king's palace; he was pleasant and witty all the time. Mr. Burton said it was the happiest pulpit he had ever preached in. After two hours the hangman began to cut off their ears; he began with Mr. Burton's. There were very many people; they wept and grieved for Mr. Burton, and at the cutting of each ear there was such a roaring as if every one of them had at the same instant lost an ear. Bastwick gave the hangman a knife, and taught him to cut off his ears quickly and very close, that he might come there no more. The hangman burnt Prynne in both cheeks and, as I hear, because he burnt one cheek with a letter the wrong way he burnt that again. Presently a surgeon clapped on a plaster to take out the fire. The hangman hewed off Prynne's ears very scurvily, which put him to much pain, and after he stood long in the pillory before his head could be got out, but that was a chance. The reason why Prynne was so ill used by the hangman was he promised him five pieces to use him kindly the time before, which he did, and Prynne had given him but half a crown, in five sixpences. But now the hangman was quit with him, for it is said that Prynne fainted in the pillory after the execution; the cause was his standing in the pillory so long after. The humours of the people were various, some wept, some laughed, and some were very reserved. . . . Saturday all the town was full of it that Mr. Prynne was dead, found dead upon his knees with his hand lift[ed] up to heaven, but there was no such thing, for I hear he was not sick.

DAVID CRESSY, TRAVESTIES AND TRANSGRESSIONS IN TUDOR AND STUART ENGLAND 225 (2000).

Yet another contemporaneous account, by Reverend George Gerrard in a 1637 communication to Thomas Wentworth (or Lord Strafford), is found elsewhere. *See* Vande Zande, *supra* note 475, at 344:

> In the palace-yard two pillories were erected, and there the sentence of the Star Chamber against Burton, Bastwick, and Prynne was executed. They stood two hours in the pillory. The place was full of people, who cried and howled terribly, especially when Burton was cropped. Dr. Bastwick was very merry; his wife, Dr. Poe's daughter, got on a stool and kissed him. His ears being cut off, she called for them, put them in a clean handkerchief, and carried them away with her. Bastwick told the people the lords had collar-days at court, but this was his collar-day, rejoicing much in it.

[566] "Proceedings against John Bastwick, M.D. Henry Burton, Clerk, and William Prynne, Esq.; for Seditious Libels, in the Court of Star-Chamber, 14 June 1637. 13 Car. I.", *in*

Transgressions in Tudor and Stuart England (2000), "reflected England's culture and religious divisions." For "[a] few high conformists," the punishments were "too light, and wished 'the pillory had been changed into a gallows." While one referred dismissively to Bastwick, Burton and Prynne as "the cropped libellers," some "likened the martyrdom to 'a glorious wedding day'" and "[m]ore moderate men thought the censure 'too sharp, too base and ignominious for gentlemen of their ingenuous vocation'."[567] Subjecting English gentlemen to such treatment was seen by many people as particularly offensive,[568] though not everyone in prior

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1 Thomas Salmon, A New Abridgement and Critical Review of the State Trials 128 (Dublin, 1737) (noting that "[a]ll that we can learn of the Information exhibited by the Attorney-General is, That it was preferred against the said *Bastwick*, *Burton*, and *Prynne*, for Writing and Publishing Seditious and Schismatical Books against the Government, in Church and State"; that "Archbishop *Laud* would not be concerned in the Sentence, because, he said, it might look like Revenge in him, these Libels being levelled against his Grace personally, as well as against Episcopacy, and the Ecclesiastical Government"; and that "the Prisoners remained in the said respective Islands" where "they were respectively confined" until "they were set at Liberty by the Parliament, that begun the Grand Rebellion, in the Year 1641, when they were brought back to *London* in Triumph")

567 Cressy, *supra* note 565, at 225; *see also id.* ("The Catholic courtier Sir Kenelm Digby, writing to Viscount Conway, remarked sarcastically on the 'venerations' of the 'puritans,' who 'keep the bloody sponges and handkerchiefs that did the hangman service in the cutting off their ears. You may see how nature leads men to respect relics of martyrs.'").

568 2 Daniel Neal & Joshua Toulmin, The History of the Puritans, or, Protestant Non-Conformists, from the Death of Queen Elizabeth to the Beginning of the Civil War in the Year 1642 xxiii (new ed. 1794) (noting the "sufferings of *Prynne*, *Burton*, and *Bastwick*, and their Sentence"; referencing "Archbishop Laud's speech in the star-chamber"; and asserted that "[t]he cruel sentence disgusts the whole nation"); *see also id.* at 278 ("The star-chamber and high-commission exceeded all the bounds not only of law and equity, but even of humanity itself. We have related the sufferings of Mr. *Prynne*, *Burton*, and *Bastwick*, in the year 1633. These gentlemen, being shut up in prison . . . ."); *id.* at 279 ("When the defendants had prepared their answers, they could not get council to sign them; upon which they petitioned the court to receive them from themselves, which would not be admitted; however *Prynne* and *Bastwick*, having no other remedy, left their answers at the office, signed with their own hands, but were nevertheless proceeded against *pro confesso*. *Burton* prevailed with Mr. *Holt*, a bencher of Gray's-Inn, to sign his answer; but the court ordered the two chief justices to expunge what they thought unfit to be brought into court, and they struck out the whole answer, except six lines at the beginning, and three or four at the end; and because Mr. Burton would not acknowledge it thus purged, he was also taken *pro confesso*."); *id.* at 366–67 ("Mr. *Prynne*, Mr. *Burton*, and Dr. *Bastwick*, being remanded from the several islands to which they had been confined, upon their humble petition to the house of commons, were met some miles out of town by great numbers of people on horseback with rosemary and bays in their hats, and escorted into the city in a sort of triumph, with loud acclamations for their deliverance; and a few weeks after, the house came to the following resolutions: 'That the several judgments against them were illegal, unjust, and against the liberty of the subject; that their several fines be remitted; that they be restored to their several professions; and that, for reparation of their losses, Mr. *Burton* ought to have six thousand pounds, and Mr. *Prynne* and Dr. *Bastwick* five thousand pounds each, out of the estates of the archbishop of Canterbury, the high commissioners, and those lords who had voted against them in the star-chamber; but the confusion of the times prevented the payment of the money.'").

centuries agreed with that assessment.[569]

In the seventeenth century, issues of class played a central role in the way in which the punishments of William Prynne (a lawyer), Henry Burton (a clergyman), and John Bastwick (a physician) were perceived.[570] "The resentment which the Star Chamber sentences on Prynne, Burton, and Bastwick aroused," historian Christopher Hill points out, "sprang not so much from their savagery as because this savagery was employed against gentlemen, members of the three learned professions." "Any Justice of the Peace," Hill notes, "daily imposed sentences of flogging and branding on the lower orders, and tried to get confessions from them by means which he abhorred when used by the prerogative courts against his own class." Of the common law tradition, Hill emphasizes: "The common law was the law of free men. 'He that hath no property in his goods,' said a member of Parliament in 1624, 'is not free.'" "The gentry were exempted from the servile punishment of flogging," Hill notes of their customary exemption from such severe and humiliating corporal punishments. "No goods: to be whipped," Hill stresses by way of contrast of the judgment often imposed upon poor defendants, "was a frequent decision by Justices of the Peace in quarter sessions.[571]

The historian George Macauley Trevelyan gave a very similar explanation of what so upset seventeenth-century English society. As Trevelyan wrote in *England under the Stuarts*:

> Prynne a lawyer, Burton a clergyman, and Bastwick a doctor, had composed and secretly put into circulation violent attacks on the bishops. They were condemned by the Star Chamber to be pilloried, to lose their ears, and to suffer solitary confinement for life. The cruel mangling and branding, which idle crowds watched with cheerful interest when inflicted on cheating tradesmen or sturdy beggars, were on this occasion resented as an indecent outrage on the three liberal professions to which the victims belonged. . . . When the hangman sawed off Prynne's ears a yell arose to which Charles should have listened at Whitehall . . . The State, too . . . met its Prynne in the more attractive personality of John Lilburne. . . . Six months after Prynne's sentence, he refused, as a prisoner before the Star Chamber, to take the oath to answer all questions put to him by the court. For this offense, though he was a gentleman born, Lilburn[e] was

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569 Christopher Wren, comp., Parentalia: or, Memoirs of the Family of the Wrens 32 (London, 1750) (noting that Prynne, Bastwick and Burton "were sentenced by the Court, consistent with Law and Justice, though some misguided People thought with too much Rigour," for "horrid Defamations and Slanders" and noting that "as an additional Mark on *Prynne*, more than the others, it was decreed, that he should be stigmatiz'd on both Cheeks with S. L. signifying a *seditious Libeller*"); *see also id.* ("*John Lilburne*, and *John Warton*, the two Printers and Publishers of Mr. *Prynne*'s seditious libel above cited, call'd, *News from Ipswich*, were deservedly punish'd by Censure in the *Star-Chamber*, upon Information preferr'd in that high Court by the King's Attorney-General").

570 "The charge against Dr. John Bastwick, Henry Burton, and William Prynne was 'writing and publishing seditious, schismatical and libellous Books against the Hierarchy.'" Richard L. Noble, *Lions or Jackals? The Independence of the Judges in* Rex v. Hampden, 14 Stan. L. Rev. 711, 739 n.158 (1962) (quoting 3 How. St. Tr. 711 (St. Ch. 1637)).

571 Christopher Hill, The English Bible and the Seventeenth Century Revolution 45 (1994).

> whipped at the cart's tail from the Fleet to Palace Yard, pilloried, gagged, and deliberately starved almost to death in prison. Again, men observed with indignation that classes hitherto exempt from corporal punishment were being degraded by a jealous absolutism.[572]

E. The Ulster Remonstrances (1642)

The British and the Irish have long had a fraught and contentious relationship—one that has, on multiple occasions, descended into violence and brutality. British settlements and English confiscations of land in Ireland during the Tudor and Stuart reigns led to bitter disputes and, ultimately, to an Irish rising in 1641.[573] The Tudor kings had expelled Irish natives from their freeholds, and in the reign of Elizabeth I—the last monarch of the House of Tudor—there was overt discrimination against Irish-Catholics and "renewed efforts were made to extirpate the native populations, from the four large counties of Munster included in the Desmond forfeitures, and to plant those counties with English tenants."[574] "The Tudor effort to Anglicize Ireland was intensified during the long reign of Elizabeth I," one history notes, adding that "efforts were made to transform Ireland in religion, culture, and politics."[575] As yet another source observes: "Elizabeth, in an attempt to force the Irish to convert, instituted recusant fees, which were fines, for those not attending Sunday service at the Church of Ireland. These fees were not well received by Irish Catholics."[576]

In the Stuart dynasty, the oppression of the Irish continued. During James I's reign, one history recounts, "a more methodical system was pursued, for confiscating the six counties of Ulster included in the O'Neill forfeitures, called the Ulster Plantation, and for planting the greater portion of those counties with British tenants."[577] "The merciless manner in which these Ulster confiscations were carried out, and subsequent efforts to confiscate other districts of Ireland," that history notes in discussing the reign of James I and his son and successor, Charles I, "were the proximate causes of the general rebellion in 1641, which afforded a foundation

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572 George Macauley Trevelyan, England Under the Stuarts 172–73 (21st ed. 1949).

573 Vincent Scully, The Irish Land Question, with Practical Plans for an Improved Land Tenure, and a New Land System 259 (1851).

574 *Id.* at 260–61.

575 Thomas Hachey, et al., The Irish Experience 16 (1989).

576 Christaldi, *supra* note 75, at 129; *see also id.* ("Tensions mounted between the official Protestant Church of Ireland, and the Irish Catholic Church, which, though illegal, was the church of the majority of the Irish people. Hence, the Irish were forced to subsidize a church they repudiated and to practice their religion underground."); *id.* ("During this time, all of Europe was divided between Catholicism and Protestantism. England was a major Protestant power and had as its greatest enemies the Catholic powers of Spain and France. The Pope was also seen as a rival leader. Catholics had to give their allegiance to the Pope, and the Pope was the King's political and religious enemy. Thus to English Protestants loyalty to Catholicism was loyalty to a foreign ruler. Distrust and hatred between the English and Irish grew. The English were viewed as invading foreigners, and the Irish were ungrateful rebels to the crown. Because of Ireland's close proximity to England, the Crown constantly feared that Catholic powers would encourage and subsidize revolt in Ireland.").

577 Scully, *supra* note 573, at 262.

for creating further forfeitures, under the English statute called the 'Adventurers Act.'"[578]

Although the British presence in Ireland "dates from the era following the Norman Invasion of 1066," a large number of English Protestants settled in what became known as Northern Ireland as part of what became known as "the Plantation of Ulster."[579] "For historians," one account emphasizes, "the defeat of

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[578] *Id.* at 263-64; *see also* PHILIP DWYER, THE DIOCESE OF KILLALOE FROM THE REFORMATION TO THE CLOSE OF THE EIGHTEENTH CENTURY 187–88 (1878):

> In respect of political and economical affairs the King was advised to raise money by the expedient of selling lands in Ireland to adventurers, at so much per acre, in the different provinces.
>
> This is the object of the 17 of Charles I., called—The Adventurers Act. In a curious square quarto, "printed in London for Joseph Hunscott, 1642," and "Published by Authoritie," and entitled a "Particular Relation of the Present State and Condition of Ireland as it now Stands, manifested by several letters," &c., &c., the following appears . . . . This pamphlet concludes with a letter to Sir R. King from "Ad. Loftus," the closing sentence of which is too good to be left in oblivion. "We have indited of treason all the noblemen, gentlemen, and freeholders in the counties of Dublin, Meath, Kildare, and Wickloe, which I hope will be a great advantage to the Crown, and good to this poor kingdom, when these rascals shall be confounded, and honest Protestants planted in their places." (Ad. Loftus, 14 Feb., 1641.)
>
> Than this Act, there could hardly have been invented by his Majesty's greatest enemy a more certain method of injuring his friends, of strengthening his foes, and of ultimately ruining the Royal cause in Ireland. Also an idea was long cherished that as Queen Elizabeth had settled Munster, and King James Ulster, so Charles must needs settle Connaught. But the difference was this. In the first case Desmond's rebellion naturally led to a vast forfeiture, and O'Neile's bloody uprising had left the Crown in absolute mastery of the six counties of the North. Charles I. was to make good the forfeiture and settlement of Connaught by legal chicanery and an unkingly breach of faith . . . .

See also id. at 578 (in a note associated with the text's reference to "legal chicanery," reprinting an Ulster Remonstrance referencing "heavy fines, mulcts, and censures of pillory, stigmatizings, and other like cruel and unusual punishments") (citing Desiderata Curiosa Hib., p. 82).

[579] Alexander C. Linn, Note, *Reconciliation of the Penitent: Sectarian Violence, Prisoner Release, and Justice Under the Good Friday Peace Accord*, 26 J. LEGIS. 163, 164–65 (2000); *see also* Philip Cooke, "The Quaternary City: 'Financialisation' and 'Thin Globalisation' in Prospect," *in* URBAN EMPIRES: CITIES AS GLOBAL RULERS IN THE NEW URBAN WORLD 301 (Edward Glaeser, Karima Kourtit & Peter Nijkamp, eds. 2021) ("The Plantation of Ulster (in the northern part of Ireland) was organized by Scots and English guilds, notably the "London Companies' of 'firms', estates and 'Undertakers' such as that of the Marquis of Londonderry, during the reign of King James I. . . . Most of the colonists came from lowland Scotland and London (to Derry and Armagh). Small private plantation by wealthy landowners began in 1606, while the official plantation began in 1609. An estimated half a million acres across historic Ulster was forfeited from Gaelic chiefs. Many of these, in turn, had fled Ireland for mainland Europe in the 1607 'Flight of the Earls' following the Nine Years' War against English rule in Ireland. At the time the Ulster Plantation was occurring, the Virginia Plantation in America began at Jamestown in 1607."); Jane Hyatt Thorpe, Note, *God, Labor, and the Law: The*

Hugh O'Neill, the Earl of Tyrone, in 1603, and the Flight of the Earls in 1607 mark the end of the native Irish system and the beginning of Ireland's complete domination by England."[580] "The famed Flight of the Earls in 1607," another account observes, "robbed Ulster of its natural aristocracy when Hugh O'Neill, Earl of Tyrone, and Rory O'Donnell, Earl of Tyrconnell, fled to the continent to avoid arrest, cherishing, perhaps, the hope of returning to Ireland with a Spanish army."[581] As yet another account notes of the Irish response to English settlement: "This colonization was not welcomed by the Irish Catholic community that had previously controlled Northern Ireland or by their fellow Irish further south. In 1641, the Irish revolted under the leadership of Sir Phelim O'Neill and his followers."[582] As that latter account notes of Irish Catholics: "They were angered by their subjection to English rule, the intolerance of the Protestant Establishment toward Catholicism, and, particularly in Ulster, immigrants' domination of Irish lands."[583]

The Irish rising in October 1641 was a product of the times. While King Charles I battled Parliament, with the increasingly unpopular king always desperate for new funds to finance his troops and policies,[584] Irish Catholics—fearing an

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Pursuit of Religious Equality in Northern Ireland's Workforce, 31 Vand. J. Transnat'l L. 719, 723–24 (1998):

> In response to the "Flight of the Earls," James I confiscated all land in northern Ireland and colonized the area with English and Scottish settlers (the Plantation of Ulster) in an attempt to extend the industry, character, and loyalty of the English settlers to the Irish. As a result of the Plantation, continued English immigration to the Province, and the birth of new generations, the majority of the Ulster population was English (Anglo-Irish) by 1641. Unionist Thomas Sinclair later noted the lasting effect of the Plantation in 1912, stating: "[W]e Ulster Unionists who inhabit the province to-day [sic], or at least the greater number of us, are descendants of these settlers. The overwhelming majority are passionately loyal to the British Throne and to the maintenance of the integrity of the Union."

580 Janet Sinder, *Irish Legal History: An Overview and Guide to the Sources*, 93 Law Libr. J. 231, 248 (2001); *see also id.* ("Until the end of the sixteenth century, Ulster was considered the most unconquered and Gaelic part of Ireland by the English. This ended with the submission to the Crown by Hugh O'Neill in 1603 and his flight from Ireland, along with many other Gaelic nobles ('The Flight of the Earls'), in 1607."); Katherine A.E. Jacob, Note, *Defending Blasphemy: Exploring Religious Expression Under Ireland's Blasphemy Law*, 44 Case W. Res. J. Int'l L. 803, 811–12 (2012) ("The English perceived Native Irish culture, and the Brehon laws in particular, as barbaric. Common law was mostly unavailable to the Native Irish, whose legal families actively circulated eighth- and ninth-century texts on Brehon law, continuing to gloss and comment on the legal texts, through the sixteenth century. Common law and Brehon law clashed over issues such as marriage and inheritance, and dissimilar ecclesiastical structures and practices."); *id.* at 813–14 ("With the departure of many of the Native Irish princes in 1607, the so-called 'Flight of the Earls,' Brehon law—and Native Irish culture—was outlawed. England's resolve to eradicate vestiges of Brehon law characterized Irish legal history until the Act of Union in 1800. By the twentieth century, English common law principles were securely ingrained in Ireland.").

581 Thomas E. Hachey, et al., The Irish Experience 19 (1989).

582 Thorpe, *supra* note 579, at 724.

583 *Id.*

584 Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43

emboldened Protestant Parliament in England[585]—rebelled, with Catholics killing Protestants and vice versa over the course of the months' long, bloody rising. In conjunction with the Irish Rebellion of 1641-42, which lasted a relatively short period of time in comparison to the protracted English Civil War,[586] the "cruel and

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Clev. St. L. Rev. 221, 227–28 (1995):

> Charles's "personal rule" proved to be a disaster both for the nation and for Charles personally. Charles surrounded himself with figures—such as Archbishop William Laud—who were widely unpopular, and he proceeded to try to avoid the requirement that Parliament approve new requests for taxes by extracting as much revenue as possible from those sources traditionally available to the monarch.
>
> By 1640, however, Charles's circumstances had grown desperate. Three years earlier, Scotland had rebelled against Charles's religious policies and raised an army with the intention of going to war with England. Charles responded first by borrowing money and then by seizing the assets of the wealthiest business in England, the East India Company, but when these expedients failed he found that he had no other course but to reconvene Parliament.
>
> And so in 1640 what later became known as the Long Parliament was convened. Parliament immediately commenced to assert its rights against the King and prepared a set of grievances known as the Grand Remonstrance, which was issued in November, 1641. Parliament also began to take action against the king's closest ministers, causing the Earl of Strafford to be executed and Archbishop Laud to be arrested. In the midst of this constitutional struggle, the Irish rebelled. Parliament feared that if the militia were called up to meet the Irish threat it might used to crush parliamentary independence and so enacted in early 1642 a Militia Bill placing command of the armed forces under parliamentary control. Charles rejected the Bill, but Parliament responded by making it an ordinance of the realm. Charles "ordered the people by proclamation to disobey the ordinance of Parliament" but "both houses of Parliament declared that their ordinance must be obeyed."
>
> Parliament also asserted ever more vigorously an even broader array of rights against the Crown. A set of Nineteen Propositions, which aimed at restricting the royal prerogative in a variety of ways, were enacted and forwarded to Charles. Acceptance of these propositions "would have left [Charles] a puppet king," and this was not a result Charles desired. Charles would go to war rather than sacrifice those parts of the royal prerogative demanded by the Nineteen Propositions. Civil war broke out in August, 1642.

[585] *See, e.g.*, Christaldi, *supra* note 75, at 131 ("Protestant English political dominance and subrogation in Ireland continued until the Catholic Rebellion in 1641. Charles I . . . was involved in a bitter struggle with Parliament. Because Charles I was sympathetic to the Catholic cause and the Parliament was homogeneously Protestant, the outcome of this struggle was particularly significant to the Irish. Charles I was perceived to be succumbing to Parliament, therefore the Catholics in Ireland began to fear reaction from the Protestant Parliament if it were to seize absolute control . . . .").

[586] Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 Clev. St. L. Rev. 221, 228 (1995):

> Things began to turn badly for Charles beginning in 1645, with the organizing by Parliament of the "New Model Army" under the command of

unusual punishments" concept was used in two separate documents: "The heads of the causes which moved the northern Irish, and catholicks of Ireland, to take arms" and "The humble remonstrance of the northern catholicks of Ireland, now in arms." The first document—which includes the 18-point "heads of the causes"—ends with a reference to "cruel and unusual punishments." As that document, described and reprinted elsewhere as the 1642 "Remonstrance of Irish of Ulster,"[587] read in paragraph 18:

> 18. Half this realm was found to belong unto his majesty, as his ancient demesne and inheritance, upon old feigned titles of three hundred years past, by juries, against law, their evidence and conscience, who were corrupted to find the said titles, upon promise of part of those lands so found for the king, or other reward, or else were drawn thereunto by threats of the judges in the circuits, or by heavy fines, mulcts, and censures of pillory, stigmatizings,[588] and other like cruel and unusual punishments.[589]

Oliver Cromwell. The purpose of the Army was to provide "a more speedy, vigorous, and effectual prosecution of the war," and it succeeded in this task, defeating Charles's forces in several important engagements. Charles surrendered to the Scots in 1646, hoping that he might thereby set the Scots off against the parliamentary army, but his hopes would prove illusory and he soon found himself kidnapped by the parliamentarians in the summer of 1647. He escaped that November, but was quickly taken prisoner once again. Parliament decided to place Charles on trial for treason against the realm. Charles refused to answer the charges directly and defended himself by arguing that the court lacked jurisdiction. In the event, Charles was found guilty and executed in January, 1649.

587 A Contemporary History of Affairs in Ireland, from 1641 to 1652 (John T. Gilbert, ed. 1879), Vol. I, Pt. II, pp. 450–51.

588 Colburn's United Service Magazine and Naval and Military Journal – Part II 63 (London: Henry Colburn, 1843).

589 2 Desiderata Curiosa Hibernica: Or, A Select Collection of State Papers; Consisting of Royal Instructions, Directions, Dispatches, and Letters 78-82 (Dublin: "Printed by David Hay," 1772); *accord* Scully, *supra* note 573, at 264 n.* (quoting the paragraph from *Desiderata Curiosa Hibernica* referencing "cruel and unusual punishments"); 2 John Curry, An Historical and Critical Review of the Civil Wars in Ireland, from the Reign of Queen Elizabeth, to the Settlement under King William with the State of the Irish Catholics from that Settlement to the Relaxation of the Popery Laws, in the Year 1778, at 371-73 (1786) (same); John Curry, An Historical and Critical Review of the Civil Wars in Ireland, from the Reign of Queen Elizabeth, to the Settlement under King William with the State of the Irish Catholics from that Settlement to the Relaxation of the Popery Laws, in the Year 1778, at 640-41 (new ed. 1810) (same); 2 Dennis Taaffe, An Impartial History of Ireland, from the Period of the English Invasion to the Present Time 543–46 (1810) (same). The relevant paragraph from the 1642 Remonstrance is reprinted elsewhere with slight variations (e.g., "sty-marking" instead of "stigmatizings"). *See* 5 Transactions of the Royal Historical Society 311 (Charles Rogers, ed., 1877):

> Half the realm was found to belong to his Majesty, as his ancient demesne and inheritance, upon old, feigned titles of 300 years past by juries against law, their evidence, and conscience, who were corrupted to find the said

In fact, many "infamous punishments," lengthy imprisonments, and exorbitant fines[590] were threatened or put to use in Ireland during the Stuart dynasty. Jurors were intimidated,[591] and there was a use, or credible threats of, the pillory, cutting off ears, boring tongues, and branding foreheads with a hot iron.[592] The term *stigmatizings*—

> titles, upon promise of part of those lands so found for the king or other rewards; or else drawn thereto by threats of the judges in the circuit, or heavy fines, mulcts, and censures of pillory, sty-marking, and other cruel and unusual punishments.

Accord Joseph Fisher, The History of Landholding in Ireland 86 (1877).

590 Asenath Nicholson, Lights and Shades of Ireland 46 (1850) (noting of Thomas Wentworth's tenure as Lord Deputy of Ireland: "Next poor Cannaught's 'Graces' were followed by packed juries who, if not willing to be bribed, must submit to have their ears cropped, their tongues bored, or their foreheads marked with a red-hot iron, if a favourable verdict was not given to the crown. Roscommon, Mayo, Sligo, and Leitrim, rather than lose ears and suffer hot-iron brandings, submitted; Galway opposed; the jury were cited to Dublin Castle and fined £4000. each, and the sheriff who collected them £9000. This just severity, Wentworth remarked, would make all succeeding districts submit quietly.").

591 As one history of Ireland describes Lord Deputy Thomas Wentworth's actions during the reign of King Charles I:

> The lord-lieutenant . . . put in execution the famous project of the wholesale confiscation and "plantation" of Connaught, which had been planned by the preceding monarch. Pledging himself to Charles that he would immediately reduce Connaught to the absolute possession of the crown, he at once proceeded to make good his word. He called together packed juries, who were terrified or bribed into obedience to his commands, and were ready to find verdicts in favour of the crown. The jurors who refused to give a favourable verdict, were heavily fined, and imprisoned for long periods. "Sometimes," says the Commons' Journals, "they were pilloried with loss of ears, and bored through the tongue, and sometimes marked in the forehead with a hot iron, and other infamous punishments." This plan was found effective in Roscommon, Leitrim, Mayo, and Sligo, the greater part of which counties were confiscated to royal uses. Opposition was offered in Galway, where the jurors imagined they would have the protection of the powerful Earl of Clanricarde. But Wentworth soon bore down their opposition with a tyrant hand. Immediately on the jurors refusing to find for the crown, as in the preceding cases, they were fined £4,000 each; the sheriff who had selected them was also fined £1,000.; and the Earl of Clanricarde received a heavy reprimand from the court, and otherwise suffered severely. This "just severity," as it was called by Wentworth, was expected to "make all the succeeding plantations pass with the greatest quietness that could be desired."

Samuel Smiles, History of Ireland and the Irish People, under the Government of England 80 (1844).

592 Essays on the Repeal of the Union, to Which the Association Prizes Were Awarded, with a Supplemental Essay Recommended by the Judges (Dublin: Loyal National Repeal Association of Ireland, 1845) (observing on page 46 of *The Rights of Ireland*: "Wentworth came over to Ireland as Lord Deputy, with the avowed intention of making his master 'the most absolute monarch in Christendom.' He carried the work of confiscation forward with the unscrupulous vigour peculiar to his character. Parsons had

used in the Grand Remonstrance (1641), and referring to the corporal punishment of branding an offender's face or another part of the person's body—appears again in the Ulster Remonstrances (1642) and elsewhere, too.[593]

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got the million acres divided among Protestants, and his successor in this good work was resolved to adopt the same mode of rooting out 'Popery' from Connaught. But it was a very difficult work; for though he sought out 'fit men for jurors,' and gave the judges four shillings in the pound out of the first year's rent on all the forfeitures, and also had near the court five hundred horsemen 'as good lookers on,' yet he could not in all cases obtain verdicts. But he was not to be baffled by constitutional forms—the refractory jurors and sheriffs were fined enormously, and imprisoned in dungeons. Some were put in the pillory, and subjected to other infamous punishments such as cutting off their ears, boring their tongues and branding their foreheads with a hot iron. It was thus the soil of Connaught became the King of England's possession, and such was the regard paid to the sacred rights of property by the English authorities in these days. 'This just severity,' says Strafford, 'was expected to make all the succeeding plantations pass with the greatest quietness that could be imagined.'"); Philip Wilson, "Strafford," *in* Studies in Irish History, 1603–1649: Being a Course of Lectures Delivered before the Irish Literary Society of London 133 (R. Barry O'Brien, ed. 1906) (noting of the fining of jurors and Wentworth's conduct: "if his enemies may be believed, they were also 'pilloried with loss of ears, bored through the tongue, and marked in the forehead with a hot iron, with other like infamous punishments'") (quoting *Irish Commons' Journals*).

593 *See, e.g.,* Henry Marshall, "A Historical Sketch of Military Punishments, in as Far as Regards Non-Commissioned Officers and Private Soldiers," *in* Colburn's United Service Magazine and Naval and Military Journal (1843), pt. 2, p. 63 ("Bruce, who published his work (The Institutions of Military Law) in 1717, has a long chapter on military crimes, with the punishments awarded thereto. The punishments he enumerates are *death*, which might be awarded to a great number of delinquencies, the secondary punishments being *stigmatizing* (branding) *in the forehead, cutting off the ears, forfeiture of three months' pay, degradation to the quality of a pioneer-scavenger, and riding the wooden horse. . . .* At this time the criminal law was cruel and inexorable."); *id.* at 64 ("The injurious effects of corporal and disgraceful punishments are . . . recognized by 5 Anne, c. 6, repealing the 11 and 12 William III., which directs that persons convicted of theft '*shall be burned in the most visible part of the left cheek*.' 'And whereas,' says the Act, 'it hath been found by experience that the said punishment hath not had the desired effect by deterring such offenders from the commission of such crimes and offences; *but, on the contrary, such offenders being thereby rendered unfit to be intrusted in any honest and lawful way, become the more desperate*, be it therefore enacted that the aforesaid clause shall be and is hereby repealed.'"); *id.* ("We learn from Bruce that in his time (1717), 'by the *sea-laws* of most of the maritime powers it was ordered that whoever draws a sword, dagger, knife, &c., upon his fellow, is either to have a knife *struck through his hand, and drawn out betwixt the fingers, or is to be keel-hailed*, although he have been prevented, and has given no wound; but beating or wounding with any other weapon is now commonly punished with the loss of the right hand.'"); The Reformed Catholique: or, The True Protestant 29 (London: "*Printed for* Henry Brome," 1679):

> Under K. *James*, no man (they said) *could be assur'd of his Lands or Life*. And under the *Late King*, how were these poor People Oppress'd by *Fines*, *Imprisonments*, *Stigmatizings*, *Deprivations*, *Suspensions*, *Excommunicated*, *Outlaw'd*, *Begger'd*, Proceeded against with punishments *Pecuniary* and *Corporal*; nay, *Death* it self . . . .

See also Three Tracts Published at Amsterdam, in the Years 1691 and 1692, under the Name of Letters of General Ludlow to Sir Edward Seymour, and Other

Branding, a practice with ancient roots,[594] was a common punishment centuries ago,[595] including for the enslaved and various categories of offenders.[596]

Persons, Comparing the Oppressive Government of King Charles I in the First Four Years of His Reign, with that of the Four Years of the Reign of King James II and Vindicating the Conduct of the Parliament That Began in November, 1640 (London: "Reprinted by Robert Wilks," 1812):

> Were I to continue his *History*, (as I may in another Letter, if you accept this) when I lead you into *Westminister Hall*, you would see the Illegal and Wicked Judgements of the *Courts* there, to the compleat Overthrow of the Liberty of our Persons, and the Property of our Goods; and in opening to you his *accursed Star-Chamber* and *High Commission Courts*, I should shew you his most Cruel and Barbarous *Finings*, *Pillory-ings*, *Stigmatizings*, &c. His *Suspending*, *Excommunicating*, *Depriving* and *Imprisoning the* Conforming Clergy of the Church of England, *for Preaching against Popery, for not reading his Book for Sports on the Lord's Day, and for not making Corporal Reverence at the Name of Jesus* . . . .

Zachary Babington, Advice to Grand Jurors in Cases of Blood 102 (1680) (noting that under an act once in force "the Subject might lose his Liberty, suffer Ransom, Stigmatizing, Pillory, Imprisonment, loss of Lands and Estate (things very near to Life and Member)").

[594] W. Robert Thomas & Milhailis E. Diamantis, *Branding Corporate Criminals*, 92 Fordham L. Rev. 2629, 2647 (2024) ("Punitive tattooing and scarring moved from Roman society to European countries including England, France, and Germany, which used branding to mark slaves, prisoners, adulterers, runaway soldiers, and other criminals and outcasts. Medieval and Early Modern branding served multiple functions: to inflict suffering, to publicly stigmatize, and to help others recognize offenders.").

[595] *E.g.*, United States v. Blake, 89 F. Supp.2d 328, 341 (E.D.N.Y. 2000) ("Prior to the late seventeenth century, punishment in the Anglo–American system served primarily to deter crime and to incapacitate criminals. As to the former, the criminal law relied heavily on the threat of execution and branding."); Brandreth v. Lance, 8 Paige Ch. 24, 26 (N.Y. Chancery Ct. 1839) ("The court of star chamber in England, once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages."); Doe v. Poritz, 662 A.2d 367, 438 (N.J. 1995) (Stein, J., dissenting) ("The branding of offenders was a common feature in colonial American jurisprudence, having been in wide use in England as well. The practice consisted of burning a letter roughly corresponding to the nature of the crime committed upon the face of the criminal. Murderers were branded with the letter M; thieves with a T; fighters and brawlers with an F; vagrants with a V."); Pamela L. Bailey, Casenote, Harmelin v. Michigan: *Is the Eighth Amendment's Proportionality Guarantee Left an Empty Shell?*, 24 Pac. L.J. 221, 232 n.63 (1992) ("Blackstone's eighteenth century list of permissible punishments included hanging, dragging to the place of execution, disemboweling alive, beheading, quartering, public dissection, burning alive (for female felons), dismembering, cutting off the hands and ears, slitting the nostrils, and branding the hand or cheek.") (citing 4 W. Blackstone, Commentaries on the Law of England 1510–11 (T. Cooley & J. Andrews 4th ed. 1899)).

[596] Bradley J. Nicholson, *Legal Borrowing and the Origins of Slave Law in the British Colonies*, 38 Am. J. Leg. Hist. 38, 44-45 (1994):

> The custom of branding on the face or shoulder of a runaway servant or rogue was common in England, and was at least as common in the colonies. One seventeenth-century English statute provided that, in order for an

Thieves were branded with a "T"; blasphemers with a "B"; rogues with an "R"; and adulterers with an "A." As one source notes: "Branding served primarily as a means of public stigmatization or shaming of the accused. The branding on the forehead or other parts of the face was an especially vivid warning to others of the offender's previous behavior."[597] One scholar notes that offenders "would commonly have the first letter of the offense branded onto his forehead, cheek, or hand" and that, at one time, "[t]estimonial crimes, such as blasphemy and perjury, were punishable by piercing the offender's tongue." As that scholar emphasized of the history of the Anglo-American practice:

> The practice of branding survived in England until at least 1699; therefore, the practice of branding was also adopted by the American colonies. In some colonies, branding was replaced with requiring offenders to conspicuously wear a badge or a sewn letter indicating the crime that was committed. Under the East Jersey Codes of 1668 and 1675, first convictions for burglary were punishable by the branding of a "T" on the hand, and second convictions for the same offense were punishable by the branding of an "R" on the forehead of the offender. The Maryland colony branded the letter "B" on the forehead of convicted blasphemers, and adulteresses were required to wear the "scarlet letter" in many New England colonies. The letter "A" sewn to the adulterer's clothing was common, but some victims were branded with the letter.[598]

> incorrigible or dangerous rogue to be identified, he should be branded in the left shoulder with a hot iron with the letter "R." Slaves in Virginia were similarly punished. For an unsuccessful escape, one court ordered "Emanuel the Negro to receive thirty stripes and to be burnt in the cheek with the letter R and to work in shakle one year or more as his master shall see cause." In Barbados, a slave's penalty for the second offense of striking a "Christian," i.e., a European, was to "bee severely whipped his nose slit and bee burned in the face," where such burning presumably involved some letter signifying the crime.

[597] Terance D. Miethe & Hong Lu, Punishment: A Comparative Historical Perspective 35 (2005); *see also id.* at 35-36:

> Depending on the particular historical context, branding varied both in its form and location on the body. The French branded criminals with the royal emblem on the shoulder. This practice was later changed to the burning of a letter on the shoulder to represent the convicted offense. Facial branding in England was replaced with hand branding around the early 1700s. The early American colonists also burned particular letters on offenders' hands and forehead. Facial branding was more often imposed on more serious offenses at this time (e.g., blasphemy) and for repeat offenders. Rather than being physically branded, female offenders were forced to wear letters symbolizing their crimes on their clothing. This practice of sewing letters on garments of criminals was called the "scarlet letter."

[598] Daniel E. Hall, *When Caning Meets the Eighth Amendment: Whipping Offenders in the United States*, 4 Widener J. Pub. L. 403, 414 (1995); *see also id.* at 414–15:

> Mutilation was another example of early punishment used in England and administered in the colonies. There were three classes of punitive mutilation. First, where the punishment mirrored the crime committed, the *lex*

Among other things, a person subjected to the pillory, whipping, or stigmatizing could be challenged if called to jury service.[599]

The second document—the 1642 petition "To the king's most excellent majesty" titled "The humble remonstrance of the northern catholicks of Ireland, now in arms"—also contained a similar reference to "cruel and unusual punishments."[600] As that petition, addressed to "Most gracious and dread sovereign,"[601] read in point "19":

> 19. We cannot but with much sorrow represent to your Royal Majesty, how that the natives in the province of Ulster, and other the late Plantations made by the English here, were by force expelled out of their native seats and ancient possessions, without just grounds; and many of the principal

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> *talionis* method of punishment was administered. Mayhem was met with mayhem–an eye for an eye. The second class included those cases where the government removed the offending appendage. For example, thieves had their hands severed, and perjurers had their tongues removed. This type of punishment dates back to at least 1700 B.C. Finally, in early European history, severe and brutal mutilations were used solely for retribution and deterrence purposes. In such cases, there was no nexus between the crime and the mutilation. Noses, ears, and lips were slit; eyes were plucked out; and scalps were torn from the heads of offenders.

599 James Wishhaw, A New Law Dictionary; Containing a Concise Exposition of the Mere Terms of Art, and Such Obsolete Words as Occur in Old Legal, Historical and Antiquarian Writers 52 (London: L. & W. T. Clarke, 1829) (noting in the entry for "CHALLENGES TO THE POLLS": "*Challenges propter delictum* are for some crime or misdemeanor that affects the juror's credit, and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, tumbrel or the like; or to be branded, whipt, or stigmatized; or if he be outlawed, or excommunicated, or hath been attainted of false verdict . . . or forgery; or lastly, if he hath proved recreant when champion in the trial by battle, and thereby hath lost his *liberam legem*.") (emphasis in original; citations omitted); *see also* Greg T. Smith, "Civilized People Don't Want to See That Sort of Thing: The Decline of Physical Punishment in London, 1760–1840," *in* Qualities of Mercy: Justice, Punishment, and Discretion 41 (Carolyn Strange, ed. 1996) ("Stigmatizing punishments like the pillory ensured that the offender would be 'set apart for ever as something polluted and debased,' even if he or she was vindicated eventually."); Alice Morse Earle, Curious Punishments of Bygone Days 86 (1896) ("The rare genius of Hawthorne has immortalized in his *Scarlet Letter* one mode of stigmatizing punishment common in New England."); *id.* at 142–43 ("In Maryland blasphemy was similarly punished. For the first offense the tongue was to be bored, and a fine paid of twenty pounds. For the second offense the blasphemer was to be stigmatized in the forehead with the letter B and the fine was doubled. For the third offense the penalty was death."); *id.* at 143 ("The crime of hog stealing is minutely defined and specified, and vested with bitter retribution. It was enacted by the Maryland Assembly that for the first offence the criminal should stand in the pillory 'four Compleat hours,' have his ears cropped and pay treble damages; for the second offense be stigmatized on the forehead with the letter H and pay treble damages; for the third be adjudged a 'fellon,' and therefor receive capital punishment.").

600 Desiderata Curiosa Hibernica, *supra* note 589, at 82; *accord* A Contemporary History of Affairs in Ireland, from 1641 to 1652 (John T. Gilbert, ed. 1879), Vol. I, Pt. II, pp. 451–56.

601 Desiderata Curiosa Hibernica, *supra* note 589, at 82.

> gentlemen who served the Crown in the wars of Queen Elizabeth, and were the principal means of the overthrow of the late Earl of Tyrone and his adherents, were for their service bereaved likewise of their whole estates, and confined to perpetual imprisonment in the Tower of London; and that all the natives, as well in Ulster as in other the planted territories in this land, were by publick direction of your State here disarmed, of purpose to expose them to the massacre of the Protestant Plantators their adversaries, who were furnished with arms, and were tied by the condition of that their Plantation, to maintain always armed men on their lands; and upon that advantage destroyed many thousands of them by martial law, without any colour of justice; and likewise by false verdicts of Protestant juries, who were drawn thereunto, either by corruption of the state here, and chiefly of Sir William Parsons, one of your Majesty's Justices of this realm, upon promise of giving the said juries part of those lands for which they were to give their verdict on your Majesty's behalf, or some other reward; or else by the violent pressing and threats of your judges here in their circuits, or by heavy fines, mulcts, and censures of pillory, stigmatizings, and other like cruel and unusual punishments.[602]

Part of the cruelty to which the two remonstrances of the Irish of Ulster referred related to efforts by English monarchs and their representatives to seize valuable lands in Ireland. Sir William Parsons, the surveyor-general of Ireland, was put in charge of "a commission for the discovery of defective titles"[603] and reportedly used "vexatious pleadings, questionable suits and partisan manipulations of his office to amass a great estate." As Jon Crawford—a legal historian who has carefully studied Irish history and Ireland's Court of Castle Chamber—writes: "Involved in the plantations of Ulster, Leitrim, Longford and Wexford, Parsons had succeeded his uncle, Sir Geoffrey Fenton, as surveyor-general in 1602. He became a notoriously unscrupulous master of the new court of wards in 1622 and was made an Irish councilor in 1623." "Though he was made a baronet and became lord justice in 1640," Crawford adds, "Parsons retired to England in 1648 amid accusations that he did much to stimulate the Irish rebellion."[604]

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602 A Contemporary History of Affairs in Ireland from 1641 to 1652 (John T. Gilbert, ed. 1879), Vol. I, Pt. II, pp. 451-60.

603 Essays on the Repeal of the Union, to Which the Association Prizes Were Awarded, with a Supplemental Essay Recommended by the Judges (Dublin: Loyal National Repeal Association of Ireland, 1845) (noting on page 46 of *The Rights of Ireland* that King James I set up the commission for the discovery of defective titles, that Sir William Parsons—"an unprincipled adventurer on whom craft and crime have conferred an unenviable notoriety"—was placed in charge of it, and further observing: "In consequence a crowd of lawyers, interested in the plunder, by the hope of sharing the booty, pounced upon Ireland like a flock of harpies" and that "by their chicanery and ingenuity succeeded so well, that a vast number of estates, amounting to a million acres of the best land in Ireland, was forfeited to the crown.").

604 Jon G. Crawford, A Star Chamber Court in Ireland: The Court of Castle Chamber, 1571–1641, at 326 (2005); *see also* 1 Thomas D'Arcy McGee, A Popular History of Ireland 86-87 (2000) (1869):

> A new instrument of oppression was . . . invented—"the Commission for

The Court of Castle Chamber was used by the English to oppress Roman Catholics in Ireland.[605] On October 23, 1641, as the Irish rising began, Sir William Parsons and another man, Sir John Borlase, issued a proclamation blaming the rising on "some evil effected Irish papists."[606] However, Parsons was singled out by

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> the Discovery of Defective Titles." At the head of this Commission was placed Sir William Parsons, the Surveyor-General, who had come into the kingdom in a menial situation, and had, through a long half century of guile and cruelty, contributed as much to the destruction of its inhabitants, by the perversion of law, as any armed conqueror could have done by the edge of the sword. Ulster being already applotted, and Muster undergoing the manipulation of the new Earl of Cork, there remained as a field for the Parsons Commission only the Midland Counties and Connaught. A horde of clerkly spies were employed under the name of "Discoverers," to ransack old Irish tenures in the archives of Dublin and London, with such good success, that in a very short time 66,000 acres in Wicklow, and 385,000 acres in Leitrim, Longford, and Meaths, and King's and Queen's Counties, were "found by inquisition to be vested in the Crown." The means employed by the Commissioners, in some cases, to elicit such evidence as they required, were of the most revolting description. In the Wicklow case, courts-martial were held, before which unwilling witnesses were tried on the charge of treason, and some actually put to death. Archer, one of the number, had his flesh burned with red hot iron, and was placed on a gridiron over a charcoal fire, till he offered to testify anything that was necessary. Yet on evidence so obtained whole baronies and counties were declared forfeited to the Crown.

605 The punishments imposed in the Court of Castle Chamber escalated over time. *See, e.g.*, 1 Robert Steele, Bibliotheca Lindesiana: A Bibliography of Royal Proclamations of the Tudor and Stuart Sovereigns and of Others Published Under Authority, 1485–1714, with an Historical Essay on Their Origin and Use xxxii (1910) ("We have almost no records of the enforcement of proclamations in Ireland by the Court of Castle Chamber. In 1619 we find a fine of £40 and imprisonment during pleasure for circulating foreign Roman Catholic books; 1617, fine of £20 and imprisonment for harbouring priests; 1616, fine of £10 and imprisonment for bringing in a Jesuit to Ireland. There are a few records of fines for absence from hostings, and everything we know seems to show that English Star Chamber practice was followed."); Calendar of the State Papers, Relating to Ireland, of the Reign of James I, 1615–1625, Preserved in Her Majesty's Public Record Office, and Elsewhere 148 (Charles W. Russell & John P. Prendergast, eds. 1880) (noting that in 1617 that John Brenagh was "ordered to be nayled on the pillory and imprisoned," and that in 1618 "Verdon, the priest," was "called into the Castle-chamber, where, on his knees, he acknowledged his wicked error, and the justice for his censure, and seemed to express much sorrow for it" and that "[t]he next morning" it was "made known" to "His Majesty's and their Lordships' merciful favour, who were pleased that the part of his censure that concerned his ears should be remitted, but that he must prepare himself to endure the execution of the rest, and thence the sheriffs carried him to the pillory, it being a market day, and set him thereon for the space of one hour"); Calendar of the State Papers Relating to Ireland, of the Reigh of Charles I, 1633–1647, Preserved in the Public Record Office 306 (Robert Pentland Mahaffy, ed. 1901) (noting under heading "Extract from the Proceedings of the Court of Castle Chamber of 10 July 1641": "Showing that certain persons were on July 10, 1639, condemned for perjury to be fined £100 each, to be put in the pillory in Dublin with their ears nailed thereto, to acknowledge their offences in the Court of Castle Chamber and other Courts, and to be imprisoned during the Lord Deputy's pleasure.").

606 M. Perceval-Maxwell, The Outbreak of the Irish Rebellion of 1641, at 240

Irish Catholics as one of the causes of the Irish rising. Indeed, in *A Remonstrance of Grievances Presented to His Most Excelletn Majestie, in the Behalfe of the Catholicks of Ireland* (1643), blame for the rebellion was laid on the English administration in Ireland, including the actions of William Parsons. Note was taken of his "immortall hatred" of Catholics that threatened the "welfare and happinesse of this Nation." In particular, Parsons and his allies were accused of endeavoring "to make themselves stil greater and richer, by the total ruine and extirpation of this people."[607]

The Irish had lodged multiple grievances before the October 1641 Irish rising. In State Papers relating to Ireland, one finds this entry for July 16, 1641, from Whitehall: "The King, having several times heard the Committee of the Irish Parliament and being ready to grant their petitions, so far as 'could well stand with the service of His Majesty and the present constitution of that kingdom or with the nature of the things desired by them' has this day ordered that Sir Dudley Carleton, Kt., collect and write out the grievances and the King's answers, and enter both in the Register of the Acts of the Council."[608] Among the grievances and Charles I's replies: (1) "The High Commission Court should be abolished, and the ecclesiastical proceedings be left to the ordinary judicature in the sever dioceses." The king's answer: "The Court shall be suspended during the King's pleasure."[609] (2) "An Act should be passed forbidding any juror to be bound to the Castle Chamber, or to be there in any sort questioned, excepting corruption be proved against them. Juries shall not be compelled to respect the evidence of notoriously bad characters." The king's evasive answer: the Court of Castle Chamber "shall be regulated" on the English model.[610]

Prior to the October 1641 Irish rising, the Irish Commons had also submitted to the Irish Lords a series of questions relating to "*recent invasion of the established rights of the subject*," with a request that the Lords "*require the Judges to give their opinions on them*."[611] Those questions included: (1) "*Are the King's subjects in Ireland free, and to be governed only by the Statute and Common Law of England?*"; (5) "*Are monopolies lawful? If so, how should those who infringe them be punished?*"; (6) "*May the Chief Governor punish by fine, imprisonment, mutilation, pillory, or otherwise?*"; (8) "*Are the subjects amenable to martial law in time of peace? If not, what is the punishment for those who inflict it upon them?*"; (9) "*Are voluntary oaths, taken for affirmance or disaffirmance of anything, punishable in the Castle Chamber? If so, why?*"; (10) "*Why is nobody admitted to reducement of fines or other penalties in the Castle Chamber or Council Board until he confesses the offence for which he is punished, though really he may be innocent?*"; (16) "*By what law are jurors that give verdict according to their conscience, and are sole*

(1994).

607 Eamon Darcy, The Irish Rebellion of 1641 and the Wars of the Three Kingdoms 94 (2013) (citing *A remonstrance of grievances presented to his most excellent majestie, in the behalf of the Catholicks of Ireland*, Waterford 1643).

608 Calendar of the State Papers Relating to Ireland, of the Reign of Charles I, 1633–1647, Preserved in the Public Record Office 317 (Robert Pentland Mahaffy, ed., 1901).

609 *Id.* at 319.

610 *Id.* at 320.

611 *Id.* at 332–33 (italics in original; entry for August 19, 1641).

judges of the fact, censured in the Castle Chamber, in great fines and sometimes pillories, with loss of ears and bored through the tongue, and marked sometimes with an hot iron and other like infamous punishments?"; (17) "*Can the Castle Chamber mutilate people? If not, what penalty should be inflicted on those who have done so*"?; (18) "*Should the Castle Chamber, in passing censure, have regard to the words of the Great Charter,* Salvo Contenemento, &c."?[612]

The Latin *salvo contenemento suo* means "saving his livelihood."[613] In his *Commentaries on the Laws of England*, Sir William Blackstone later observed that "[t]he reasonableness of fines in criminal cases has also been usually relegated by the determination of Magna Carta, concerning amercements for misbehavior in matters of civil right." In looking back to a much earlier use of the "salvo contenemento" language, Blackstone quoted the following text from the Magna Carta: "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti; salvo contenemento suo: et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvo wainagio suo*." Blackstone's translation: "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandise; and to the countryman his wainage, or team and instruments of husbandry."[614] According to one study of the Magna Carta, which had been written in Latin: "It was not in the interest of the state itself that the *liber homo* should be so heavily amerced as to be incapable of keeping up his position. Hence the common law confirmed by Magna Carta prohibited such ruinous amercements."[615]

The idea of avoiding excessive punishments thus dated back many centuries, long before the formation of the Queries in Ireland. "The English history of the prohibition on excessive fines is based on the principle of *salvo contenemento*, or the idea that no fine should be so damaging that it amounts to a life sentence," one modern scholar, Tim Donaldson, explains, adding this commentary: "Despite excessiveness and proportionality having evaded bright-line classifications since before the Magna Carta, fines should not be so ruinous that they leave a person without means to care for themselves or their family. Historically, this principle even extended to merchants, providing them with sufficient means for economic survival when courts assessed monetary sanctions."[616] Shortly before James II's

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612 *Id.* at 333–34 (italics in original).

613 Robert W. Emerson & John W. Hardwicke, *The Use and Disuse of the Magna Carta: Due Process, Juries, and Punishment*, 46 N.C. J. Int'l L. 571, 633 (2021). "The *salvo contenemento suo* principle is embodied in Clause 20 of the Magna Carta, which states, in relevant part: 'For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood.'" Id. at 633 n.357 (quoting The Magna Carta of John (1215), 17 John 1, cl. 20 (Eng.)); *see also* McLean, *supra* note 296, at 836 (discussing the concept).

614 Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1333 (11th Cir. 2021) (Tjoflat, J., concurring in part and dissenting in part) (quoting 4 William Blackstone, Commentaries on the Laws of England 379 (Lewis ed. 1902)).

615 James Tait, *Studies in Magna Carta*, 27 English Hist. Rev, 726 (Reginald L. Poole, ed. 1912).

616 Tim Donaldson, *More Than Lip Service Is Required: Excessive Fines Clause Limitations upon Fining the Homeless*, 54 St. Mary's L.J. 629, 632–33 (2023):

reign, Donaldson writes of a decision handed down during Charles II's reign, "Chief Justice North of the Court of Common Pleas commented in *Lord Townsend v. Hughes* that '[i]n cases of *fines* for criminal matters, a man is to be fined by Magna [Carta] with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay.'"[617] "The Court of King's Bench," Donaldson emphasizes, "contemporaneously acknowledged in another case that it should mitigate fines imposed by lower tribunals when excessively imposed."[618] In *The Case of the William Earl of Devonshire* (1689), the House of Lords struck down a £30,000 fine as "excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land."[619]

The 1641 Queries "placed the Irish council immediately on the defensive," historian Jon Crawford writes of the Irish Privy Council, noting that "both Protestant and Catholic members of the parliament" supported the Queries even as "Bramhall and Bolton penned defences of their actions in the Irish council and warned that the replacement of the lord chancellor as speaker would threaten the stability of the kingdom as well as the lawful proceedings of parliament." "The delay of the Irish judges prompted the commons to submit the Queries to the English parliament for a ruling on the points of law," Crawford explains, observing that Patrick Darcy later emphasized in a speech in June 1641: "Ireland is annexed to the crown of England, and governed by the laws of England."[620] The third query, or interrogatory, Crawford writes, "was the vital one for the continued existence of the conciliar court; the fourth query—asking the same question of the chief governor acting alone—suggested "that Strafford arrogated to himself the judicial power of the council board"; and the queries that followed demanded to know the legal authority for grants of monopolies and the legitimacy of Ireland's lord deputy—as Crawford puts it—"to fine, imprison, pillory or mutilate those who violated the regulation of monopolies." The Queries, Crawford notes, "placed the Irish judges in a hopeless

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> The right to be free from excessive fines did not originate in the 1689 bill of rights, which "was only declaratory, throughout, of the old constitutional law of the land." The prohibition against excessive fines comes from common law principles that pre-date Magna Carta. Those principles provided that a subject could be amerced (i.e., assessed a financial penalty) for erecting a building that encroached upon royal land, but that the subject should be amerced "so as not to lose any property necessary to maintain his position." Magna Carta confirmed in 1215 that "[a] freeman shall be amerced for a small offence only according to the degree of the offence; and for a grave offence he shall be amerced according to the gravity of the offence, saving his contenement." Magna Carta therefore formally recognized a *salvo contenemento* principle that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry."

617 Tim Donaldson, *More Than Lip Service Is Required: Excessive Fines Clause Limitations upon Fining the Homeless*, 54 St. Mary's L.J. 629, 636 (2023) (quoting Lord Townsend v. Hughes (1677–78), 86 Eng. Rep. 994).

618 *Id.* (citing Anonymous (1679), 86 Eng. Rep. 217).

619 The Case of William Earl of Devonshire, 11 How. St. Tr. 1353, 1370 (H.L. 1689).

620 Crawford, *supra* note 604, at 403.

quandary, since the lord lieutenant was now impeached, the lord deputy had recently died, the lords justices were personally compromised and the judges themselves sat on the very tribunals which were now under attack."[621]

Before the Irish judges ultimately offered "timid responses" to the Queries in August 1641, historian Jon Crawford explains, "the Irish committee of the privy council, writing on 11 May 1641, replied to the Queries by simply restating the judicial boundaries which delineated the star chamber in England and required castle chamber to conform to them"; the commons sought from the lords an answer to the Queries on May 12th, the day Thomas Wentworth, the Earl of Strafford, was executed at the age of 48 on Tower Hill; the Irish Parliament was prorogued as authorities played for more time; and after Wentworth's execution, "Charles I proceeded to address the Irish grievances by his own authority, rather than that of parliament." "Sitting with twelve members of the privy council on 16 July 1641," Crawford observes, "the king ordered the secretary of state, Dudley Carleton, to enter the royal answers in the register of the council and to prepare letters to be given to the Irish parliament."[622] On August 19, 1641, in a communication to Edward Littleton (appointed Lord Keeper of the Great Seal of England after the previous keeper, John Finch, fled into exile), Thomas Tempest—the Attorney General for Ireland—reported:

> The Commons asked the Lords to require the Judges to answer certain questions, and when the answers given were not satisfactory to the Commons, that House drew up answers on points of law to its own questions. I send you questions and answers. When the Commons' answer came to be voted on by the Lords, the Judges were absent on circuit, and I (being present by virtue of his Majesty's writ) asked to speak. I reminded their Lordships of Lord Chancellor Egerton's speech on the question of the *Postnati*, in which he said that the Lords, for their judgment on matters of law, are informed by the Judges. I also read them part of the Irish Statute of 11 Eliz., which declared that, according to Poynings' law, no matters could be settled in the Irish Parliament without the King's consent, and desired that the Judges' answers and the other declarations might be sent to England. In this I failed.[623]

Along with enclosing a "*Copy of Questions submitted by the Irish Commons to the Irish Lords, with a request that the Lords will require the Judges to give their opinions on them*," there was enclosed an "*Answer and Declaration of the Judges*

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621 *Id.* at 404.

622 *Id.* at 167, 407-09; *see also id.* at 408:

> On 12 May, the commons sought from the lords an answer to the Queries which the judges were to review. The commons apparently planned a public demonstration against the indicted officials . . . . The lords justices feared the intent of parliament to proceed 'capitally' against the two judges and the bishop, explaining they doubted the validity of precedent for this, and seeking advice from England.

623 Calendar of the State Papers Relating to Ireland, of the Reign of Charles I, 1633–1647, Preserved in the Public Record Office 332 (Robert Pentland Mahaffy, ed. 1901).

to the foregoing."[624]

The enclosed "*Answer and Declaration of the Judges*" read in part as follows:

> *They preface their answers with a few general considerations.*
> *They protest against being asked questions in this way. There is no precedent for it, except in the time of Richard II., and this they think is not an example. They beg that their reasons for this objection may be remembered, and imparted to anybody who receives a copy of their answers.*
> . . . .
> *These twenty-two questions contain at least fifty general interrogatories. If they are now forced to give an answer upon all these points, they will not be bound by it in future. Judges, Holy Fathers, Councils, and Parliaments have ever been apt to change their opinion. Their answer on these questions must necessarily be based on the details, and if they give an answer now, it might quite rightly be upset if a change of details presented the problem in a different form at some future time.*
> *Many of the questions asked affect in a high degree the Prerogative, the Government, the Revenue, and the martial affairs of the King. The Judges can give no opinion on these points. If, moreover, the questions are drawn up with a view to punishment, they must necessarily give their opinion only with the most careful reserve. The answering of such questions might prejudice the position of the Bench in future. Many of them have already been voted and presented to the King as grievances. The questions take for granted many of the questions upon which they demand an opinion, and the Judges do not think that any useful end would be served by answering such general interrogatories as "By what law? in what case? of what power? of what force? how? where? why? by whom? wherefore? what punishment? by what rule of policy? in what condition of persons? On all these questions subsequent Judges might differ from them. Nevertheless they answer as follows:—*
> *(1.) The people of Ireland are free, and subject to the English laws, but as many laws have grown obsolete in England, "and some particular ancient laws, as well in criminal as civil causes, have been changed by interpretation of the Judges there, as they find it most agreeable for the general good of the Commonwealth, and as the times did require it; so our predecessors, the Judges of this kingdom, as the necessities of the times did move them, did declare the law in some particular cases, otherwise than the same is practised in England, which the now Judges cannot alter without apparent diminution of a great part of his Majesty's standing revenue, and opening a gap for the shaking and questioning of the estates of many of his Majesty's subjects." The law with regard to felony and treason is different here from in England. A man killed in rebellion here forfeits all his property to the Crown. This is not so in England. In the same way the Irish Bench has always held that persons who commit felony and then will not submit to the law, but hide and live*

[624] *Id.* at 332–34.

by robbery, are levying war against the King, and are, therefore, guilty of treason. . . . [T]here are several statutes in force, both in England and Ireland, which are not part of the common law, as Lex et Consuetudo Parliamenti and others.

(2.) *The Judges do take the oath of Judges, as prescribed and explained in* 18 *and* 20 *Ed. III. They may not delay suits, except when they sit under pretence of any Act of State, proclamation, or order from the Government. There is no penalty for their transgressions, other than what is declared in their oath.*

(3.) *This is a question of the Prerogative which we, as Judges, do not feel called upon to decide. We hold that it is no part of our duty to seek, without the Royal permission, into the Commissions or Instructions of the Chief Governor and Council of Ireland as to give opinion on their jurisdiction. See* 28 *Hen. VI., c. 2 [Ireland], where, after matters are directed to be sent to the ordinary Courts, the King's prerogative is expressly saved.*

(4.) *Their answer is here the same as to the third question.*

(5.) Prima facie, *all grants of monopolies are against the law, but the King, whose advantage is that of the Commonwealth, may make particular exceptions to this rule. Thus, if somebody introduces a new trade, he may fairly be given a monopoly by the King for a certain time. The thing may become lawful or unlawful, according as the details alter. The Statute* 21 *Jac. I., c. 3 [England], concerning monopolies, should be consulted.*

(6.) *Answer same as to 3.*

(7.) *Acts of State or Proclamations cannot override the common law, but they are useful, and, when they are not given* ultra vires*, the contemners of them may be punished. They can say no more.*

(8.) *They know no rule of law by which martial law can be enforced, but this is a matter of prerogative.*

(9.) *The taking and giving of voluntary oaths may be illegal, as the King alone, the fountain of justice, is empowered to give them. Persons doing these things may be tried by the common law, or, in bad cases, by the Castle Chamber. Orders and acts based on such voluntary oaths are apt to cause strife.*

(10.) *There is no certain rule for reducement of fines. The matter is one which the King's clemency decides after the sentence has been passed. It is usual not to reduce the fine till the person affected has admitted his guilt.*

(11.) *Copies of their indictments cannot be denied to those accused of treason or felony.*

. . . .

(16.) *Judges are judges of validity of evidence, even though jurors be sole judges of fact. Juries which give their verdict clearly against the weight of evidence, have been and ought to be censured in the Castle Chamber. They have of old been punishable by a second jury of* 24*, who can brand them as perjurors if they find the verdict to have been against the weight of evidence. This is the right Court to do these things.*

(17.) *Answer same as to* 16.

> (18.) *The clause of the Great Charter which is mentioned is only to be understood of amerciaments, not of fines.*[625]

Eventually, the handling of, and responses to, the Queries, became moot as the Irish rising began in October 1641 and all the violence took the oxygen away from those making legal arguments. "[T]he Irish Rebellion in October 1641," Crawford observes, brought "a sudden end to the relevance of the Queries and the opportunity to resolve the central issues of prerogative law in relation to common law principles."[626] "On 22 October 1641," Crawford notes, "the rebellion in Ulster by Phelim O'Neill and the arrest of conspirators in Dublin by the lords justices created a military emergency which made the return of normal judicial routine impossible." As Crawford adds: "Fighting quickly drew into the conflict all the Irish counties, and outrageous military excesses widened the gap between adversaries and made negotiations more difficult, although every side in the deepening civil war claimed to be fighting for the crown."[627] The "targeting" of the Court of Castle Chamber by the Queries, Crawford concludes in retrospect of that prerogative court, "is a remarkable, even modern, example of legislative reform posing as interrogation." "Without claiming that the court was inherently illegitimate," he notes, the Queries served the purpose of showing that "the tribunal had become a rogue carnivore, tearing ruthlessly at the social fabric and undermining the faith and trust of the king's subjects in his law."[628]

In the decade prior to the Irish rising of 1641, the Court of Castle Chamber imposed draconian sentences. Indeed, chapter ten of Jon Crawford's book is aptly titled "The Menace of Judicial Despotism: The Court of Castle Chamber, 1629 to 1641." The court continued ordering the use of the pillory during this period, with one man, Patrick O'Mulvaney, convicted of slandering members of the Irish nobility in the early 1630s and ordered to be whipped and pilloried and imprisoned for life, and a sheriff, James McCarton, found guilty of extortion, fined £200, and ordered to be pilloried in Dublin and Downpatrick in 1631. Much of the period covered by chapter ten of Crawford's book coincided with Thomas Wentworth's stint as Ireland's lord deputy from 1632 to 1640, with Wentworth recalled to England in the late 1630s, then impeached in 1640 before being put on trial and executed the following year as a result of a bill of attainder.[629] One historical account notes that

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625 *Id.* at 334–37.
626 Crawford, *supra* note 604, at 167.
627 *Id.* at 412.
628 *Id.* at 405.
629 *Id.* at 402:

> The parliamentary advocate, John Pym, adroitly manipulated the commons into a full hearing on the tyranny of Strafford in April 1641 so that the impeachment trial was superseded by a bill of attainder, accusing Strafford of treason. Pym employed many witnesses from Ireland, including Strafford's enemies Mountnorris, Cork, Roebuck Lynch and Charles Wilmot. This proceeding was rapidly concluded on 21 April, after which the lords approved the act of attainder on 8 May and sent it to the king for the royal signature, requiring the execution of Charles I's closest personal advisor. Signed by the king on 10 May 1641, the act of attainder was duly enforced the following day when Strafford was executed on Tower Hill.

from January until March of 1641, the members of the Irish Parliament "were busy co-operating with the Commons of England in regard to the Earl of Strafford's trial."[630]

During his tenure as lord deputy, Wentworth used the Court of Castle Chamber—as Crawford writes—"as a threat to his adversaries, intimidating Lord Wilmot through bills in castle chamber and exchequer so that he would agree to transfer his interest in the castle of Athlone to the crown," and by threatening "a heavy fine and imprisonment" against "the former lord chief justice, the wealthy earl of Cork" that led to "the humiliating capitulation of the earl prior to a full hearing of his cause." Fines and imprisonment ordered by the Court of Castle Chamber—or the threat thereof—were also used to coerce jurors, with the court also handling ecclesiastical matters. "The famously extra-legal machinations of Wentworth as lord deputy of Ireland were prefigured in his multiple star chamber cases in England," Crawford writes, noting how, in England, the "cunning Wentworth" had commenced an action against his Yorkshire neighbor, David Foulis, for "scandalous words" that resulted in Foulis being fined £1,000 and the attachment of his lands for payment.[631]

In those contentious, prejudice-filled times, prerogative courts such as England's Star Chamber and Ireland's Court of Castle Chamber were thus powerful tools of oppression. Thomas Wentworth—King Charles I's chosen Lord Deputy of Ireland, and later known as the Earl of Strafford—had nearly "complete control of the Court of Castle Chamber" by the beginning of 1636.[632] "Without control of the Court of Castle Chamber," historian Hugh Kearney explains, "it is very doubtful whether Wentworth would have been able to force through his policies so effectively and so swiftly."[633] Noting that Wentworth "depended on it to deal with any tendency towards opposition which he found in important quarters," Kearney writes: "Resistance to the plantation of Galway was crushed by the imposition of heavy fines and the imprisonment of the Galway jury on the grounds of conspiracy."[634]

The Court of Castle Chamber was "used to enforce proclamations" and to punish the offence of "conspiracy," and those threatened included Sir Vincent Gookin and Viscount Wilmot, former vice-president of Connacht.[635] "Other references in the State papers provide examples of heavy fines and imprisonment being inflicted," Kearney stresses, adding: "Perhaps the most important intervention of the court in Wentworth's later years was in Ulster where it inflicted heavy fines and life imprisonment upon a group which refused to take an oath denouncing the Scottish National League and Covenant."[636] "The resentment which it aroused was

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630 Calendar of the State Papers Relating to Ireland, of the Reign of Charles I, 1633–1647, Preserved in the Public Record Office xxxv (Robert Pentland Mahaffy, ed. 1901).

631 Crawford, *supra* note 604, at 361–63, 367, 369–77, 563.

632 Hugh Kearney, Strafford in Ireland, 1633–41: A Study in Absolutism 72 (1989).

633 *Id.* at 73.

634 *Id.*

635 *Id.*

636 *Id.*; *see also id.* at 73–74:

> The Court of Castle Chamber was thus only a court in theory; in practice it was an instrument at the full disposal of the lord deputy, particularly after the fall of Mountnorris in 1635. It ceased to be used against the recusants as

concealed until after Wentworth's fall from power," Kearney notes of the Court of Castle Chamber, "but even then it was difficult to attack the legal position of the court directly and the opposition groups in the 1640 parliament had to content themselves with asking by what law were jurors sentenced to great fines, pillories, loss of ears, being bored through the tongue, branding and similar punishments."[637]

The use of the cruel and unusual punishments terminology in the 1642 Ulster Remonstrances in association with various non-lethal corporal punishments is significant, because it makes clear that such corporal punishments—even decades before the English Bill of Rights—were plainly seen as qualifying as cruel and unusual ones. Indeed, a straightforward application of the interpretive canon *ejusdem generis*—Latin for "of the same kind or class"[638]—establishes that excessive and non-lethal corporal punishments qualified as "cruel and unusual punishments" in that era.[639] As noted above, the 1642 Irish remonstrances refer to

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a body and was in the main directed at those who ventured to oppose in any way the policies of the lord deputy.

637 *Id.* at 74; *see also id*.:

> The Court of Castle Chamber lay at the heart of Wentworth's administration, making the rule of 'thorough' possible. It became the instrument of a despotism as severe as that of Richelieu in providing an arbitrary sanction for every act and organ of the administration.

638 O'Bryant v. Adams, 123 N.E.3d 689, 693 (Ind. 2019); Smith v. State, No. 21, 2021 WL 5919473, *1 n.5 (Md. Ct. Spec. App. Dec. 15, 2021); *see also* Village of Elwood v. LB Anderson Land Holding, LLC, 2024 IL App (3d) 220515-U, 2024 WL 774962, *7 (Ill. App. Ct. Feb. 26, 2024) (citations omitted):

> The doctrine of *ejusdem generis* is a cardinal rule of contract construction. By definition, the doctrine provides that "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." Translated from Latin, the phrase literally means "of the same kind or class." Under the *ejusdem generis* doctrine, where a clause describes something and then provides examples using the phrase "included but not limited to," the other things listed are interpreted as meaning "other of the same kind" or "other such like."

639 The *ejusdem generis* maxim, which has deep roots in Anglo-American law, is often used as a tool of statutory interpretation. *E.g*., United States v. Koutsostamatis, 956 F.2d 301, 306–07 (5th Cir. 2020):

> Our reading of the text is supported by tried-and-true tools of statutory interpretation—*noscitur a sociis* and *ejusdem generis*. Both canons have deep roots in our legal tradition. *See, e.g.*, *Hay v. Earl of Coventry*, (1789) 100 Eng. Rep. 468, 470 (KB) (attributing the rule of *noscitur a sociis* to Lord Hale); *Archbishop of Canterbury's Case*, (1596) 76 Eng. Rep. 519, 520–21 (KB) (using *ejusdem generis*). Both canons remain relevant today. *See Lagos*, 138 S. Ct. at 1688–1689 (using *noscitur a sociis*); *Epic Sys. Corp. v. Lewis*, —U.S.—, 138 S. Ct. 1612, 1625, 200 L.Ed.2d 889 (2018) (using *ejusdem generis*). For centuries, courts have used these canons to interpret texts. Courts therefore presume that "Congress legislates with knowledge of [these] basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc*., 498 U.S. 479, 496, 111 S. Ct. 888, 112 L.Ed.2d 1005 (1991).

"heavy fines, mulcts, and censures of pillory, stigmatizings,[640] *and other like* cruel and unusual punishments."[641]

The *ejusdem generis* canon, the use of which in England predated the Irish remonstrances[642] and which was embraced, like the *noscitur a soclis* maxim,[643]

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[640] Colburn's United Service Magazine and Naval and Military Journal – Part II 63 (London: Henry Colburn, 1843).

[641] Desiderata Curiosa Hibernica, *supra* note 589, at 78–82 (italics added).

[642] Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 Notre Dame L. Rev. 2053, 2068–69 (2017) ("The origins of the grammar/Latin canons are more complex. Some of these canons, including *ejusdem generis* and *inclusio unius*, appear to have been used since late sixteenth- or early seventeenth-century England, and they make their first appearances in federal court opinions in the early nineteenth century."); *id.* at 2068 n.81:

> On the origins of *ejusdem generis*, see The Archbishop of Canterbury's Case (1596) 76 Eng. Rep. 519 (KB) (Eng.); *see also* Button v. State Corp. Comm'n of Va., 54 S.E. 769, 771 (Va. 1906) ("The principle [of *ejusdem generis*] is happily illustrated by the Archbishop of Canterbury's Case."); Scalia & Garner, *supra* note 13, at 200 ("Courts have applied the rule [of *ejusdem generis*], which in English law dates back to 1596, to all sorts of syntactic constructions that have particularized lists followed by a broad, generic phrase."); I Graham Willmore et al., Reports of Cases Argued and Determined in the Court of Queen's Bench 7 (London, H. Butterworth, R. Pheney & G.F. Cooper 1839) ("When general words follow particular ones, they must be held to apply to matters *ejusdem generis*. This rule was laid down in the Archbishop of Canterbury's case ...."); David Hunter Miller, *The Occupation of the Ruhr*, 34 Yale L.J. 46, 49 (1924) ("In English law, the rule goes back at least to Coke [author of the opinion in Canterbury's Case] . . . ."). *Expressio unius* has likewise been traced to Edward Coke. *See, e.g.*, Edward Coke, Fasciculus Florum (Thomas Ashe ed., London, G. Eld 1618); Michael Hawke, The Grounds of the Lawes of England (London, H. Clifford & T. Dring 1657).
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> On the origins of *noscitur a sociis*, see *State v. Murzda*, 183 A. 305, 308 (N.J. 1936) ("Noscitur a sociis. This maxim [is] grounded in grammar and firmly established as a rule of exposition since its adoption by Lord Hale . . . ."); *see also* 3 American Railroad and Corporation Reports 138 (John Lewis ed., Chicago, E.B. Myers & Co. 1891) ("Lord Hale's maxim of *noscitur a sociis* is . . . the rule . . . that the meaning of a word may be ascertained by reference to the meaning of words associated with it."); William Hayes, An Inquiry into the Effect of Limitations to Heirs of the Body in Devises 329 (London, J. Butterworth & Son 1824) ("[I]n determining Evans v. Astley, the Court considered the rule adopted by Lord Hale, *noscitur a sociis* . . . ."); James Ram, A Practical Treatise of Assets, Debts and Encumbrances 52-53 (Kessinger Publ'g 2010) (1835) (same); 4 The Revised Reports: Being a Republication of Such Cases in the English Courts of Common Law and Equity from the Year 1785, at 611-12 (Frederick Pollock et al. eds., London, Sweet & Maxwell, Ltd. 1892) ("In the construction of wills we cannot do better than adopt the rule mentioned by Lord Hale, *noscitur à sociis*.").

[643] *E.g.*, State v. Dowling, 263 P.3d 116, 119 n.4 (Haw. Intermediate Ct. App. 2011) ("*Noscitur a sociis* is Latin for 'it is known by its associates' and is '[a] cannon [sic] of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.'") (quoting Black's Law Dictionary 1160–

by early American courts,[644] applies "when a list of more than one item within an enumeration is followed by a catch-all phrase at the end."[645] Such interpretive

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61 (9th ed. 2009)); *see also* State v. Murzda, 183 A. 305, 308 (N.J. Ct. of Errors & Appeals, 1936):

> While the words of a constitutional limitation are, for obvious reasons, to be taken in their natural and ordinary sense, significance, and import, and regard is to be had to their general and popular usage, unless terms of art are employed, which are to be given their technical sense, the intent, as we have stated, is not to be collected from any particular expression, but from a general view of the whole clause. It is an established canon of interpretation, in aid of the primary rule adverted to, and applicable alike to all written instruments, that the meaning of words may be indicated or controlled by those with which they are associated. Noscitur a sociis.
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> This maxim, grounded in grammar and firmly established as a rule of exposition since its adoption by Lord Hale, merely embodies and gives specific application to the general principle that the true sense of a particular word or expression is to be gathered from the context. See Hay v. Earl of Coventry, 3 Term R. 83, 86; Bishop v. Elliott, 11 Exch. 113, 10 Exch. 496, 519; Lewis' Sutherland Statutory Construction (2d Ed.) 414; Dwarris on Statutes, pp. 702, 703. As stated by Lord Bacon, the coupling of words together ordinarily evinces an intention that they are to be understood in the same general sense. Bacon's Work, vol. 4, p. 26. Under this rule, the natural, ordinary, and general meaning of terms and expressions may be limited, qualified, and specialized by those in immediate association, although it is the intent gathered from the whole context that is to ultimately prevail. Words which, standing alone, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. Coke's Littleton, 381a; Downes v. Bidwell, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088; Cooley's Constitutional Limitations, pp. 127, 129.

644 Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 Notre Dame L. Rev. 2053, 2069 n.82 (2017):

> For an early invocation of *ejusdem generis*, see for example Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 329 (1827) ("The principle, that the association of one clause with another of like kind, may aid in its construction, is deemed sound . . . ."); and Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs, 17 U.S. (4 Wheat.) 1, 7 (1819). *Noscitur a sociis* is of similar date, *see, e.g.*, Lambert's Lessee v. Paine, 7 U.S. (3 Cranch) 97, 134 (1805) ("It is true, that this word, when coupled with things that are personal only, shall be restrained to the personality. *Noscitur a sociis*."). *Expressio unius est alterius exclusio* finds roots in the early nineteenth century as well. *See, e.g.*, United States v. Grundy, 7 U.S. (3 Cranch) 337, 356 n.* (1806); Manella, Pujals & Co. v. Barry, 7 U.S. (3 Cranch) 415, 430 (1806).

645 O'Bryant v. Adams, 123 N.E.3d 689, 693 (Ind. 2019); *see also* Howard v. Wyman, 271 N.E.2d 528, 529 (N.Y. 1971):

> The statute provides for replacement of necessary furniture and clothing for persons who have suffered the loss of such items 'as the result of fire, flood or Other like catastrophe'. The loss of those articles to one who has no money with which to replace them might well be deemed a 'catastrophe'. However, our task is to decide not whether a burglary may, in some instances, be termed a 'catastrophe' as that word is generally understood but, rather,

maxims—the case law shows—have long been employed in interpreting statutes and constitutions.[646] "The meaning of the catch-all phrase," the Supreme Court of Indiana has written of the application of that canon, "turns on the nature of the items within the enumerated list."[647] As that court emphasized, using the same "other like" language found in the 1642 remonstrances but in a very different factual example:

> Suppose, for example, an invitation to a party says the menu will consist of "hamburgers, hot dogs, and other like food." Under common usage, we expect "other like food" to be defined with reference to the foods listed. Hamburgers and hot dogs are casual foods, inexpensive, and easy to prepare. Because they "all belong to an obvious and readily identifiable genus", we expect that "the speaker or writer has that category in mind for the entire passage." Given the invitation's list of specified foods, it would come as little surprise if the host also served baked beans and potato salad. But no one would expect the menu to include lobster thermidor or pheasant under glass.[648]

Conclusion

The "cruel and unusual punishments" moniker was part of common parlance long before the drafting of the English Declaration of Rights and its statutory counterpart, the English Bill of Rights. The prohibition against "cruel and unusual punishments,"

> what the Legislature and the Social Services Department intended when they used the phrase 'fire, flood or other like catastrophe'. Having in mind the maxims, Ejusdem generis and Noscitur a sociis, it is difficult to conclude that it was the legislative design to include 'burglary' within the covering clause employed. Reasonably construed, the phrase, a 'like catastrophe' encompasses only a natural occurrence—and, in the case of a fire, one that is man-made—but a burglary is far too unlike a fire or a flood to be included.

646 *E.g.*, Alabama State Docks Dept. v. Alabama Pub. Serv. Comm'n, 265 So.2d 135, 143 (Ala. 1972) ("The doctrine of 'ejusdem generis' applies to constitutional as well as statutory provisions."); Ex parte King, 217 S.W. 465, 468–69 (Ark. 1919) ("The doctrine of *ejusdem generis* may apply as well in the construction of a constitution as in the construction of a statute. That doctrine is that when general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated."); Meyer v. Kalkmann, 6 Cal. 582, 585 (1856) ("The maxim *noscitur a soclis*, so constantly applied in construing constitutional provisions, is most applicable here."); Dike v. State, 38 N.W. 95, 95 (Minn. 1888) ("In construing the meaning of the word 'privilege,' as used in the constitution, the maxim, *noscitur a soclis*, is applicable.").

647 *O'Bryant*, 123 N.E.3d at 693; *see also id.* ("Scalia and Garner explain the canon this way: 'Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned[.]'") (citing Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 199 (2012)).

648 *Id.* (citation omitted); *see also* Zane v. Brown, 25 Backes 200, 203, 126 N.J. Eq. 200, 203 (1939) ("The expression 'or other indebtedness of a public nature' must be read, in consonance with the maxim of ejusdem generis, as though it were stated 'or other *like* indebtedness of a public nature.'") (citation omitted; italics in original).

in fact, was already considered to be an "ancient" right by the late 1680s when Parliament adopted the English Bill of Rights and codified that common law right[649] in writing, through legislation, for the first time. When early Americans, in state constitutions, adopted their own prohibitions against "cruel and unusual," "cruel or unusual," or simply "cruel" punishments, and when they, in 1791, through a national ratification process, codified the prohibition against "cruel and unusual punishments" in the U.S. Constitution's Eighth Amendment, they obviously did so against the backdrop of English history, the prohibition's centuries-old linguistic and common-law origins,[650] an aversion to civil law-style torture,[651] and—it must not be forgotten—when slavery and a whole host of dreadful punishments (e.g., hanging, the pillory, and whipping) were still in use.[652]

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649 *E.g.*, Stinneford, *Death, Desuetude, and Original Meaning*, *supra* note 6, at 591 n.309 (citations omitted):

> Common law thinkers universally held that common law rights, like the right not to be subjected to cruel and unusual punishments, have their ultimate foundation in natural law. For example, Edward Coke asserted that the "Law of Nature is part of the Law of England." Coke also asserted that "nothing that is contrarie to reason, is consonant to Law," and that "reason is the life of the Law, nay the common Law it selfe is nothing else but reason."

650 Vicenç Feliú, *From the Fox to Onlyfans: The Changing Landscape of Property Law*, 48 Nova L. Rev. 281, 288-89 (2024) (discussing the English common law and its evolution over time).

651 *E.g.*, State v. Perry, 610 So.2d 746, 763 (La. 1992) ("While fear of torture was the central concern of the Framers of the Eighth Amendment, its English background indicates that the concern for regularity and generality in the imposition of severe punishment also underlies the Clause.") (citing Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1789 (1970)); *see also* Stinneford, *The Original Meaning of "Unusual," supra* note 16, at 1790–91 (noting that Sir William Blackstone, the influential English jurist, "praised the English system of criminal prosecution—in comparison to the systems prevalent in continental Europe—because of the common law protections that were afforded to criminal defendants," with Blackstone writing that in England, "crimes are more accurately defined, and penalties less uncertain and arbitrary; . . . all our accusations are public, and our trials in the face of the world; . . . torture is unknown, and every delinquent is judged by such of his equals"); *id.* at 1791 ("Blackstone also generally praised the English system of criminal punishment, which was much fairer and more merciful than 'the shocking apparatus of death and torment' that prevailed in the countries of continental Europe").

652 *E.g.*, Commonwealth v. Wyatt, 27 Va. (6 Rand.) 694, 701 (Va. Gen. Ct. 1828) ("The punishment of offences by stripes is certainly odious, but cannot be said to be *unusual*. This Court, regarding the discretion delegated by the Act in question, as being of the same character with the discretion always exercised by Common Law Courts to inflict fine and imprisonment, and subject to be restrained by the same considerations, does not feel itself at liberty in this case to refuse to obey the Legislative will, nor to execute that will by its Judgments.") (italics in original). In his *Commentaries on the Laws of England*, William Blackstone—in spite of his general praise of England's criminal justice system—nevertheless harshly critiqued Parliament's "Bloody Code" that made so many offenses (including "break[ing] down . . . the mound of a fishpond, whereby any fish shall escape; or . . . cut[ting] down a cherry tree in an orchard") capital crimes. As Blackstone wrote:

> [S]anguinary laws are a bad symptom of the distemper in any state. . . . It is moreover absurd and impolitic to apply the same punishment to crimes of

America's founders—many of them lawyers well versed in England's common law system[653] and who had a clear aversion to civil law procedures and arbitrariness[654]—would, naturally, have fully expected the common law to evolve.[655]

> different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the ultimum supplicium, to every case of difficulty. It is, it must be owned, much easier to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.

Stinneford, *The Original Meaning of "Unusual," supra* note 16, at 1792 (quoting Blackstone).

653 The common law played a key role in the establishment of individual rights in England, including through the efforts of Sir Edward Coke. *E.g.*, Stinneford, *The Original Meaning of "Unusual," supra* note 16, at 1778:

> The common law's status as a source of fundamental law gave it the potential to limit the arbitrary exercise of state power. Indeed, Coke asserted that the common law—as reflected in Magna Carta and elsewhere—was the source of numerous rights and liberties of citizens, including the right to due process of law, indictment by grand jury, habeas corpus, the right not to be subjected to double jeopardy, and the right to taxation only with the consent of Parliament. Although Coke found the basis for many of these rights in Magna Carta and other ancient statutes, he made clear that these written laws merely affirmed the existence of rights that had already developed through long usage. He described Magna Carta as "but a confirmation or restitution of the Common Law." Elsewhere, he wrote that "[t]he Common Law appeareth in the Statute of Magna Charta and other ancient Statutes (which for the most part are affirmations of the Common Law) in the originall writs, in judiciall Records, and in our bookes of termes and yeers."

654 *E.g.*, Stinneford, *Is Solitary Confinement a Punishment?*, *supra* note 307, at 28–29:

> Americans of the Founding Era were at least as concerned about constraining governmental punishment discretion as were English common law thinkers. They were acutely aware of the historical struggles to constrain this discretion, and were determined not to permit the same abuses that had occurred in England. For example, when England tried to give an Admiralty Court criminal jurisdiction over American colonists, Americans protested that because the Admiralty Court used the civil law procedures, it was comparable to the Court of Star Chamber. As John Adams wrote: "Can you recollect the complaints and clamors, which were sounded with such industry, and supported by such a profusion of learning in law and history, and such invincible reasoning . . . against the Star-Chamber and High Commission, and yet remain an advocate for the newly-formed courts of admiralty in America?"

655 *E.g.*, H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 Va. L. Rev. 689, 733–34 (1994):

> In America, with its common-law legal heritage, the operative meaning of constitutional texts, like that of statutory texts, evolves over time. Judicial

As a result, contrary to the view of originalists that the Eighth Amendment's "cruel and unusual punishments" prohibition had a "fixed" meaning[656] or should be frozen in time in terms of what it should be interpreted to forbid,[657] there is every logical

> applications of the text to particular controversies build on earlier decisions and in turn are interpreted and reconciled by the creation of constitutional law doctrine that is linked to the originating text in an increasingly genealogical manner. The evolutionary nature of the common law's dealing with normative instruments was well understood at the time the principles of '98 were articulated, and some Republicans, Jefferson among them, periodically objected to the conversion of the written Constitution into an evolving system of common law. Other Republicans, from the beginning, accepted the legitimacy of the common law development of the law of the Constitution. Madison, who consistently accepted the authority of settled precedent contrary to his own view of the meaning of the uninterpreted text, believed "that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions." Constitutional interpretation, he reasoned, benefits by "the illustration to be derived from a series of cases actually occurring for adjudication." The resulting constitutional law, being derived from the authoritative text in a legitimate fashion, shares in the text's authority. Peter Lyons and Paul Carrington of the Virginia Court of Appeals explained in an 1804 opinion that "written constitutions are, like other instruments, subject to construction; and, when expounded, the exposition, after long acquiescence, becomes, as it were, part of the instrument; and can, no more, be departed from, than that." In a legal culture shaped by the common law tradition, the Republican emphasis on the text inevitably invited change.

See also Deep Photonics Corp. v. LaChapelle, 491 P.3d 60, 65 n.3 (Or. 2021) (en banc) ("[O]ur cases interpreting constitutional provisions make clear that the framers did not view the common law as 'static or unchanging.' Rather, 'they would have understood that the common law as not tied to a particular point in time but instead continued to evolve to meet changing needs.' And they would have assumed that constitutional provisions would be interpreted in light of the evolving common law.") (citations omitted).

656 *See, e.g.*, Jeff Thomson, *Prosecuting a Capital Case*, 13 U. St. Thomas J. L. & Pub. Pol'y 26, 36 (2018) ("[T]he United States Supreme Court stated in *Gregg v. Georgia* that '[a]t the time the Eighth Amendment was ratified, capital punishment was a common sanction in every state.'"). Originalists, in effect, seek to lock-in practices permitted when the relevant provision of the U.S. Constitution was ratified (even though the cruel and unusual punishments provision arose out of the common law, which traditionally evolves). *E.g.*, American Legion v. American Humanist Ass'n, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring; joined by Justice Thomas) ("The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago.").

657 *Cf.* Ford v. Wainwright, 477 U.S. 399, 405 (1986) ("There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishments that had been considered cruel and unusual *at the time that the Bill of Rights was adopted*.") (emphasis added). For generations, American jurists have wrestled with history's role in constitutional interpretation. *E.g.*, United States v. Rabinowitz, 399 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) ("Words must be read with the gloss of the experience of those who framed them."); State of South Carolina v. United States, 199 U.S. 437, 448-49 (1905), *overruled on other grounds*, Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 540 (1985):

reason to believe that the founders fully expected a common law concept like the prohibition against cruel and unusual punishments to gradually evolve over time, just like other common-law rules do.[658] The comments and expressed fears of Representative Samuel Livermore in the debate at the First Congress, if nothing else, make that quite clear, with Livermore expressly contemplating that the Eighth Amendment's language might one day be interpreted to bar both corporal punishments and capital punishment.[659]

> The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded.

[658] *See* Rogers v. Tennessee, 532 U.S. 451, 461 (2001) ("The common law . . . presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles."); Myanna Dellinger, *An "Act of God"? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change*, 67 Hastings L.J. 1551, 1614 (2016) ("The common law has always evolved and continues to do so as well as it should."); *see also* Nicholas A. Kahn-Fogel, Katz, Carpenter, *and Classical Conservatism*, 29 Cornell J.L. & Pub. Pol'y 95, 115 (2019):

> [I]t is likely that the framers themselves had every expectation that the particular common law rules of search and seizure in existence in 1791 would eventually change, and there is no evidence that they believed the Reasonableness Clause of the Fourth Amendment would both constitutionalize those rules and freeze them forever as they existed at the time of ratification. Rather, even if the framers did expect the Reasonableness Clause to incorporate common law norms, they understood that common law rules evolve over time. More broadly speaking, numerous authors have argued that the framers themselves expected that future courts would interpret constitutional language through "case-by-case interpretation" and that "they anticipated that departures from their literal language would be occasioned by new and unforeseen circumstances, not by efforts to give effect to their own, unexpressed intentions."

[659] Christian Behrmann & Jon Yorke, *The European Union and Abolition of the Death Penalty*, 4 Pace Int'l L. Rev. Online Companion 1, 51 (2013):

> [I]n the drafting debates on the text of the Eight[h] Amendment in 1789, Samuel Livermore of New Hampshire, argued that when punishment technologies, such as through modernized prison systems, were improved by being more humane and effective, there would be no need for the death penalty, when he stated: "It is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."

In constitutional interpretation, judges have an important role to play—and modern judges should not shirk that weighty responsibility by trying to divine what eighteenth-century American lawmakers or seventeenth-century British subjects or eighteenth-century U.S. citizens thought about antiquated punishments. Jurists and scholars have long debated the death penalty's constitutionality,[660] but it is now plainly time—using reason and logic, and to protect fundamental human rights—to legally classify the death penalty under the rubric of torture because of its inherent characteristics.[661] Indeed, in the debate over the Eighth Amendment's text at the First Congress, Representative Samuel Livermore made these specific comments: "What is understood by excessive fines? It lies with the court to determine."[662] In other words, judges must decide legal controversies and disputes using their—don't stop the presses—*judgment*.

And so it goes when it comes to determining the meaning of "cruel and unusual punishments." Comparing seventeenth- and eighteenth-century thought with twenty-first-century thought is like comparing apples and oranges or, perhaps more aptly, covered wagons and jet airplanes or quill pens and content created through Artificial Intelligence; they are altogether different, with the founding period occurring centuries before the world awakened to the concept of universal human rights and the horrors of concentration camps and an array of cruel and torturous acts—whether brought to light with respect to Nazi atrocities, the Holocaust, and World War II, or more recently by human rights NGOs such as Amnesty International and Human Rights Watch.

Anyone who studies history knows that laws and practices change over time. Representative Livermore himself commented on what became the Eighth Amendment's Cruel and Unusual Punishments Clause and how it might be interpreted in the future,[663] with Justice William Brennan pointing out in *Furman*

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[660] For example, in 1963, Justice Arthur Goldberg tried to convince his colleagues of the death penalty's unconstitutionality by circulating a memo to them. *See* Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term*, 1963, 27 S. Tex. L. Rev. 493 (1986). Likewise, many American jurists have expressed similar sentiments. Kevin M. Barry, *The Law of Abolition*, 107 J. Crim. L. & Criminology 521, 523 (2017) ("[F]or over a half-century, at least thirty-five federal and state judges have concluded that the death penalty is unconstitutional per se."). In contrast, Professor John Stinneford argues that "[t]he death penalty is not an unconstitutional method of punishment at this point in time because it is a traditional punishment that has never fallen out of usage." Stinneford, *Death, Desuetude, and Original Meaning*, *supra* note 6, at 592. Only if a "traditional punishment falls out of usage long enough to show a stable, multigenerational consensus against it," Stinneford argues, can a punishment "appropriately be called cruel and unusual." *Id.*

[661] *See generally* Bessler, The Death Penalty's Denial of Fundamental Human Rights, *supra* note 47; Bessler, The Death Penalty as Torture, *supra* note 47.

[662] Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1321 n.4 (11th Cir. 2021) (Newsome, J., concurring) (citing 1 Annals of Congress 782 (1789) (Joseph Gales ed., 1834)).

[663] "Mr. Livermore," as the record shows, made these remarks in the debate at the First Congress:

> No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these

that "a considerable majority" of members of the First Congress agreed to the Eighth Amendment's language in spite of Livermore's objections to the proposed amendment.[664] Justices Thurgood Marshall and William O. Douglas, in their concurring opinions in *Furman*, likewise took specific note of Representative Livermore's comments.[665] While one comment in late eighteenth-century

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> punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

1 Annals of Cong. 754 (1789).

664 *Furman*, 408 U.S. at 262–63 (Brennan, J., concurring). In his concurrence in *Furman*, Justice Brennan also stressed of the Eighth Amendment and Representative Livermore's comments:

> We know that the Framers' concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon 'cruel and unusual punishments' precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes. Yet we cannot now know exactly what the Framers thought 'cruel and unusual punishments' were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that only torturous punishments were to be outlawed. As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered 'cruel and unusual' at the time.

Id. at 263. In his concurrence, Justice Brennan also made these observations in his opinion concluding that the death penalty violated the Eighth and Fourteenth Amendments:

> There is, first, a textual consideration raised by the Bill of Rights itself. The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections. We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause. Nor is there any indication in the debates on the Clause that a special exception was to be made for death. If anything, the indication is to the contrary, for Livermore specifically mentioned death as a candidate for future proscription under the Clause. Finally, it does not advance analysis to insist that the Framers did not believe that adoption of the Bill of Rights would immediately prevent the infliction of the punishment of death; neither did they believe that it would immediately prevent the infliction of other corporal punishments that, although common at the time, are now acknowledged to be impermissible.

Id. at 283–84 (citations omitted).

665 *Id.* at 244 (Douglas, J., concurring); *id.* at 321 n.19 (Marshall, J., concurring):

> There is some recognition of the fact that a prohibition against cruel and unusual punishments is a flexible prohibition that may change in

legislative debate is just one comment, it is nonetheless indicative and reflective of what common sense dictates: that what was once considered *not* cruel and unusual might very well *become* cruel and unusual in the eyes of a future judge tasked with interpreting a common-law concept. Of course, perceptions of cruelty can change over time.

When the death penalty's objective characteristics are considered, capital punishment should easily—and immediately—be declared unconstitutional under the U.S. Constitution's Eighth Amendment. In reality, America's death penalty has *always* been extraordinarily cruel and torturous—and it has clearly *become* unusual, especially in comparison to life and life-without-parole ("LWOP") sentences, in the twenty-first century.[666] In fact, America's use of capital punishment is unusual in at least three ways: (1) it is unusual or rare in frequency, especially in comparison to life and LWOP sentences, (2) it is unusual because it is administered in an arbitrary and discriminatory manner, thus running afoul of the Fourteenth Amendment's Equal Protection Clause; and (3) it is unusual that such a torturous practice would still be permitted when the law has articulated an *absolute* bar on torture, one admitting of no exceptions.[667]

America's founders, in line with the English common law's then-existing condemnation of torture, repeatedly renounced *torture* (as least as they understood

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> meaning as the mores of a society change, and that may eventually bar certain punishments not barred when the Constitution was adopted. Ibid. (remarks of Mr. Livermore of New Hampshire). There is also evidence that the general opinion at the time the Eighth Amendment was adopted was that it prohibited every punishment that was not 'evidently necessary.' W. Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania (1793), *reprinted in* 12 Am. J. Legal Hist. 122, 127 (1968).

666 Life without parole sentences now far eclipse death sentences. *Compare* Ashley Nellis & Celeste Barry, "A Matter of Life: The Scope and Impact of Life and Long Term Imprisonment in the United States," The Sentencing Project (Jan. 8, 2025), https://www.sentencingproject.org/reports/a-matter-of-life-the-scope-and-impact-of-life-and-long-term-imprisonment-in-the-united-states/ ("One in six people in prison—nearly 200,000 people nationwide—are serving life sentences."); *id.* (finding that 194,803 people were serving a life sentence in a U.S. prison, and that 56,245 people were serving life without parole (LWOP) sentences in 2024), *with* "Facts about the Death Penalty," Death Penalty Info. Ctr., Dec. 19, 2024, https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf?dm=1736463595 (noting that there are currently 2,180 people on death row in the United States); *see also* William W. Berry III, *Capital Trifurcation*, 12 Tex. A&M L. Rev. 129, 131 (2024) ("The death penalty is disappearing in the United States. Annual executions remain under 25 per year, and new capital sentences per year have not exceeded 75 in over a decade, despite approximately 20,000 homicides annually."); *id.* ("Presently, over 55,000 individuals are serving LWOP sentences, a number that continues to grow.").

667 John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions,* 79 Mont. L. Rev. 7, 45 (2018); Bessler, *Torture and Trauma, supra* note 328, at 28, 58, 88–89, 93, 98. Decades ago, Amnesty International's Declaration of Stockholm (1977) declared that "[t]he death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life." John D. Bessler, *The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights*, 61 Santa Clara L. Rev. 467, 577–78 (2021).

it in their time).[668] Judicial torture had developed in continental European legal systems beginning in the thirteenth century,[669] and America's founders openly spoke out against torture as used in continental European civil law systems.[670] And they did so against the backdrop of ongoing efforts in Europe to outlaw torture[671] and the history of England's monarchs using torture and assorted cruel practices and

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668 John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 Nw. J. Int'l Hum. Rts. 3, 13 (2004):

> Torture, though certainly used in treason investigations under warrants from the secretary of state or attorney-general, was never acknowledged as lawful by the English courts. Indeed, there was no common-law authority approving it, and the balance of explicit authority was against it, whereas the Civil law treated it as a routine part of criminal procedure: judicial torture was used in Prussia until 1754, and in France until 1780.

669 Jeremy A. Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 Pace Int'l L. Rev. 93, 105 (2001):

> With the rise of the inquisitorial process in criminal cases, elaborate safeguards developed to protect the defendant. But as the rules of proof (e.g., assigning specific weight to the testimony of various classes of witnesses; forbidding a conviction in the absence of two eyewitnesses or a confession) grew more and more complex, fewer and fewer criminal defendants became eligible for conviction. Accordingly, beginning in the thirteenth century and lasting in various parts of Europe through the middle of the eighteenth century, judicial torture of criminal defendants became more acceptable and more consistently used.

670 Günter Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, 56 Am. J. Comp. L. 403, 408 (2008):

> Torture is widely associated with the dark Middle Ages and characterized as the senseless and indiscriminate application of extreme physical pain and mental agony, directed against whoever was suspected of a crime. It is correct that torture, also referred to as the "painful question," can be traced back to the medieval administration of justice. Its origins, however, reach back to the Greco-Roman world whence violence in criminal legal procedures accompanied the reception of Roman Law and proliferated since the thirteenth century across Europe, including the Holy Roman Empire of the German Nation. During the first half of the eighteenth century, the extortion of confessions in criminal trials within and without the Inquisition gradually waned.

671 There were ongoing efforts to abolish torture in continental Europe in the 1770s—efforts that had begun decades earlier. *See, e.g.*, Langbein, Torture and the Law of Proof, *supra* note 21, at 63 ("Maria Theresa's privy councillor Josef von Sonnenfels prepared a memorandum in the early 1770s for internal circulation within the Austrian regime, calling for the abolition of judicial torture; the document later became public and acquired a reputation as one of the leading abolitionist tracts."); John D. Bessler, *The Gross Injustices of Capital Punishment: A Torturous Practice and Justice Thurgood Marshall's Astute Appraisal of the Death Penalty's Cruelty, Discriminatory Use, and Unconstitutionality*, 29 Wash. & Lee J. Civ. Rts. & Soc. Just. 65, 97-98 (2023) (discussing Frederick II's abolition of torture in 1740 except for "especially serious cases" and his 1754 directive ordering a complete cessation of torture).

punishments through their prerogative powers in the Tudor and Stuart dynasties.[672] "When the text from the English Bill of Rights was borrowed by the Founders," the U.S. Court of Appeals for the Eleventh Circuit recently emphasized, "it reflected their pronounced fear of 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.'"[673]

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672 *See, e.g.*, Heikki Pihlajamäki, *The Painful Question: The Fate of Judicial Torture in Early Modern Sweden*, 25 Law & Hist. Rev. 557, 560 (2007) (describing opposition to torture by the English common law courts but noting "eighty-one torture warrants" were "issued by the Privy Council between 1540 and 1640" during the Tudor and Stuart periods).

673 United States v. Schwarzbaum, No. 22-14058, 2025 WL 271734, *6 (11th Cir. Jan. 23, 2025) (quoting *Ingraham*, 430 U.S. at 665). In the last several decades, scholars have written a great deal about the history of article 10 of the English Bill of Rights and the U.S. Constitution's Eighth Amendment. *See, e.g.,* Ryan, *supra* note 61, at 578–80:

> There are several reasons why most scholars adopt the understanding that Article 10 was intended to prevent the reoccurrence of events such as the Popish Plot over the understanding that it was enacted to prevent the reoccurrence of events such as the Bloody Assize. First, the allegedly cruel methods of punishment employed during the Bloody Assize continued in use after the passage of Article 10. Second, the chief prosecutor of the Bloody Assize was a leading member of the committee that drafted the English Bill of Rights, and it is unlikely that he would have drafted a document condemning his own actions. And finally, the Bloody Assize is barely mentioned in the debate regarding the passage of Article 10. Scholars adopting this position that Article 10 was intended to prevent the reoccurrence of events such as the Popish Plot then conclude that Article 10 does not prohibit particular cruel methods of punishment. This is because, first of all, "[n]one of the punishments inflicted upon Oates amounted to torture." Additionally, life imprisonment was probably not excessive in this case, because a number of innocent people were executed as a result of Oates's scheme. Further, the 2,000-mark fine may have been excessive and the defrocking unusual, but they were not considered cruel. Accordingly, most scholars conclude that, in the context of the English Bill of Rights, "cruel and unusual" seems to have meant simply "cruel and illegal."
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> Although most scholars believe, then, that Article 10 was intended to prevent cruel and illegal punishments, they conclude that this meaning was lost on the drafters of the Virginia Declaration of Rights and the Eighth Amendment, who believed that Article 10 was indeed intended to prevent cruel methods of punishment. This belief by scholars is rooted in colonists' fears of torture and barbarous punishments, which are exhibited in the few statements made by the Framers and Ratifiers regarding cruelty and the Eighth Amendment. This belief also stems from the colonists' limited access to English legal resources. Of the legal treatises available to the colonists, only Blackstone's *Commentaries* addressed the topic of punishment. It states that, although seventeenth-century England allowed hanging, embowelling alive, beheading, quartering, public dissection, and burning alive as punishments and, "in very atrocious crimes other circumstances of terror, pain or disgrace [were] super-added" to the punishment, "the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savor of torture or cruelty." Blackstone's *Commentaries* may not entirely account for how the

In the late eighteenth century, America's founders—blinded by tradition and societal habits of the past, with many founders still enslaving fellow human beings[674] and grotesquely exploiting their labor, often through the use of the lash[675]—did not classify capital punishment as either "cruel and unusual" or torturous. In essence, at a time when the concept of torture was under-conceptualized,[676] they viewed capital punishment and torture in completely separate legal silos and did not recognize the torturous nature of credible death threats in the context of punishment.[677] This was a time—as noted above—when punishments were meted out very differently depending on one's social status or class, just as it was largely aristocrats and elites—the upper class—who fought duels in England and America in prior centuries.[678]

While the U.S. Constitution's Eighth Amendment broadly—indeed, absolutely—forbids "cruel and unusual punishments,"[679] the Civil Right Act of 1866, passed by Congress after the Civil War, required "like punishment, pains, and penalties" regardless of race.[680] The U.S. Constitution's Fourteenth Amendment,

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colonists arrived at a conclusion that Article 10 was intended to prevent cruel methods of punishment, however. The Framers' misunderstanding of Article 10 may be partly due to the philosophical and legal writings of the time, such as Robert Beale's 1583 manuscript entitled *A Book Against Oaths Ministered in the Courts of Ecclesiastical Commission* and Nathaniel Ward's draft code that became Massachusetts's Body of Liberties, both of which expressed disapprobation of barbarous punishments or torture.

674 Roy L. Brooks, *Ancient Slavery Versus American Slavery: A Distinction with a Difference*, 33 U. Mem. L. Rev. 265, 269-70 (2003) (noting that George Washington, Thomas Jefferson, Alexander Hamilton, Patrick Henry, John Hancock, and other founders and presidents enslaved people).

675 Aaron Schwabach, *Thomas Jefferson, Slavery, and Slaves*, 33 T. Jefferson L. Rev. 1, 4 (2010) (noting that "[t]wenty-five of Jefferson's slaves" at Monticello "were household servants" and that "[t]he remaining slaves were agricultural laborers, though for a while they also worked as weavers and as industrial workers in Jefferson's nail factory").

676 Torture was once seen as operating principally upon the body. The law's prohibition against torture, however, is now understood to bar both physical and psychological forms of torture, with the Third Geneva Convention (1949) barring the "physical or mental torture" of prisoners of war and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) broadly—indeed, absolutely—forbidding torture, "whether physical or mental" in nature. No public emergency, and not even war, or threat of war, can be used to justify torture. Bessler, *Torture and Trauma, supra* note 328, at 1, 26–27, 29.

677 John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 St. Louis U. L.J. 781, 798 (2018).

678 Williamjames Hull Hoffer, *North v. South: A Legal History of the Caning of Charles Sumner*, 43 Rutgers L.J. 515 (2013) ("Duels were the natural outgrowth of the honor culture and the honor culture a natural outgrowth of an aristocratic society built on the oppression of a servile class."); Daryl J. Levinson, *Collective Sanctions*, 56 Stan. L. Rev. 345, 383-84 (2003) ("State governments in the antebellum South failed to abolish the institution of dueling because members of the elite social classes who participated in duels valued each other's esteem more than they feared being jailed or hanged for winning a duel—or being shot dead in the course of one. Where groups have control over the granting or withholding of esteem, they may be able to control behavior at minimal cost.").

679 U.S. Const., amend. VIII.

680 *See* Bessler, *The Inequality of America's Death Penalty*, *supra* note 46, at 515–16.

ratified in 1868, was in fact adopted in part to ensure the constitutionality of the Civil Rights Act of 1866, with the Fourteenth Amendment guaranteeing "equal protection of the laws."[681] In light of the Constitution's Eighth and Fourteenth Amendments and the terms of the Civil Rights Act of 1866, any punishment that is inflicted arbitrarily, discriminatory, or in violation of a universal human right (e.g., the right to be free from cruelty, discrimination, or torture) must be seen as "unusual" as a matter of law within the meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause and equivalent provisions of state constitutions.[682]

As this Article has shown, the concept of cruel and unusual punishments first arose out of common English usage and the prohibition became part of England's common law before being codified in the English Bill of Rights, early American state constitutions, and the U.S. Bill of Rights. If the general prohibition against "cruel and unusual punishments" is to have any consequential meaning in modern life, it cannot be read in a "fixed" or static fashion by the U.S. Supreme Court to only prohibit the antiquated and extraordinarily barbarous methods of execution once used in England. Indeed, such punishments had, by the late eighteenth century, already fallen into disuse in the newly formed United States of America. A methodology of interpreting the Eighth and Fourteenth Amendments that only bars incredibly hideous *methods of execution* such as crucifixion, disemboweling, hanging and drawing and quartering, beheading, and burning at the stake would be utterly meaningless in the twenty-first century. Notably, by the early 1640s, the Ulster remonstrances were already classifying an array of *non-lethal* corporal punishments (e.g., branding, the pillory) as cruel and unusual punishments.

A principled reading of the Eighth Amendment's Cruel and Unusual Punishments Clause should never permit the use of capital charges, death sentences, or death warrants that inflict severe pain or suffering, whether physical or mental, on someone. The use of state-sanctioned executions unnecessarily ends the lives of already incarcerated offenders after they and their loved ones have been subjected to severe torment, by way of credible death threats, before those executions are carried out. It cannot be disputed that the commencement of capital prosecutions, the imposition of death sentences, and the scheduling of executions via death warrants are intentional acts. When judged objectively, they constitute official, highly credible threats of death that plainly inflict, at a minimum, impermissible psychological torture, with botched executions often leading to excruciating physical pain, too. As any execution approaches, the threat of death inevitably becomes imminent. American death row inmates, if not exonerated (as 200 have been in America since the 1970s),[683] now spend, on average, more than twenty

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681 U.S. Const., amend. XIV.

682 *E.g.*, Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citations omitted):

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"

683 Facts about the Death Penalty, Death Penalty Info. Ctr., Feb. 7, 2025 (last visited Feb. 9, 2025).

years on death row between sentencing and execution,[684] thus aggravating the cruel and torturous nature of their years of confinement as they live under highly credible, continuous threats of death.[685]

While credible death threats, all by themselves, are cruel and torturous in nature, the prolonged periods of time inmates spend on death row grotesquely aggravates their severity.[686] While the death penalty is the "ultimate sanction," lesser punishments can—and already do—qualify as cruel and unusual punishments. Indeed, the cruel and unusual punishments terminology—inherited from England and long in use in America—became so prevalent and deeply ingrained in American life and everyday usage in prior centuries and decades that it found its way into multiple legislative enactments. To this day, an existing federal statute passed by Congress protects U.S. seamen from "cruel and unusual punishment"[687]—a phrase

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[684] By contrast, in America's founding era, the average time spent awaiting execution after sentencing was just a few months. Jacob Leon, Bucklew v. Precythe's *Return to the Original Meaning of "Unusual": Prohibiting Extensive Delays on Death Row*, 68 CLEV. ST. L. REV. 487, 489 (2020) ("This Article, with data gathered from approximately 150 execution delays in eight states during 1770–1791, provides enough data to show that no sentence-to-execution delay exceeding three months enjoyed 'long usage' in the eighteenth century.").

[685] Carol S. Steiker & Jordan M. Steiker, *Capital Clemency in the Age of Constitutional Regulation: Reversing the Unwarranted Decline*, 102 TEX. L. REV. 1449, 1467–69 (2024) (noting that "[t]his past year saw the longest average time of death row incarceration prior to execution in American history—about 23 years").

[686] *E.g.*, Riley v. Attorney General of Jamaica, 1 AC 719, 734–35 (P.C. 1983) (appeal taken from Jam.) (Lords Scarman and Brightman, dissenting) ("[i]t is no exaggeration . . . to say that the jurisprudence of the civilized world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognized and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading"). The *Riley* dissenters emphasized that "[t]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689." *Id*. at 734. In 1993, a unanimous decision by an *en banc* Privy Council embraced the *Riley* dissenters' position. *See Pratt v. Attorney General*, [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jam.) (en banc), *reprinted in* 33 I.L.M. 364, 386 (1994) (re-examining *Riley*, unanimously overturning the death sentences of two inmates who had spent fourteen years on Jamaica's death row, and concluding that death row delays of more than five years have strong presumption of unconstitutionality). *See also* Andrew R. Dennington, *We Are the World? Justifying the U.S. Supreme Court's Use of Contemporary Foreign Legal Practice in* Atkins, Lawrence, *and* Roper, 29 B.C. INT'L & COMP. L. REV. 269, 283-85 (2006) (discussing Justice Breyer's dissents about the cruel and unusual nature of prolonged time on death row).

[687] 18 U.S.C. § 2191. A federal law, passed by Congress and approved on March 3, 1835, provided in part:

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

equated in the statute itself with corporal punishments *less than death* (just as the Ulster remonstrances, in the early 1640s, employed that terminology in a similar manner).

Titled "Cruelty to seamen," that federal statute subjects any "master or officer of a vessel of the United States" to fines or imprisonment of up to five years if such person "flogs, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any corporal *or other cruel and unusual punishment*."[688] Notably, reflecting the split in how "cruel and unusual" versus "cruel or unusual" was used in prior centuries,[689] a similar federal law also bars military commissions from "flogging," "branding," "marking" or "tattooing on the body" or inflicting any other "cruel or unusual punishment."[690] In effect, those laws—like the once-in-place and now-defunct American laws and legal standards for the treatment of the enslaved[691]—demand a fact-specific adjudication of what actually constitutes a "cruel" or "unusual" punishment, or both.

While capital punishment has long been considered a permissible or "lawful sanction"[692] and, in effect, been misclassified *as something other than torture* because of that concept's narrower construction in prior centuries, logic dictates that, in the modern era, acts of cruelty and torture by state officials be identified by their objective *characteristics*, not by how they are *characterized* by those in power.[693] In fact, a mock or simulated execution is already considered to be a classic example of psychological torture.[694] As one source puts it: "mock executions are

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> or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

"An Act in amendment of the acts for the punishment of offenses against the United States," Public Law No. 28, § 3, *reprinted in* George Sharswood, ed., The Public and General Statutes Passed by the Congress of the United States of America (from 1828 to 1836 Inclusive) 2417 (1837) & 5 The Military and Naval Magazine of the United States, from March, 1835, to September, 1835, at 316 (1835).

688 18 U.S.C. § 2191.

689 *See Harmelin*, 501 U.S. at 966. In 1791, five state constitutions barred "cruel or unusual punishments." *See* Del. Declaration of Rights, § 16 (1776); Md. Declaration of Rights, art. XXII (1776); Mass. Declaration of Rights, art. XXVI (1780); N.C. Declaration of Rights, § X (1776); N.H. Bill of Rights, Art. XXXIII (1784). While two states simply prohibited "cruel" punishments, Pa. Const., Art. IX, § 13 (1790); S.C. Const., Art. IX, § 4 (1790), Virginia's Declaration of Rights and the U.S. Constitution's Eighth Amendment prohibited "cruel and unusual punishments." *See* Va. Declaration of Rights, § 9; U.S. Const., amend. VIII.

690 *See* 10 U.S.C. § 949s ("Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission under this chapter or inflicted under this chapter upon any person subject to this chapter."); *see also* 10 U.S.C. § 855 – Art. 55 ("Punishment by flogging, or by branding, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.").

691 Reinert, *supra* note 150, at 822-24, 840, 847-48.

692 *See generally* Bessler, *The Abolitionist Movement Comes of Age, supra* note 667.

693 *Id.*

694 Ronald J. Comer, Abnormal Psychology 162 (8th ed. 2013) (listing "threats of death" and "mock executions" as forms of "psychological torture"); Gary D. Solis, The Law

perhaps the quintessential illustration of impermissible psychological torture."[695] If a *simulated* execution is torture (and it is), then why not a *real* one? The use of credible death threats—an immutable characteristic of *any* death penalty regime, whether in the United States or elsewhere—are classified in other legal contexts as tortious, torturous, and criminal acts.[696] To rid the U.S. Supreme Court's Eighth Amendment jurisprudence of its Dr. Jekyll-and-Mr. Hyde quality (with the Eighth Amendment normally *protecting* inmates from harm yet, paradoxically, *permitting* their execution), the U.S. Constitution's Eighth Amendment should finally be interpreted in a principled manner, with *both* capital punishment and non-lethal corporal punishments declared unconstitutional.[697]

The whole project of "originalism" is fatally flawed and a fool's errand because it looks to a time when slavery was still in use, when women and minorities endured systematic discrimination and oppression, and when punishments such as branding, the pillory, and the lash were still in use.[698] The judicial philosophy of originalism must be rejected, and the "cruel and unusual punishments" moniker—used in the past to refer to both methods of execution and non-lethal corporal punishments—should be applied and read in the twenty-first century to bar state-sanctioned killing. Capital punishment should be outlawed by the U.S. Constitution's Eighth and Fourteenth Amendments just as the "cruel and unusual punishments" language has already been read to prohibit cruel conditions of confinement, sadistic threats of death, and non-lethal corporal punishments such as the gratuitous beating or lashing of prisoners.[699] "Seeking out the 'original intent' of the First Congress is hardly a useful quest," Judge Abner Mikva of the U.S. Court of Appeals for the District of Columbia Circuit once emphasized, pointing out how Justice William Brennan—a strong advocate for human dignity—used the Eighth Amendment's unique history to make the point that the death penalty should be declared unconstitutional.[700]

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of Armed Conflict: International Humanitarian Law in War 668 (2d ed. 2016) ("The U.N. Human Rights Committee and the Inter-American Commission on Human Rights consider mock executions torture."); *see also* Torture and Its Consequences: Current Treatment Approaches 204 (Metin Başoğlu ed. 1992) ("Sham executions are a well-known and frequently reported form of torture (e.g., Allodi & Cowgill, 1982; Benfeldt-Zachrisson, 1985; Goldfeld *et al.*, 1988).").

695 David R. Dow, et al., *The Extraordinary Execution of Billy Vickers, the Banality of Death, and the Demise of Post-Conviction Review*, 13 Wm. & Mary Bill Rts. J. 521, 550 (2004).

696 Bessler, *Taking Psychological Torture Seriously, supra* note 328, at 14–34.

697 *See generally* John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 Brit. J. Am. Legal Stud. 297 (2013) (discussing the U.S. Supreme Court's Eighth Amendment jurisprudence).

698 *Id.* (discussing corporal punishments used in prior times).

699 Bessler, *The Abolitionist Movement Comes of Age*, *supra* note 667.

700 Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 Ohio St. L.J. 979, 980 (1989):

> The phrase "cruel and unusual punishment" was taken from some obscure English manifesto; it had not been used in any previous statute. An opponent in the First Congress complained that the language was so vague that it might subsequently be used to strike down state statutes which ordained "ear-cropping"' or "capital punishment."' Since the proponents of the eighth amendment had the votes, nobody bothered to answer the opponent, and the

At bottom, capital charges, death sentences, and death warrants are credible threats of death backed by enormous state power. With a mock or simulated execution already considered to be psychological torture, the Eighth Amendment—long interpreted to bar torture—must be interpreted to prohibit both physical and mental forms of torture and, in particular, to outlaw capital punishment, a lethal sanction.[701] The death penalty bears all the indicia and characteristics of a cruel and unusual, indeed an arbitrary, capricious, discriminatory and torturous, practice.[702] As the writer Albert Camus once wrote of the extreme cruelty and inhumanity of capital punishment:

> Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.[703]

language was adopted notwithstanding the ambiguity. While Justice Brennan uses the example to advance his position against capital punishment, even the most ardent hanging judge would find ear-cropping a cruel and unusual punishment today. Seeking out the "original intent"' of the First Congress is hardly a useful quest.

701 *See generally* Bessler, *The Anomaly of Executions, supra* note 697; John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 Am. Crim. L. Rev. 1913 (2012).

702 Bessler, "What-Ifs and Missed Opportunities," in Death Penalty in Decline?, *supra* note 301, at 21; John D. Bessler, *The Inequality of America's Death Penalty, supra* note 46.

703 Albert Camus, "Reflections on the Guillotine," *in* Albert Camus, Resistance, Rebellion, and Death: Essays 199 (Justin O'Brien, trans. 1995).

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