

School of
Law



BRITISH JOURNAL OF AMERICAN LEGAL STUDIES

VOLUME 2 - ISSUE 2
Fall 2013

ARTICLES

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

John D Bessler

Law and the Lively Experiment in Colonial Rhode Island

Scott D Gerber

Beyond Sumptuary: Constitutionalism, Clothes and Bodies in Anglo-American Law, 1215-1789

Ruthann Robson

Manipulating Public Law Favorability: Is It Really This Easy?

Brian Christopher Jones

Holding Corporations to Account: Crafting ATS Suits in the UK?

Simon Baughen

Environmental Claims and Insolvent Companies: The Contrasting Approaches of the United Kingdom and the United States

*Blanca Mamutse and
Valerie Fogleman*

**BRITISH JOURNAL OF
AMERICAN LEGAL STUDIES**

VOLUME 2 - ISSUE 2

Fall 2013

ARTICLES

- The Anomaly of Executions: The Cruel and Unusual Punishments
Clause in the 21st Century
John D Bessler 297
- Law and the Lively Experiment in Colonial Rhode Island
Scott D Gerber 453
- Beyond Sumptuary: Constitutionalism, Clothes and Bodies
in Anglo-American Law, 1215-1789
Ruthann Robson 477
- Manipulating Public Law Favorability: Is It Really This Easy?
Brian Christopher Jones 511
- Holding Corporations to Account: Crafting ATS Suits in the UK?
Simon Baughen 533
- Environmental Claims and Insolvent Companies: The Contrasting
Approaches of the United Kingdom and the United States
Blanca Mamutse and Valerie Fogleman 579

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

John D. Bessler*

University of Baltimore School of Law

ABSTRACT

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

CONTENTS

I. INTRODUCTION.....	299
II. “CRUEL AND UNUSUAL”: A SHORT HISTORY	312
A. <i>The Origins of the Phrase</i>	312
B. <i>Blackstone’s Commentaries</i>	317

* Associate Professor, University of Baltimore School of Law; Adjunct Professor, Georgetown University Law Center.

C. <i>The Eighth Amendment and Its Equivalents</i>	327
D. “Cruel” and “Unusual” Homicides and Beatings.....	338
E. <i>Early American Cases</i>	345
i. An Overview: 1791 to 1830	345
ii. Early Jurists on Cruelty and Race	349
iii. The Supreme Court’s Pre-1900 Cases.....	366
III. THE STATE OF THE NATION	381
A. <i>The American Death Penalty</i>	381
B. <i>The Supreme Court’s Jurisprudence</i>	387
i. A “Progressive” Approach	387
ii. The “Evolving Standards of Decency” Test	393
iii. Existing Eighth Amendment Case Law	397
iv. Excessive and Disproportionate Punishments	406
IV. THE TRANSFORMATION OF AMERICAN LAW	415
A. <i>The Fourteenth Amendment’s Ratification</i>	415
B. <i>Due Process and Equal Protection</i>	418
C. <i>The Effect on What Is Considered “Cruel and Unusual”</i>	425
V. TOWARD A PRINCIPLED EIGHTH AMENDMENT	428
A. <i>The Punishment Continuum</i>	428
B. <i>The Abandonment of Corporal Punishments</i>	430
C. <i>To Kill or Not to Kill?</i>	439
VI. Conclusion.....	447

The Anomaly of Executions

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

¹⁹ *Id.* at 420.

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

³¹ *See, e.g., Harmelin*, 501 U.S. at 983 (“Throughout the 19th century, state courts interpreting state constitutional provisions with identical or more expansive wording (*i.e., ‘cruel or unusual’*) concluded that these provisions did not proscribe disproportionality but only certain modes of punishment.”) (*italics in original*); *see also People ex rel. Kemmler v. Durston*, 55 Hun 64, 7 N.Y.S. 813, 815 (N.Y. Sup. Ct. 1889): We have no doubt that if the legislature of this state should undertake to prescribe, for any offense against its laws, the punishment of burning at the stake, breaking on the wheel, disembowelling, or hanging in chains, to perish by exhaustion, it would be the duty of the courts to pronounce upon such attempt the condemnation of the constitution. In the case supposed, no doubt could exist, because the statute would be, on its face, repugnant to the provision of the constitution against cruel and unusual punishments. It is common knowledge that the punishments mentioned are unusual, and, by the common consent of mankind, they are cruel punishments, because they involve torture and a lingering death.

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

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

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

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

³⁴ 404 F.2d 571 (8th Cir. 1968).

³⁵ *Id.* at 579.

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

³⁷ *Jackson*, 404 F.2d at 579.

³⁸ *Id.*

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

⁵³ 430 U.S. 651 (1977).

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

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

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

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

⁵⁵ *Id.* at 670 n.39.

⁵⁶ 217 U.S. 349 (1910).

⁵⁷ *Id.* at 373.

⁵⁸ *Id.* at 363-64.

⁵⁹ *Id.* at 373.

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

II. “CRUEL AND UNUSUAL”: A SHORT HISTORY

A. *The Origins of the Phrase*

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

⁹⁴ *Id.* at 174.

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

B. Blackstone's Commentaries

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

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

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

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

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

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

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

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

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

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

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

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

¹¹² *Id.* at 138.

¹¹³ *Id.* at 151.

¹¹⁴ *Id.* at 323.

¹¹⁵ *Id.* at 219.

¹¹⁶ *Id.* at 399.

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

¹²⁵ *Id.* at 200.

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

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

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

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

¹²⁷ *Id.* at 199.

¹²⁸ *Id.* at 200.

¹²⁹ *Id.*

¹³⁰ *Id.*

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

¹³² *Id.* at 372.

¹³³ *Id.* at 368-69.

¹³⁴ *Id.* at 369-70.

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (italics in original).

¹⁴⁷ *Id.* at 372.

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

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

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

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

¹⁵⁰ *Id.* at 393-94.

¹⁵¹ *Id.* at 394, 396-98, 402-03.

¹⁵² *Id.* at 394.

¹⁵³ *Id.* at 394-95.

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

C. The Eighth Amendment and Its Equivalents

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

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

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

¹⁶⁷ *Id.* at 217.

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

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

¹⁷⁰ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

¹⁹³ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

²⁰³ *Id.* at 119.

²⁰⁴ *Id.* at 66-84.

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

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

The Anomaly of Executions

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

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

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

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

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

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

²¹⁰ 1 Mo. 709, 1827 WL 1987 (1827).

²¹¹ *Id.* at *1.

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

²¹³ *Id.* at *1.

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

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

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

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

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

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

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

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

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

²¹⁸ That law provided as follows:

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

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

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

The Anomaly of Executions

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

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

²²⁰ *Biography of William Goodell*, RG 30/29 -William Goodell Family Papers, Oberlin College Archives, available at <http://www.oberlin.edu/archive/holdings/finding/RG30/SG29/biography.html>.

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

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

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

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

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

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

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

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

Id. (italics in original).

²²⁶ *Id.* (italics in original).

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

²³⁵ *Id.* at *1-2.

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

²³⁷ *Id.*

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

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

Id. at *1; compare *State v. Boon*, Tay. 246, 1801 WL 701 *5 (N.C. Conf. 1801)

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

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

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

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

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

²⁴⁰ *Id.* As the solicitor general argued:

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

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

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

²⁴² *Id.* at *5.

²⁴³ *Id.*

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

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

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

The Anomaly of Executions

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

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

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

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

Id. at *5.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

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

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

Id.

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

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

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

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

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

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

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

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

²⁵⁴ 10 U.S.C. § 855 (emphasis added).

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

E. Early American Cases

i. An Overview: 1791 to 1830

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

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

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

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

Id. at *4.

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

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

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

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

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

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

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

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

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

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

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

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

²⁷⁵ *Id.* at 340-42.

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

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

Id. at 342.

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

The Anomaly of Executions

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

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

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

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

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

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

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

²⁸² *Id.* at 154.

²⁸³ *Id.* at 157, 187, 203-04, 451.

²⁸⁴ *Id.* at 134.

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

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

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

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

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 9-10.

²⁹¹ *Id.* at 9 n.*.

²⁹² *Id.* at 10.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 11.

²⁹⁷ *Id.*

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

The Anomaly of Executions

ii. Early Jurists on Cruelty and Race

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

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

²⁹⁹ 1825 WL 1899 (Pa. 1825).

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

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

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

³⁰³ *Id.* at *5.

³⁰⁴ *Id.*

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

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

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

³⁰⁵ *Id.*

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

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

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

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

³¹⁰ As Justice Duncan noted:

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

The Anomaly of Executions

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

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

James, 1825 WL 1899 at *6.

³¹¹ *Id.* at *7.

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

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

James, 1825 WL 1899 at *7.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at *8.

³¹⁶ *Id.* (italics in original).

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

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

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

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

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

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

³¹⁸ *Id.*

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

³²⁰ *James*, 1825 WL 1899 at *8.

³²¹ *Id.*

The Anomaly of Executions

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

³²² The opinion in *James* stated as follows:

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

James, 1825 WL 1899 at *8.

³²³ *James*, 1825 WL 1899 at *9:

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

³²⁴ *James*, 1825 WL 1899 at *9:

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

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

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

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

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

James, 1825 WL 1899 at *10.

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

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

Id.

³²⁷ *Id.*

³²⁸ *Id.* (italics in original).

The Anomaly of Executions

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

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

³²⁹ *Id.*

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

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

³³² Justice Duncan noted:

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

James, 1825 WL 1899 at *10.

tailment of death sentences.³³³

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

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

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

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

³³⁵ *James*, 1825 WL 1899 at *11.

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

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

Id.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

The Anomaly of Executions

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

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

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

³⁴⁰ *Id.*

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

³⁴² *Id.* at *12.

³⁴³ 5 Binn. 554, 558 (Pa. 1813).

³⁴⁴ *James*, 1825 WL 1899 at *12.

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

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

³⁴⁶ *James*, 1825 WL 1899 at *12.

³⁴⁷ *Id.*

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

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

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

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

Id.

³⁴⁹ *Id.*

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

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

Id.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

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

The Anomaly of Executions

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

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

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

³⁵⁵ *James*, 1825 WL 1899 at *13.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* at *14.

³⁶³ *Id.* at *13.

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

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

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

³⁶⁴ *Id.*

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

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

³⁶⁷ *Id.* at *2.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

The Anomaly of Executions

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

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

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

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

³⁷⁴ *Id.*

³⁷⁵ *Id.*

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

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

³⁷⁸ *Ely*, 1820 WL 1161 at *4.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

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

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

³⁸¹ *Id.*

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

³⁸³ *Ely*, 1820 WL 1161 at *4.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at *5.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

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

The Anomaly of Executions

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

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

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

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

³⁹¹ *Id.* at *2-4.

³⁹² *Id.* at *1.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

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

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

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

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

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

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

³⁹⁹ *Aldridge*, 1824 WL 1072 at *3.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

The Anomaly of Executions

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

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

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

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

⁴⁰⁴ *Id.* (italics in original).

⁴⁰⁵ *Id.* at *3-4.

⁴⁰⁶ *Id.* at *7.

⁴⁰⁷ U.S. Const., amend. XIII.

⁴⁰⁸ U.S. Const., amend. XIV.

⁴⁰⁹ *Id.*

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

iii. The Supreme Court’s Pre-1900 Cases

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

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

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

⁴¹¹ 99 U.S. 130 (1878).

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

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

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

The Anomaly of Executions

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

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

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

⁴¹⁵ *Id.* at 134-35.

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

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

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

⁴¹⁹ *Id.* at 135.

⁴²⁰ *Id.*

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

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

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

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

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

⁴²² 136 U.S. 436 (1890).

⁴²³ *Id.* at 438-39.

⁴²⁴ BESSLER, *supra* note 413, at 47.

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

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

⁴²⁷ *Id.* at 440-41.

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

⁴²⁹ *In re Kemmler*, 7 N.Y.S. at 148.

The Anomaly of Executions

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

⁴³⁰ *Id.*

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

⁴³² *In re Kemmler*, 136 U.S. at 442.

⁴³³ The lower court judge ruled as follows:

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

Id. at 149-50.

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

⁴⁴² *Id.*

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

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

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

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

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

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

⁴⁴⁶ *In re Kemmler*, 136 U.S. at 444.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 446.

The Anomaly of Executions

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

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

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

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

⁴⁵⁰ *In re Kemmler*, 136 U.S. at 445.

⁴⁵¹ *Id.* at 446.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 446-47.

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

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

Id. at 449.

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

⁴⁵⁷ *Id.* at 447.

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

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

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

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

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

Id. at 448-49.

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

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

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

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

⁴⁶¹ 142 U.S. 155 (1891).

⁴⁶² *Id.* at 156-57.

The Anomaly of Executions

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

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

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

⁴⁶³ *Id.* at 157-58.

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

⁴⁶⁵ *Id.* at 158.

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

⁴⁶⁷ 144 U.S. 323 (1892).

⁴⁶⁸ *Id.* at 327, 330.

⁴⁶⁹ *Id.* at 331.

⁴⁷⁰ The Vermont Supreme Court ruled as follows:

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

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

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

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

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

Id. at 331 (citation omitted).

⁴⁷¹ *Id.* at 331-32.

⁴⁷² *Id.* at 332.

⁴⁷³ *Id.* at 334-35.

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

⁴⁷⁵ *Id.* at 338.

⁴⁷⁶ *Id.* at 339.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* As Justice Field wrote:

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

The Anomaly of Executions

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

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

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

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

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

Id.

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

⁴⁸¹ *Id.* at 339-40.

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

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

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

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

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

⁴⁸³ *Id.* at 339-40.

⁴⁸⁴ *Id.* at 341.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 359.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

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

The Anomaly of Executions

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

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

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

⁴⁹² *Id.* at 360-61.

⁴⁹³ 83 U.S. (16 Wall.) 36 (1872).

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

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

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

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* at 362.

⁴⁹⁹ *Id.* at 362-63.

⁵⁰⁰ As Field wrote:

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

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

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

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

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

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

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

Id. at 363.

⁵⁰¹ *Id.* at 364.

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

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

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

The Anomaly of Executions

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

III. THE STATE OF THE NATION

A. The American Death Penalty

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

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

Id. at 370.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

⁵¹⁵ 396 Md. 256, 914 A.2d 25 (2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

B. The Supreme Court’s Jurisprudence

i. A “Progressive” Approach

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

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

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

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

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

⁵⁴⁴ *Id.*

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

⁵⁴⁶ 217 U.S. 349 (1910).

⁵⁴⁷ *Id.* at 357.

⁵⁴⁸ *Id.*

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

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

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

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

⁵⁵¹ *Id.* at 359, 365.

⁵⁵² *Id.* at 377, 381-82.

⁵⁵³ *Id.* at 365.

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

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

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

The Anomaly of Executions

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

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

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

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

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

Id. at 366-67.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.* at 367-68.

⁵⁵⁹ *Id.* at 368.

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

⁵⁶¹ *Weems*, 217 U.S. at 368.

⁵⁶² *Id.*

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

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

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

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

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

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

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

⁵⁶⁷ *Weems*, 217 U.S. at 369.

⁵⁶⁸ 99 U.S. 130 (1878).

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

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

The Anomaly of Executions

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

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

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

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

⁵⁷³ *Weems*, 217 U.S. at 371.

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

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

⁵⁷⁶ *Id.* at 372.

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.*

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

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

⁵⁷⁹ *Id.* at 372-73.

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

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

Id. at 373.

⁵⁸¹ *Id.* at 378.

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

⁵⁸³ *Id.* at 378.

The Anomaly of Executions

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

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

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

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

ii. The “Evolving Standards of Decency” Test

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

⁵⁸⁴ As the Court in *Weems* explained:

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

Id. at 378-79.

⁵⁸⁵ *Id.* at 377.

⁵⁸⁶ *Id.* at 381.

⁵⁸⁷ *Id.* at 377.

⁵⁸⁸ *Id.* at 382.

⁵⁸⁹ 356 U.S. 86 (1958).

⁵⁹⁰ *Id.* at 101.

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

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

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

⁵⁹¹ *Id.* at 87.

⁵⁹² *Id.*

⁵⁹³ *Id.* at 88.

⁵⁹⁴ *Id.* at 87-88, 90.

⁵⁹⁵ *Id.* at 87-88, 99.

⁵⁹⁶ *Id.* at 92.

⁵⁹⁷ *Id.* at 92-93.

⁵⁹⁸ *Id.* at 97-99.

⁵⁹⁹ *Id.* at 99.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

⁶⁰² *Id.* (italics added).

The Anomaly of Executions

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

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

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

⁶⁰³ *Id.*

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

⁶⁰⁵ *Id.* at 100.

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* at 100-101.

⁶¹⁰ *Id.* at 100 n.32.

⁶¹¹ *Id.*

⁶¹² *Id.* (citations omitted).

⁶¹³ *Id.*

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

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

⁶¹⁴ *Id.* at 100 n.32.

⁶¹⁵ *Id.*

⁶¹⁶ *Id.* at 101.

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

⁶¹⁸ *Id.* at 102.

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

⁶²⁰ *Id.* at 102.

⁶²¹ *Id.*

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

The Anomaly of Executions

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

iii. Existing Eighth Amendment Case Law

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

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

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

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

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

Id.

⁶²⁴ U.S. CONST., amend. VIII.

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

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

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

⁶²⁸ 402 U.S. 183 (1971).

⁶²⁹ *Id.* at 196.

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

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

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

⁶³⁰ *Id.* at 207.

⁶³¹ 408 U.S. 238 (1972).

⁶³² *Id.*

⁶³³ *Id.*

⁶³⁴ 428 U.S. 153 (1976).

⁶³⁵ *Id.* at 197-98, 206-207.

⁶³⁶ *Id.* at 169.

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

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

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

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

⁶⁴¹ 356 U.S. 86 (1958).

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

⁶⁵⁵ U.S. CONST., amend. VIII.

⁶⁵⁶ *Graham*, 130 S. Ct. at 2022 (“the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution”).

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

⁶⁵⁸ 1 Cranch 137, 5 U.S. 137 (1803).

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

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

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

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

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

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

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

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

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

The Anomaly of Executions

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

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

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

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

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

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

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

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

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

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

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

⁶⁷² *Id.* at 196.

⁶⁷³ *Id.* at 197.

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

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

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

⁶⁷⁵ *Id.* at 637.

⁶⁷⁶ *Id.*

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

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

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

Id.

⁶⁷⁹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989)

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

The Anomaly of Executions

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

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

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

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

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

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

iv. Excessive and Disproportionate Punishments

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

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

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

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

⁶⁸⁵ *Id.* at 592.

⁶⁸⁶ 554 U.S. 407 (2008).

⁶⁸⁷ 458 U.S. 782 (1982).

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

⁶⁸⁹ 477 U.S. 399 (1986).

⁶⁹⁰ *Id.* at 410.

⁶⁹¹ 487 U.S. 815 (1988).

⁶⁹² *Id.* at 818-38.

⁶⁹³ 543 U.S. 551 (2005).

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

The Anomaly of Executions

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

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

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

⁶⁹⁶ 536 U.S. 304 (2002).

⁶⁹⁷ 492 U.S. 302 (1989).

⁶⁹⁸ *Atkins*, 536 U.S. at 318.

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

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

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

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

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

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

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

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

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

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

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

⁷⁰⁷ *Id.*

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

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

⁷¹⁰ 538 U.S. 63 (2003).

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

The Anomaly of Executions

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

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

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

⁷¹² U.S. CONST., amend. XIII.

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

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

⁷¹⁵ 524 U.S. 321 (1998).

⁷¹⁶ *Id.* at 324-26.

⁷¹⁷ *Id.* at 324, 334.

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

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

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

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

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

⁷²⁰ *Id.* at 335.

⁷²¹ *Id.*

⁷²² *Id.*

⁷²³ *Id.*

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

⁷²⁵ *Id.* at 334 (citing *Austin v. United States*, 509 U.S. 602, 622-23 (1993) & *Alexander v. United States*, 509 U.S. 544, 559 (1993)). The question of whether a fine is constitutionally excessive, Justice Thomas wrote, was entitled to “de novo” review, without any deference to the district court’s determination of excessiveness. *Id.* at 336 n.10.

The Anomaly of Executions

al excessiveness standard.”⁷²⁶ He found two such considerations “particularly relevant.”⁷²⁷ “The first, which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause,” Thomas wrote, “is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature.”⁷²⁸ “The second,” Thomas added, “is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.”⁷²⁹ Finding both principles “counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense,” the majority in *Bajakajian* adopted the standard of “gross disproportionality,” the standard also articulated in the Court’s Cruel and Unusual Punishments Clause precedents.⁷³⁰

In applying the “gross disproportionality” standard, words that do not appear in the Constitution itself, the Court in *Bajakajian* found that a forfeiture of \$357,144 would violate the Excessive Fines Clause.⁷³¹ Justice Thomas emphasized that the crime “was solely a reporting offense”; that the offense was “unrelated to any other illegal activities”; that the money “was the proceeds of legal activity and was to be used to repay a lawful debt”; that “it was perfectly legal” for the defendant to “possess the \$357,144 in cash and to remove it from the United States”; and that the defendant “is not a money launderer, a drug trafficker, or a tax evader.”⁷³² Justice Thomas also specifically rejected the contention that “the proportionality of full forfeiture is demonstrated by the fact that the First Congress enacted statutes requiring full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods’ value.”⁷³³ Thomas pointed out that the type of forfeiture imposed by these early customs statutes was civil or remedial, not criminal, in nature.⁷³⁴

In *Bajakajian*, Justice Kennedy’s dissent expressed outrage, finding that the Constitution “does not forbid forfeiture of all of the smuggled or unreported cash.”⁷³⁵ “For the first time in its history,” the dissent began,

⁷²⁶ *Id.* at 336.

⁷²⁷ *Id.*

⁷²⁸ *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983) (“Reviewing courts ... should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes”) & *Gore v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment, ... these are peculiarly questions of legislative policy”)).

⁷²⁹ *Id.*

⁷³⁰ *Id.* Justice Thomas noted that the “gross disproportionality” standard had been developed by the Court in its Cruel and Unusual Punishments Clause precedents. *Id.*

⁷³¹ *Id.* at 337; *see also id.* at 337 n.11 (“The only question before this Court is whether the full forfeiture of respondent’s \$357,144 ... is constitutional under the Excessive Fines Clause. We hold that it is not.”).

⁷³² *Id.* at 337-38 & n.13.

⁷³³ *Id.* at 340.

⁷³⁴ *Id.* at 340-43.

⁷³⁵ *Id.* at 354 (Kennedy, J., dissenting).

“the Court strikes down a fine as excessive under the Eighth Amendment.”⁷³⁶ As Justice Kennedy wrote: “The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court’s test, its decision portends serious disruption of a vast range of statutory fines.”⁷³⁷ The dissent agreed with the gross disproportionality test, but took issue with the Court’s application of it. “This test would be a proper way to apply the Clause,” Kennedy wrote, “if only the majority were faithful in applying it.”⁷³⁸ “The majority’s assessment of the crime accords no deference, let alone substantial deference, to the judgment of Congress,” Kennedy emphasized.⁷³⁹

Apart from the Excessive Fines Clause arena, judges have already concluded that certain *modes* of execution—among them, burning at the stake,⁷⁴⁰ crucifixion,⁷⁴¹ and breaking on the wheel⁷⁴²—would be excessive and thus unconstitutional.⁷⁴³ As Justice William Douglas, for example, wrote in his concurrence in *Robinson v. California*: “The historic punishments that were cruel and unusual included ‘burning at the stake, crucifixion, breaking on the wheel,’ quartering, the rack and the thumbscrew, and in some circumstances even solitary confinement.”⁷⁴⁴

In 1857, the Supreme Court of Ohio—after noting that, under English law, drawing and quartering, being dragged to the place of execution, or being disemboweled or burned alive, were sometimes “[s]uperadded”—also opined as follows: “These cruel devices for purposes of torture in inflicting the punishment of death for what was deemed the more atrocious crimes, as well as the ignominious inventions, as the punishment for minor offenses, by mutilation or dismemberment, such as the cutting off the hand or the ears, or fixing a lasting stigma by slitting the nostrils, or branding

⁷³⁶ *Id.* at 344.

⁷³⁷ *Id.*

⁷³⁸ *Id.* at 348.

⁷³⁹ *Id.*

⁷⁴⁰ *In re Kemmler*, 136 U.S. 435, 446-47 (1890) (describing burning at the stake as “cruel and unusual”); *Twining v. State of New Jersey*, 211 U.S. 78, 125 (1908) (Harlan, J., dissenting) (describing “burning at the stake” as a “cruel or unusual” punishment); *accord Furman*, 408 U.S. at 385 (Burger, C.J., dissenting) (writing that capital punishment “is not a punishment such as burning at the stake that everyone would ineffectually find to be repugnant to all civilized standards”).

⁷⁴¹ *In re Kemmler*, 136 U.S. at 446-47 (describing crucifixion as “cruel and unusual”).

⁷⁴² *Id.* (describing breaking on the wheel as “cruel and unusual”).

⁷⁴³ In a dissent in one case, Justice John Paul Stevens—joined by Justice Blackmun—noted that “[t]o that list we might have added the garrotte, a device for execution by strangulation developed—and abandoned—centuries ago in Spain.” *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 658 n.10 (1992) (Stevens, J., dissenting).

⁷⁴⁴ *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) (citations omitted).

The Anomaly of Executions

the hand or cheek, or by the use of the pillory, the stocks, or the ducking stool, etc., have been wholly discarded in this country, as relics of barbarism, inconsistent with the humane and enlightened spirit of the age.”⁷⁴⁵

In contrast, the U.S. Supreme Court has upheld, or declined to hear legal challenges to, the following methods of execution: hanging⁷⁴⁶ and firing squads,⁷⁴⁷ electrocution⁷⁴⁸ and lethal gas,⁷⁴⁹ and lethal injection.⁷⁵⁰ In *Baze v. Rees*⁷⁵¹—the 2008 case upholding Kentucky’s lethal injection protocol—the Supreme Court first explained that “[a] total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States.”⁷⁵² The Court’s opinion, written by Chief Justice John Roberts, and joined by Justices Kennedy and Alito, then opined: “Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”⁷⁵³ “Through-

⁷⁴⁵ *Robbins v. State*, 1857 WL 73 *20 (Ohio 1857).

⁷⁴⁶ *Campbell v. Wood*, 511 U.S. 1119 (1994) (denying a petition for writ of certiorari). By the middle of the nineteenth century, hanging was the “nearly universal form of execution” in the United States. *Baze v. Rees*, 553 U.S. 35, 41 (2008).

⁷⁴⁷ *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1879).

⁷⁴⁸ *In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). In 1888, New York became the first state to authorize electrocution as a method of execution. *Glass v. Louisiana*, 471 U.S. 1080, 1082 & n.4 (1985) (Brennan, J., dissenting from denial of cert.). Electrocution remained a predominant mode of execution for nearly a century. *Baze*, 553 U.S. at 42. *Compare* *Bryan v. Moore*, 528 U.S. 1133 (2000) (mem.) (dismissing a challenge to Florida’s electric chair as moot after the Florida legislature adopted lethal injection as an alternative means of execution).

⁷⁴⁹ *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 653 (1992) (refusing to consider on the merits a claim that execution by lethal gas is cruel and unusual in violation of the Eighth Amendment). The Supreme Court also refused to hear a challenge to the constitutionality of lethal gas in an earlier case. *Gray v. Lucas*, 463 U.S. 1237, 1239-40 (1983) (Burger, C.J., concurring in denial of cert.) (rejecting an Eighth Amendment challenge to lethal gas because the petitioner had not shown that “the pain and terror resulting from death by cyanide gas is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment right”) (quoting *Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir. 1983)).

⁷⁵⁰ *Baze v. Rees*, 553 U.S. 35 (2008).

⁷⁵¹ 553 U.S. 35 (2008).

⁷⁵² *Baze*, 553 U.S. at 42.

⁷⁵³ *Id.* at 47. The constitutionality of certain methods of execution has been attacked in the past, with at least some judges inclined to find particular methods of execution unconstitutional. *Gomez v. United States Dist. Court for the Northern Dist. of Cal.*, 503 U.S. 653, 654, 656-57 (1992) (Stevens, J., dissenting) (arguing that lethal gas is unconstitutional because of “the availability of more humane and less violent methods of execution”); *Glass v. Louisiana*, 471 U.S. 1080, 1093 (1985) (Brennan, J., dissenting from denial of cert.) (arguing that electrocution is unconstitutional); *Campbell v. Wood*, 114 S. Ct. 2125, 2126 (1994) (Blackmun, J., dissenting) (“The public condemnation of hanging is overwhelming. Not only have 46 of the 48 States that once regularly imposed hanging

out our history,” Chief Justice Roberts wrote, “whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge.”⁷⁵⁴

On the other hand, the U.S. Supreme Court has also squarely held that prisoners must be *protected* from harm, even *prospective* harm. For example, in *Nelson v. Campbell*,⁷⁵⁵ the Supreme Court held that a federal civil rights statute, 42 U.S.C. § 1983, was an appropriate vehicle for a prisoner to challenge Alabama’s proposed use of a “cut-down” procedure to access his compromised veins during a lethal injection procedure.⁷⁵⁶ In that case, the petitioner, David Nelson, alleged three days before his scheduled execution that the use of the “cut-down” procedure would violate the Eighth Amendment.⁷⁵⁷ Petitioner had been informed by the warden that prison personnel would cut a 0.5-inch incision into petitioner’s arm and catheterize a vein 24 hours before the scheduled execution.⁷⁵⁸ Writing for the Court and allowing the section 1983 claim to proceed, Justice Sandra Day O’Connor concluded that “the gravamen of petitioner’s entire claim is that use of the cut-down would be *gratuitous*.”⁷⁵⁹ “Merely labeling something as part of an execution procedure,” O’Connor emphasized, “is insufficient to insulate it from a § 1983 attack.”⁷⁶⁰

abandoned the practice, but many state legislatures rejected the practice because it was perceived as inhumane and barbaric, precisely the concern that lies at the core of the Eighth Amendment.”); *Campbell v. Wood*, 18 F.3d 662, 715 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting) (arguing that hanging violates the Eighth Amendment because it involves risks of pain and mutilation not presented by lethal injection).

⁷⁵⁴ *Baze*, 553 U.S. at 62. “Our society,” Roberts added, however, “has nonetheless steadily moved to more humane methods of carrying out capital punishment.” “The firing squad, hanging, the electric chair, and the gas chamber,” he wrote, “have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection.” *Id.* From a constitutional perspective, Chief Justice Roberts explained his position as follows: “The broad framework of the Eighth Amendment has accommodated this progress toward more humane methods of execution, and our approval of a particular method in the past has not precluded legislatures from taking the steps they deem appropriate, in light of new developments, to ensure humane capital punishment.” *Id.* “The fact that society has moved to progressively more humane methods of executions,” Roberts emphasized, “does not suggest that capital punishment itself no longer serves valid purposes; we would not have supposed that the case for capital punishment was stronger when it was imposed predominantly by hanging or electrocution.” *Id.* at 62 n.7.

⁷⁵⁵ 541 U.S. 637 (2004).

⁷⁵⁶ *Id.* at 639.

⁷⁵⁷ *Id.*

⁷⁵⁸ *Id.* at 641.

⁷⁵⁹ *Id.* at 645 (italics in original). As Justice O’Connor noted: “petitioner has been careful throughout these proceedings, in his complaint and at oral argument, to assert that the cut-down, as well as the warden’s refusal to provide reliable information regarding the cut-down protocol, are *wholly unnecessary* to gaining venous access.” *Id.* at 645-46 (italics in original).

⁷⁶⁰ *Id.* at 645.

The Anomaly of Executions

Indeed, in *Farmer v. Brennan*,⁷⁶¹ the Supreme Court ruled that a prison official may be held liable for “deliberate indifference” to a prisoner’s Eighth Amendment right to protection against violence while in custody if the official “knows that [the] inmate face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”⁷⁶² “The Amendment,” the Court ruled, “also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’”⁷⁶³ In yet another case, dealing with a prisoner’s exposure to second-hand smoke, the Court also opined that a prisoner’s Eighth Amendment claim could be based upon “future harm” to health.⁷⁶⁴

IV. THE TRANSFORMATION OF AMERICAN LAW

A. The Fourteenth Amendment’s Ratification

The U.S. Bill of Rights originally applied only to the federal government.⁷⁶⁵ In the landmark case of *Barron v. Baltimore*,⁷⁶⁶ the Supreme Court—in an opinion written by Chief Justice John Marshall—held that “[t]hese amendments contain no expression indicating an intention to apply them to the state governments.”⁷⁶⁷ The Fifth Amendment, he wrote in that case, “must be understood as restraining the power of the general government, not as applicable to the states.”⁷⁶⁸ As Marshall wrote: “The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.”⁷⁶⁹

⁷⁶¹ 511 U.S. 825 (1994).

⁷⁶² *Id.* at 828, 834, 847; *accord* *Ortiz v. Jordan*, 131 S. Ct. 884, 892-93 (2011) (citing that language).

⁷⁶³ *Farmer*, 511 U.S. at 832.

⁷⁶⁴ *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (emphasis added) (citation omitted); *see also id.* (“It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”); *Washington v. Medical Staff T.C.S.O.*, No. A-06-CA-130-SS, 2006 WL 2052848 *5 (W.D. Tex., July 21, 2006) (“The Eighth Amendment embraces the treatment of medical conditions which may cause future health problems.”).

⁷⁶⁵ *Barker v. People*, 3 Cow 686 (N.Y. Sup. Ct. 1824) (“The provision in the constitution of the United States, that cruel and unusual punishments shall not be inflicted, is a restriction [sic] upon the government of the United States only; and not upon the government of any state.”).

⁷⁶⁶ 32 U.S. 243 (1833).

⁷⁶⁷ *Id.* at 250.

⁷⁶⁸ *Id.* at 247.

⁷⁶⁹ *Id.*; *see also* *Fox v. Ohio*, 46 U.S. 410, 434 (1847) (“The prohibition alluded to as contained in the amendments to the constitution ... were not designed as limits upon the

The Fourteenth Amendment, however, made the Eighth Amendment and other individual rights applicable to the states.⁷⁷⁰ The Fourteenth Amendment, ratified in 1868, begins: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”⁷⁷¹ Coming on the heels of the Thirteenth Amendment, which abolished slavery,⁷⁷² the Fourteenth Amendment gave American citizens—including all newly emancipated citizens—additional legal rights. As the remainder of Section 1 of the Fourteenth Amendment reads: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁷⁷³

The Fourteenth Amendment’s ratification thus changed the nature of the U.S. Constitution in profound ways.⁷⁷⁴ First, the Fourteenth Amendment changed the federal-state power structure. States—and not just the federal government—were now explicitly prohibited from taking certain actions, and the federal courts themselves became more powerful instruments of justice. Second, the Fourteenth Amendment—as determined in a series of subsequent cases—applied various provisions of the U.S. Bill of Rights to the states through the Supreme Court’s “selective incorporation” doctrine.⁷⁷⁵ This legal development gave federal judges the power to protect the rights of American citizens from abusive state power—even power traditionally exercised by Southern states to repress minorities.⁷⁷⁶ Finally, along with replicating the Fifth Amendment’s “due process of law” provision, the Fourteenth Amendment went further, realizing the Declaration of

State governments in reference to their own citizens. They are exclusively restrictions upon federal power ...”).

⁷⁷⁰ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001) (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States.”).

⁷⁷¹ U.S. CONST., amend. XIV, § 1.

⁷⁷² U.S. CONST., amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁷⁷³ U.S. CONST., amend. XIV, § 1.

⁷⁷⁴ U.S. CONST., amend. XIV (ratified July 9, 1868).

⁷⁷⁵ *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3034 (2010).

⁷⁷⁶ Akhil Reed Amar, *America’s Lived Constitution*, 20 *YALE L.J.* 1734, 1779 (2011) (“Reconstruction Republicans used Section 1 of that Amendment to take special aim at the abusive practices of state governments of the Deep South, a region that had lagged behind national norms of liberty and equality. Even if a particular state legislature consistently authorized a given punishment, that consistency hardly made the practice “usual” when judged by the national baseline envisioned by the Fourteenth Amendment.”).

The Anomaly of Executions

Independence's emphasis on equality by putting in place the new guarantee to "equal protection of the laws."⁷⁷⁷

Unfortunately, it took considerable time before the U.S. Supreme Court actually recognized the Fourteenth Amendment's legal significance. Indeed, after the Fourteenth Amendment's ratification, the Supreme Court reaffirmed its *Barron v. Baltimore* holding for many decades.⁷⁷⁸ In almost open defiance of the Fourteenth Amendment's plain language, the Court—in case after case—simply stuck to its prior ruling in *Barron*.⁷⁷⁹ This happened in spite of the fact that the Fourteenth Amendment's advocates plainly intended to make the U.S. Bill of Rights—including the Eighth Amendment—applicable to the states.⁷⁸⁰ Indeed, legislators pushing for the adoption of the Fourteenth Amendment explicitly said so during the debates while it was being considered.⁷⁸¹

Not until the early 1960s—over ninety years after the Fourteenth Amendment's ratification—was the Eighth Amendment finally held applicable to the states.⁷⁸² In *Robinson v. California*,⁷⁸³ the 1962 case that did it,

⁷⁷⁷ U.S. CONST., amend. XIV (ratified July 9, 1868).

⁷⁷⁸ In 1866, the Supreme Court considered the question of whether fines and penalties imposed under a Massachusetts law were "excessive, cruel, and unusual." *Pervear v. Commonwealth*, 72 U.S. 475, 479 (1866). Adhering to its holding in *Barron v. Baltimore*, the Court in *Pervear* held that the Eighth Amendment "does not apply to State but to National legislation." *Id.* at 479-80. In affirming the judgment of the Massachusetts court, the Court in *Pervear* also emphasized in dicta: "[I]t appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this." *Id.* at 480. A "NOTE" to the *Pervear* case also notes that "[t]he same order was made in four other cases, presenting, as the Chief Justice said, 'substantially the same facts and governed by the same principles.'" *Id.* (citations omitted).

⁷⁷⁹ *Twitchell v. Commonwealth of Pennsylvania*, 74 U.S. 321, 322, 325-26 (1868) (citing *Barron v. Baltimore* with approval and rejecting the habeas corpus petition of a man convicted of murder and sentenced to be hanged in spite of his argument based on the Fifth and Sixth Amendments); *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The first amendment to the Constitution ... like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.") (citing *Barron*); see also *Eilenbecker v. District Court of Plymouth County*, 134 U.S. 31, 34 (1890) ("[T]he first eight articles of the amendments to the constitution have reference to powers exercised by the government of the United States, and not to those of the states. The limitation, therefore, of articles 5, 6, and 8 of those amendments, being intended exclusively to apply to the powers exercised by the government of the United States, whether by congress or by the judiciary, and not as limitations upon the powers of the states, can have no application to the present case ... ") (citations omitted).

⁷⁸⁰ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 204-205.

⁷⁸¹ *Id.* Senator Jacob Howard of Michigan also explained in 1866 that the Fourteenth Amendment "prohibits the hanging of a black man for a crime for which the white man is not to be hanged." *Id.* at 206.

⁷⁸² *Graham v. Florida*, 130 S. Ct. 2011, 2018 (2010) (citing *Robinson v. California*, 370 U.S. 660 (1962) for the proposition that the Eighth Amendment was made applicable to the states by the Due Process Clause of the Fourteenth Amendment).

the Supreme Court held that punishing someone for being addicted to narcotics is a cruel and unusual punishment.⁷⁸⁴ In spite of the Fourteenth Amendment's recognition of citizens' "privileges or immunities," the right to be free from "cruel and unusual punishments" was not grounded—as might have been expected—in the Fourteenth Amendment's Privileges or Immunities Clause. Instead, as it had done with other individual rights in the Bill of Rights, the Supreme Court used the Fourteenth Amendment's Due Process Clause to make the Eighth Amendment applicable to the states. Since 1962, the Supreme Court has routinely reaffirmed that the Fourteenth Amendment's Due Process Clause made the Eighth Amendment applicable to the states.⁷⁸⁵

B. Due Process and Equal Protection

The Fifth Amendment's Due Process Clause unequivocally prohibits the federal government from depriving an individual "of life, liberty, or property, without due process of law."⁷⁸⁶ States are similarly restricted by the Fourteenth Amendment, which provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."⁷⁸⁷ Initially, the U.S. Supreme Court looked to what procedures were required by the English common law to define the contours of due process.⁷⁸⁸ For example, in *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁷⁸⁹ the Supreme Court analyzed the types of procedures the framers of the Fifth Amendment would have considered "the law of the land."⁷⁹⁰ That "frozen-in-history" approach, however, soon gave way to a non-historical methodology, with the Court asking instead—as two scholars put it—"whether a given procedure was essential to *modern*—as opposed to 17th century—notions of fairness."⁷⁹¹

⁷⁸³ 370 U.S. 660 (1962).

⁷⁸⁴ *Id.* at 666-68.

⁷⁸⁵ *E.g.*, *Graham*, 130 S. Ct. at 2018; *Baze*, 553 U.S. at 47.

⁷⁸⁶ U.S. CONST., amend. V. The Fifth Amendment also states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* The right to be free from bodily harm has long been noted in the American legal system, and dates back to the time of the Founding Fathers. See ZEPHANIAH SWIFT, A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 179 (1795):

Not only is a man protected against loss of limb, but the body and the limbs, are protected against all menaces, assaults, beating, and wounding. Such acts are a breach of the peace, and punishable by fine. The person injured, has an action of trespass for assault and battery, against the wrong-doer, to recover damages for the injury he has sustained. This security of our body and limbs, from all corporal injuries, is an inestimable right.

⁷⁸⁷ U.S. CONST., amend. XIV, § 1.

⁷⁸⁸ John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 550 (1994).

⁷⁸⁹ 59 U.S. (18 How.) 272 (1855).

⁷⁹⁰ *Id.* at 276.

⁷⁹¹ Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 468-69 (1986); see also *Adamson v.*

The Anomaly of Executions

The U.S. Supreme Court, in fact, has repeatedly emphasized that “due process is flexible and calls for such procedural protections as the particular situation warrants.”⁷⁹² As Justice Felix Frankfurter once explained, due process is, “perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.”⁷⁹³ Thus, it has been concluded that even “ancient” procedural rules “must satisfy contemporary notions of due process.”⁷⁹⁴ In *Mathews v. Eldridge*,⁷⁹⁵ the Court—in setting forth its flexible balancing-of-interests approach—articulated the following three areas of importance for a court to consider in determining what process is due:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁷⁹⁶

The private interest at stake in the death penalty debate—the right of an inmate to remain alive—is of utmost importance.⁷⁹⁷ Indeed, the right to “life” has, since America’s very inception, been considered a basic right, or—to use the exact wording of the Declaration of Independence—an “unalienable” right.⁷⁹⁸ The Supreme Court, in a number of cases, has confirmed that principle, characterizing the “right to life” as “fundamental.”⁷⁹⁹

California, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring) (asking whether procedures are necessary for the “protection of ultimate decency in a civilized society”).

⁷⁹² *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey*); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 15 n.15 (1978) (same); *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (same); *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196-97 (2001) (same); see also *Connecticut v. Doe*, 501 U.S. 1, 10 (1991) (“Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”).

⁷⁹³ *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

⁷⁹⁴ *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 630 (1990) (Brennan, J., concurring).

⁷⁹⁵ 424 U.S. 319 (1976).

⁷⁹⁶ *Id.* at 335; see also *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (“we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures”).

⁷⁹⁷ *Berry v. City of Muskogee*, 900 F.2d 1489, 1493-97 (10th Cir. 1990) (holding that a prisoner’s Eighth Amendment rights were violated when he was murdered while in custody); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (holding that “wanton or obdurate disregard of or deliberate indifference to the prisoner’s right to life as a condition of confinement is a substantive constitutional deprivation whether it falls under the due process clause or the Eighth Amendment”).

⁷⁹⁸ *Butts v. People of State of Ill.*, 333 U.S. 640, 651 (1948); see also Elizabeth R. Jungman, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1077 (2003) (“Capital cases necessarily implicate a defendant’s fundamental right to life.”). “The self-evident truths and the unalienable rights” set forth in the Declaration of Independence, Justice Thurgood Marshall once remarked, “were intended, however, to apply only to white men.” Regents

The risk of wrongful convictions and executions is, in the twenty-first century, well documented,⁸⁰⁰ making the possibility of “erroneous deprivation” of life—to borrow the words of *Mathews*—a real one. While deterring crime is a legitimate government function, there is no persuasive evidence that executions deter crime more effectively than life-without-parole sentences,⁸⁰¹ making death sentences unnecessary. The Founding Fathers—living in an era when American penitentiaries were not yet a universal reality—themselves often expressed the view that any punishment beyond that which was necessary was “tyrannical.”⁸⁰² The first U.S. penitentiary, Philadelphia’s Walnut Street Prison, was not even opened until 1790, and it took several decades before America’s penitentiary system was built out on a state-by-state basis. Pennsylvania itself authorized two new penitentiaries—the Western Penitentiary in 1818 and the Eastern Penitentiary in

of *University of California v. Bakke*, 438 U.S. 265, 388 (1978) (opinion of Marshall, J.); *accord Bell v. State of Maryland*, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring) (the “ideal” of the Declaration “was not fully achieved with the adoption of our Constitution because of the hard and tragic reality of Negro slavery”).

⁷⁹⁹ *Ford v. Wainwright*, 477 U.S. 399, 409 (1986); *see also Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (referring to the “fundamental human rights of life and liberty”); *Woods v. Nierstheimer*, 328 U.S. 211, 216 (1946) (referring to the “fundamental rights to life and liberty guaranteed by the United States Constitution”); *Callan v. Wilson*, 127 U.S. 540, 550 (1888) (referring to “the fundamental rights of life, liberty, and property”); *Powell v. Commonwealth of Pennsylvania*, 127 U.S. 678, 685 (1888) (same); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (referring to “the fundamental rights to life, liberty, and the pursuit of happiness”); *Hurtado v. People of State of California*, 110 U.S. 516, 539 (1884) (Harlan, J., dissenting) (“The phrase ‘due process of law’ is not new in the constitutional history of this country or of England. It antedates the establishment of our institutions. Those who had been driven from the mother country by oppression and persecution brought with them, as their inheritance, which no government could rightfully impair or destroy, certain guaranties of the rights of life, liberty, and property which had long been deemed fundamental in Anglo-Saxon institutions.”); *Slaughter-House Cases*, 83 U.S. 36, 116 (1872) (Bradley, J., dissenting) (describing the right to “life” as one of the “fundamental rights which can only be taken away by due process of law”); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943) (“One’s right to life, liberty and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”); *Lucas v. Forty-Fourth Colorado General Assembly*, 377 U.S. 713, 736-37 (1964) (“A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be.”).

⁸⁰⁰ *The Innocence List*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Aug. 29, 2013) (listing 142 cases where defendants had their convictions overturned, with a subsequent acquittal at re-trial or where charges were dropped, or where defendants were given a pardon by a governor based on new evidence of innocence).

⁸⁰¹ NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *DETERRENCE AND THE DEATH PENALTY* (Apr. 2012) (finding that deterrence studies are flawed and do not factor in the effects of noncapital punishments).

⁸⁰² BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 50 (discussing the copying of Beccaria’s maxim to that effect by John Adams).

The Anomaly of Executions

1821—after the Walnut Street Prison proved inadequate to the state’s needs.⁸⁰³

Although the Declaration of Independence mentions the concept of equality, the Equal Protection Clause, which now unequivocally reaches state actors,⁸⁰⁴ was not added to the Constitution until the adoption of the Fourteenth Amendment in 1868. That provision specifically commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”⁸⁰⁵ Unlike the Thirteenth Amendment, which exempted those convicted of crimes from its protection, the Fourteenth Amendment protects every person, even inmates, without exception. In the non-capital context, that Fourteenth Amendment’s unequivocal language has already been used to strike down discriminatory policies at schools on the basis of race⁸⁰⁶ and gender.⁸⁰⁷ The Supreme Court so held based on the Fourteenth Amendment’s plain language—and “even though those who drafted the Amendment evidently thought that separate was not unequal.”⁸⁰⁸ In short, the Equal Protection Clause, like the Due Process Clause, has been read in a contemporary fashion based upon its plain and unequivocal language—and not in accord with the antiquated personal views and prejudices of its drafters.⁸⁰⁹

The Supreme Court’s equal protection jurisprudence has, significantly, regularly concerned itself “with governmental classifications that ‘affect

⁸⁰³ Meskell, *supra* note 140, at 853-54; L. A. Tulin, *Book Review*, 37 YALE L. J. 1168, 1168-69 (1928) (reviewing HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA* (1927)).

⁸⁰⁴ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009). It is well settled that the Equal Protection Clause applies to administrative as well as legislative acts. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 597 (2008).

⁸⁰⁵ U.S. CONST., amend. XIV (ratified July 9, 1868); *see also* *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (“the Equal Protection Clause ‘protect[s] persons, not groups’”) (quoting *Adarand*, 515 U.S. at 227) (emphasis in original).

⁸⁰⁶ *Brown v. Bd of Educ. of Topeka*, 347 U.S. 483 (1954) (prohibiting segregated schools).

⁸⁰⁷ *United States v. Virginia*, 518 U.S. 515, 534 (1996) (male-only admissions policy at Virginia Military Institute violated the Equal Protection Clause); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (female-only admission policy at a traditionally single-sex public college violated the Equal Protection Clause).

⁸⁰⁸ *Van Orden v. Perry*, 545 U.S. 677, 732 (2005) (Stevens, J., dissenting).

⁸⁰⁹ *See* Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2337-42 (1995) (“[e]qual protection had not been identified with social integration when the Fourteenth Amendment was drafted in 1866, nor when it was ratified in 1868, nor when *Plessy [v. Ferguson]*, 163 U.S. 537 was decided in 1896”). The Equal Protection Clause has also been used to invalidate discriminatory practices in jury selection. *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994) (discrimination in jury selection on the basis of gender violates the Equal Protection Clause); *Georgia v. McCollum*, 505 U.S. 42, 44 (1992) (racial discrimination in jury selection offends the Equal Protection Clause).

some groups of citizens differently than others.”⁸¹⁰ In some circumstances, an equal protection claim can be sustained “even if the plaintiff has not alleged class-based discrimination,” but instead claims to have been “irrationally singled out as a so-called ‘class of one.’”⁸¹¹ In *Village of Willowbrook v. Olech*,⁸¹² the Court specifically held that a property owner stated a valid claim under the Equal Protection Clause because she had been “intentionally treated differently from others similarly situated” and because there was “no rational basis for the difference in treatment.”⁸¹³ Although the word “unusual” in the Eighth Amendment invites the Court to gauge what is currently being done throughout the country to assess a punishment’s constitutionality, the Court also, because of the Fourteenth Amendment, needs to be sure not to allow arbitrary or unequal applications of the law that violate the Equal Protection Clause.

The Equal Protection Clause—as the Supreme Court itself has held—is concerned with arbitrary and discriminatory governmental conduct. “The purpose of the equal protection clause of the Fourteenth Amendment,” the Court has emphasized, “is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”⁸¹⁴ As the Court ruled as long ago as 1887 in *Hayes v. Missouri*,⁸¹⁵ the Fourteenth Amendment “requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.”⁸¹⁶ Thus, “when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a ‘rational basis for the difference in treatment.’”⁸¹⁷

⁸¹⁰ *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 601 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)); *see also* *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (“‘Equal Protection’ . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) (“the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes”).

⁸¹¹ *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 601 (2008) (citing *Village of Willowbrook v. Olech*).

⁸¹² 528 U.S. 562 (2000).

⁸¹³ *Id.* at 564. In that case, a municipality had attempted to condition the connection to the municipal water supply on the granting of a 33-foot easement instead of the norm—a 15-foot easement—required of other property owners.

⁸¹⁴ *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)); *accord Olech*, 528 U.S. at 564 (quoting the same language).

⁸¹⁵ 120 U.S. 68 (1887).

⁸¹⁶ *Id.* at 71-72.

⁸¹⁷ *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 602 (2008). In *Engquist*, the Supreme Court pointed out that “[t]here are some forms of state action” involving “discretionary

The Anomaly of Executions

Indeed, the prohibition against “cruel and unusual punishments” has long been associated with preventing arbitrary abuses at criminals’ sentencing proceedings.⁸¹⁸ In *Batson v. Kentucky*,⁸¹⁹ the Supreme Court held that

decisionmaking” where “allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.” *Id.* at 603. In that case, the Court used the example of a traffic officer handing out speeding tickets to some people but not others. *Id.* at 603-4. The Court emphasized: “[A]n allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action.” *Id.* at 604. Of course, death sentences and executions—the most severe punishments ever conceived by lawmakers—are a far cry from parking tickets.

⁸¹⁸ See, e.g., 1 FRANCIS HARGRAVE, ED., A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANORS xi (4th ed. 1776) (italics in original):

As to smaller Crimes and Misdemeanors, they are differenc’d with such a variety of extenuating or aggravating Circumstances, that the Law has not, nor indeed could affix to each a certain and determinate Penalty; this is left to the Discretion and Prudence of the Judge, who may punish it either with Fine or Imprisonment, Pillory or Whipping, as he shall think the nature of the Crime deserves; but tho’ he be intrusted with so great Power, yet he is not at liberty to do as he lists, and inflict what arbitrary Punishments he pleases; due regard is to be had to the Quality and Degree, to the Estate and Circumstances of the Offender, and to the greatness or smallness of the Offense; that Fine, which would be mere Trifle to one Man, may be the utter Ruin and Undoing of another; and those Marks of Ignominy and Disgrace, which would be shocking and grievous to a Person of a liberal Education, would be slighted and despised by one of the vulgar sort. A Judge therefore who use this discretionary Power to gratify a private Revenge, or the Rage of a Party, by inflicting indefinite and perpetual Imprisonment, excessive and exorbitant Fines, unusual and cruel Punishments, is equally guilty of perverting Justice and acting against Law, as he, who in a Case, where the Law has ascertained the Penalty, wilfully and knowingly varies from it... [W]here a Court has a Power of setting Fines, that must be understood of setting *reasonable* Fines; an *excessive Fine*, says Lord Coke, is *against Law*, and so it is declared to be by the *Act for declaring the Rights and Liberties of the Subject*, &c. The same Statute declares the illegality of unusual and cruel Punishments.

It was the non-observance of these Rules, which occasioned the dissolution of the *Star Chamber* ... when once its Authority was abus’d to wreak the Malice of particular Persons, and prostituted to the base Ends of a Court-Faction, when no Limits were observed in the Exercise of its Jurisdiction, nor Humanity in its Sentences, when the Judges thereof, however dignified by their Posts, became a Disgrace to human Nature by their barbarous and cruel butcherings, punishing pretended Libels not only with perpetual Imprisonments, but with brandings in the Face and mutilation of Members, when the Case was thus (as it appears to have been from some Instances in this Collection) it was then high time to tear it up by the Roots, as a Grievance no longer to be borne with. A Judge therefore ought to be strictly careful that he conform to the Rules of Law not only as to the nature of the Punishment, but likewise as to the degrees thereof.

It is indeed no easy matter to settle the precise Limits, how far a Court of Justice may go; every Case must depend upon its own particular Circumstances. But *some* Fines and *some* Punishments are so monstrously extravagant, that no body can doubt their being so;

the unlawful exclusion of jurors based on race required reversal because it “violates a defendant’s right to equal protection,” “unconstitutionally discriminate[s] against the excluded juror,” and “undermine[s] public confidence in the fairness of our system of justice.”⁸²⁰ The Supreme Court, in other instances, has also invalidated capital sentences based on racial bias and the dictates of the Equal Protection Clause.⁸²¹ In one case involving the exclusion through peremptory strikes of 10 of the 11 African Americans eligible to serve on the jury,⁸²² the Court held that “[d]efendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury.”⁸²³ “[T]he statistical evidence alone,” the Court held, “raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors.”⁸²⁴

The Supreme Court has emphasized that “death is different.”⁸²⁵ Yet, when it comes to the death penalty’s actual infliction, the Court—raising the specter of a slippery slope—has shunned reliance on statistical studies⁸²⁶ showing that racial discrimination is prevalent in capital charging and sentencing.⁸²⁷ In *McCleskey v. Kemp*,⁸²⁸ the Court instead held that the Equal Protection Clause—while aimed at eliminating racial discrimination⁸²⁹—only prohibits intentional discrimination that can be proven through means other than statistics.⁸³⁰ In effect, unlike what it does in jury selection cases,

such were the Fines of Sir *Samuel Barnardiston* and Mr. *Hampden*, such were the repeated Pilloryings and barbarous Whippings of *Oates*, *Dangerfield*, and *Johnson*.

⁸¹⁹ 476 U.S. 79 (1986).

⁸²⁰ *Id.* at 86-87.

⁸²¹ *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (noting that statistical evidence could support a finding of discrimination in jury selection); *Miller-El v. Dretke*, 545 U.S. 231, 240-41, 266 (2005) (considering statistical evidence in case dealing with improper exclusion of black jurors); *see also* *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) (noting that the Supreme Court “has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district”).

⁸²² *Cockrell*, 537 U.S. at 326, 331.

⁸²³ *Dretke*, 545 U.S. at 237.

⁸²⁴ *Cockrell*, 537 U.S. at 342.

⁸²⁵ *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) (“[T]here is no doubt that ‘[d]eath is different.’”) (citation omitted).

⁸²⁶ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁸²⁷ *E.g.*, U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (Feb. 1990) (reporting on studies showing “pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty”).

⁸²⁸ 481 U.S. 279 (1987).

⁸²⁹ *Bartlett v. Strickland*, 556 U.S. 1 (2009) (“[T]he ‘moral imperative of racial neutrality is the driving force of the Equal Protection Clause,’ and racial classifications are permitted only ‘as a last resort.’”) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518-19 (1989) (Kennedy, J., concurring in part)).

⁸³⁰ *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Ginsburg, J., dissenting) (“The Equal Protection Clause, this Court has held, prohibits only intentional discrimination; it does

The Anomaly of Executions

when it comes to death sentences themselves, an American death row inmate is required by the Court to prove that an individual prosecutor exhibited racial animus in that inmate's *particular case*—a tough row to hoe, to be sure.⁸³¹

C. The Effect on What Is Considered “Cruel and Unusual”

One effect of the Fourteenth Amendment's ratification—a byproduct of its adoption—was to expand the Eighth Amendment's scope. When the Eighth Amendment was ratified in 1791, it only constrained the actions of the federal government⁸³²—then a small institution with only a few legislators and a few employees.⁸³³ Although many states had similar protections against “cruel and unusual,” “cruel or unusual,” or simply “cruel” punishments,⁸³⁴ in the pre-Fourteenth Amendment era—rampant with racial prejudice and slavery⁸³⁵—African Americans were often excluded from legal protection of such constitutional rights altogether.⁸³⁶ To have a constitutional protection that ensured “equal protection of the laws” was thus a remarkable achievement.

After the ratification of the Fourteenth Amendment, aimed at stamping out invidious racial discrimination, once lawful state actions became

not have a disparate-impact component.”) (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) & *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

⁸³¹ Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 COLUM. HUM. RTS. L. REV. 395, 421 (1993).

⁸³² *United States v. Henning*, 4 Cranch C.C. 645, 26 F. Cas. 267, 271 (C.C.D.C. 1836) (“If congress have a right to pass laws prohibiting those acts to be done in the district, they have a right to affix penalties and punishment to the violation of those laws; and they are not limited in the degree of punishment, if it be not ‘cruel and unusual’ within the meaning of the 8th article of the amendments of the constitution.”).

⁸³³ KRISHNA K. TUMMALA, ED., *COMPARATIVE BUREAUCRATIC SYSTEMS* 83 (2003) (“In 1791 the federal government employed roughly 4,500 individuals.”).

⁸³⁴ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 176-81.

⁸³⁵ *See generally* WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* (1999).

⁸³⁶ In *Aldridge v. Commonwealth*, 2 Va. Cas. 47, 1824 WL 1072 (Va. Gen. 1824), the General Court of Virginia held that the state's “cruel and unusual punishments” clause did not even apply to “a free man of color.” *Id.* at *1, 3. As the Virginia court ruled: “Notwithstanding the general terms used in the Bill of Rights, it is undeniable that it never was contemplated, or considered, to extend to the whole population of the State. Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it?” *Id.* at *3; *see also Id.* (“[N]obody has ever questioned the power of the Legislature, to deny to free blacks and mulattoes, one of the first privileges of a citizen; that of voting at elections, although they might in every particular, except color, be in precisely the same condition as those qualified to vote. The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population.”).

unlawful. The Thirteenth Amendment had abolished slavery, but in response, Southern states enacted “Black Codes”—laws attempting to limit the rights of former slaves.⁸³⁷ With the Fourteenth Amendment’s “equal protection” language, though, such laws were destined to fall. Now that former slaves were citizens and were to be afforded equal protection, the idea expressed at one time that racial minorities were not entitled to be protected from “cruel” or “unusual” punishments under the Eighth Amendment could no longer withstand judicial scrutiny. While a practice such as whipping might be customary or usual in a given state, the federal courts would ultimately be able to review the matter—and put a stop to it.⁸³⁸ In the modern era, the racial bias present in the death penalty’s administration can no more be ignored than other forms of discrimination, especially given the fundamental nature of the right to life.

In fact, in interpreting the Constitution, the U.S. Supreme Court must decide for itself whether executions, with all their arbitrariness and racial bias, have become “cruel and unusual.” Just as the Court has been called upon in the past to decide what is an “infamous” crime or punishment, it can judge for itself perfectly well whether executions are “cruel” and “unusual” at this juncture and thus unconstitutional. Early American legal commentators themselves spoke of the “cruel and unusual punishments” prohibition as reflecting “the improved spirit of the age”⁸³⁹ and “the spirit of our humane general constitution.”⁸⁴⁰

The case of *Ex parte Wilson*,⁸⁴¹ decided by the Supreme Court in 1885, is instructive. In that case, the Court found that “if the crime of which the petitioner was accused was an infamous crime, within the meaning of the fifth amendment of the constitution, no court of the United States had jurisdiction to try or punish him, except upon presentment or

⁸³⁷ Sean M. Heneghan, *Employment Discrimination Faced by the Immigrant Worker: A Lesson from the United States and South Africa*, 35 *FORDHAM INT’L L.J.* 1780, 1787 (2012).

⁸³⁸ *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.).

⁸³⁹ JAMES BAYARD, *A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 154 (2d ed. 1840) (“The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion.”).

⁸⁴⁰ BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 186 (1832):

Under the [Eighth] amendment the infliction of cruel and unusual punishments, is also prohibited. The various barbarous and cruel punishments inflicted under the laws of some other countries, and which profess not to be behind the most enlightened nations on earth in civilization and refinement, furnish sufficient reasons for this express prohibition. Breaking on the wheel, flaying alive, rendering assunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution.

⁸⁴¹ 114 U.S. 417 (1885).

The Anomaly of Executions

indictment by a grand jury.”⁸⁴² Just as the Court can decide what constitutes an “infamous” crime, it can decide with little difficulty what qualifies as a “cruel and unusual” punishment.

In deciding whether the petitioner’s crime was “infamous” or not, the Supreme Court in *Ex parte Wilson* first noted that “the scope and effect” of the Fifth Amendment provision at issue, “as of many other provisions of the constitution, are best ascertained by bearing in mind what the law was before.”⁸⁴³ But after noting that the Fifth Amendment’s purpose was “to limit the powers of the legislature, as well as of the prosecuting officers, of the United States,”⁸⁴⁴ the Supreme Court framed the question as “whether imprisonment at hard labor for a term of years is an infamous punishment.”⁸⁴⁵ “What punishments shall be considered as infamous,” the Court held in language reminiscent of the “evolving standards” approach, “may be affected by the changes of public opinion from one age to another.”⁸⁴⁶

Ultimately, the Court in *Ex parte Wilson* ruled: “In former times, being put in the stocks was not considered as necessarily infamous. And by the first judiciary act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the district courts to cases ‘where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.’”⁸⁴⁷ “But at the present day,” the Court emphasized, “either stocks or whipping might be thought an infamous punishment.”⁸⁴⁸ In other words, the Supreme Court opined—as it would later with its “evolving standards of decency” test—that a punishment might be classed one way in one generation and a different way in another.⁸⁴⁹ The lesson: the fact that

⁸⁴² *Id.* at 422. The Fifth Amendment provides in part: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.” U.S. CONST., amend. V.

⁸⁴³ *Ex parte Wilson*, 114 U.S. at 422.

⁸⁴⁴ *Id.* at 426.

⁸⁴⁵ *Id.* “Infamous punishments cannot be limited to those punishments which are cruel or unusual,” the Supreme Court ruled, “because ... ‘cruel and unusual punishments’ are wholly forbidden, and cannot therefore be lawfully inflicted even in cases of convictions upon indictments duly presented by a grand jury.” *Id.* at 426-27.

⁸⁴⁶ *Id.* at 427. The Court noted that “Mr. Dane,” a legal commentator, “while treating it as doubtful whether confinement in the stocks or in the house of correction is infamous, says, ‘punishments, clearly infamous, are death, gallows, pillory, branding, whipping, confinement to hard labor, and cropping.’” (citation omitted).

⁸⁴⁷ *Id.* at 427-28 (quoting Act of Sept. 24, 1789, ch. 20, § 9).

⁸⁴⁸ *Id.* at 428.

⁸⁴⁹ In *Ex parte Wilson*, the Supreme Court—anxious to leave flexibility for future decisionmaking—ultimately held as follows: “Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the fifth amendment.” *Id.* at 429.

executions were deemed constitutional at one time does not make them constitutional for all time.

V. TOWARD A PRINCIPLED EIGHTH AMENDMENT

A. *The Punishment Continuum*

When viewed on a continuum, as the Founding Fathers so often viewed them, punishments range from *de minimis* all the way to death itself.⁸⁵⁰ In 1777, Thomas Jefferson methodically divided crimes into three categories: (1) capital offenses or—in his words—“Crimes whose punishment. Extends to *Life*”; (2) “Crimes whose punishment goes to *Limb*,” such as castration for rapists; and (3) “Crimes punishable by *Labor &c.*”⁸⁵¹ Cesare Beccaria had suggested a “scale of punishments,” writing that “a scale of misdeeds can be identified, at the top of which are those that are immediately destructive to society and at the bottom those that cause the least possible injustice to its individual members.”⁸⁵² “If geometry were applicable to the infinite and obscure combinations of human actions,” Beccaria concluded, “there would be a corresponding scale of punishments, descending from the most severe to the mildest.”⁸⁵³

Most punishments the Eighth Amendment is concerned with are meted out at criminals’ sentencing proceedings. But other post-sentencing actions (i.e., those that occur within the confines of prisons) can also constitute Eighth Amendment violations. Thus, in *Estelle v. Gamble*,⁸⁵⁴ the Supreme Court first applied the Cruel and Unusual Punishments Clause to deprivations that were not specifically part of a prisoner’s sentence.⁸⁵⁵ Not all actions of guards or uses of force, of course, lead to Eighth Amendment violations. As the Supreme Court quite appropriately clarified: “*de minimis* uses of physical force” do not violate the Eighth Amendment’s prohibition of “cruel and unusual punishments” unless the force used is “repugnant to the conscience of mankind.”⁸⁵⁶

⁸⁵⁰ E.g., John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 957-58 (2011) (“Thomas Jefferson narrowly failed in his attempt to get Virginia to enact his “Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital,” which set forth a scale of crimes and punishments in the manner suggested by Beccaria and Blackstone.”).

⁸⁵¹ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 144.

⁸⁵² AARON THOMAS, ED., CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 18 (Aaron Thomas & Jeremy Parzen, trans. 2008).

⁸⁵³ *Id.*; see also *id.* at 50 (referring to “a scale of punishments”). Citing Beccaria, Blackstone similarly spoke of “a corresponding scale of punishments, descending from the greatest to the least.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 18 (19th ed. 1836).

⁸⁵⁴ 429 U.S. 97 (1976).

⁸⁵⁵ *Hudson v. McMillian*, 503 U.S. 1, 10 (1992).

⁸⁵⁶ *McMillian*, 503 U.S. at 9-10; *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1178 (2010); compare *Hudson*, 503 U.S. at 18 (Thomas, J., dissenting) (“The Court today ... broadly asserts that *any* ‘unnecessary and wanton’ use of physical force against a prisoner

The Anomaly of Executions

In other words, the protection provided to inmates by the Eighth Amendment's Cruel and Unusual Punishments Clause has limits. "An inmate who complains of a 'push or shove' that causes no discernible injury," the Court has emphasized, "almost certainly fails to state a valid excessive force claim."⁸⁵⁷ As the Court has ruled, prison officials are free to discipline prisoners, so long as the disciplinary rules serve a rational and legitimate purpose⁸⁵⁸ and prisoners are not disciplined in an "arbitrary" manner.⁸⁵⁹ In order to prevail on an excessive force claim, the inmate must prove "not only that the assault occurred but also that it was carried out 'maliciously and sadistically' rather than as part of 'a good-faith effort to maintain or restore discipline.'"⁸⁶⁰ In the death penalty context, the issue becomes whether executions serve any rational or legitimate purpose now that maximum-security prisons and life-without-parole sentences are so widely available.

automatically amounts to cruel and unusual punishment, whenever more than de minimis force is involved.").

⁸⁵⁷ *Wilkins*, 130 S. Ct. at 1178.

⁸⁵⁸ *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("the challenged regulations bear a rational relation to legitimate penological interests"); *id.* ("In *Turner* we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a "valid, rational connection" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are 'ready alternatives' to the regulation.") (citing *Turner*, 482 U.S. at 89-91); *Overton*, 539 U.S. at 133 ("Turning to the restrictions on visitation by children, we conclude that the regulations bear a rational relation to MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. The regulations promote internal security, perhaps the most legitimate of penological goals ..."); *id.* ("MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes."); *id.* at 134 ("Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.").

⁸⁵⁹ *Overton*, 539 U.S. at 136 ("Respondents also claim that the restriction on visitation for inmates with two substance-abuse violations is a cruel and unusual condition of confinement in violation of the Eighth Amendment. The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances of this case, fall below the standards mandated by the Eighth Amendment."); *id.* at 137 ("This is not a dramatic departure from accepted standards for conditions of confinement. Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur."). In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Supreme Court noted in dicta: "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." *Id.* at 137.

⁸⁶⁰ *Wilkins*, 130 S. Ct. at 1178.

The social movement to substitute incarceration in place of death sentences—a movement that is still ongoing—has been taking place in America for centuries. It began in the Founding Fathers’ time, when the cornerstones of state penitentiaries were laid, with the torch then being passed to succeeding generations. In 1922, Justice Louis Brandeis—joined by Chief Justice William Howard Taft and Justice Oliver Wendell Holmes—noted the development in the law. In a dissenting opinion, they pointed out that “[c]onfinement in a penitentiary is the modern substitute for the death penalty and for the other forms of corporal punishment which, at the time of the adoption of the Fifth Amendment, were still administered in America for most of the crimes deemed serious.”⁸⁶¹ As Justice Brandeis reminded his audience of New York’s pre-Fifth Amendment laws: “The punishment, other than death, then prescribed for serious crimes were mutilation, cutting off the ears or nailing them to the pillory, branding, whipping, the pillory, the stocks and the ducking stool.”⁸⁶²

B. The Abandonment of Corporal Punishments

Corporal punishments were once prevalent in the English⁸⁶³ and American legal systems.⁸⁶⁴ In eighteenth-century America, corporal punishments could thus be described as common—or usual—punishments.⁸⁶⁵

⁸⁶¹ *United States v. Moreland*, 258 U.S. 433, 448 (1922) (Brandeis, J., dissenting).

⁸⁶² *Id.* at 448 n.14.

⁸⁶³ See *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000) (“Subject to the limitations that the punishment not ‘touch life or limb,’ that it be proportionate to the offense, and, by the 17th century, that it not be ‘cruel or unusual,’ judges most commonly imposed discretionary ‘sentences’ of fines or whippings upon misdemeanants. Actual sentences of imprisonment for such offenses, however, were rare at common law until the late 18th century, for ‘the idea of prison as a punishment would have seemed an absurd expense.’”) (quoting J. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 584 (3d ed.1990); JOHN BAKER, CRIMINAL COURTS AND PROCEDURE AT COMMON LAW 1550-1800, in *Crime in England 1550-1800*, p. 43 (J. Cockburn ed.1977)).

⁸⁶⁴ *Watkins v. United States*, 354 U.S. 178, 189-90 & n.12 (1957) (noting that Floyd, a Catholic, was ordered “to stand two hours in the pillory, and to be branded in the forehead with the letter K” and “to be whipped at the cart’s tail,” among other punishments, for “uttering a few contemptible expressions”); *Ex parte Lange*, 85 U.S. 163, 168 (1873) (“A criminal may be sentenced to a disgraceful punishment, as whipping, or, as in the old English law, to have his ears cut off, or to be branded in the hand or forehead.”); *Murphy v. Daytona Beach Humane Soc., Inc.*, 176 So.2d 922, 924 (Fla. App. 1965) (noting that, until its abolition, the English star chamber exercised the power of cutting off ears and branding the foreheads and slitting the noses of libelers); *State v. Chandler*, 2 Harr. 553, 1837 WL 154 *10 (Del. Gen. Sess. 1837) (noting that English law punished blasphemy “by setting the offender in the pillory for the space of two hours, branding in the forehead with the letter B, and public whipping on the bare back with thirty-nine lashes, well laid on”).

⁸⁶⁵ See James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A “Not Exactly,” Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 149 (2000) (“Corporal punishments once dominated the penal body. Whippings were a common punishment in colonial times. Other common punishments included branding; severing of

The Anomaly of Executions

The whipping of slaves was a standard disciplinary practice, and many offenses—both civilian and military—were punished with lashes,⁸⁶⁶ often in a brutal or severe manner.⁸⁶⁷ The first criminal-law statute passed by the First Congress, for example, prescribed 39 lashes for falsifying federal records, larceny, and receiving stolen goods and one hour in the pillory for perjury.⁸⁶⁸ “An Act to establish the Judicial Courts of the United States”—another law passed by the First Congress—gave the federal courts exclusive jurisdiction over “all crimes and offences that shall be cognizable under the authority of the United States” where, among other things, “no other punishment than whipping, not exceeding thirty stripes . . . is to be inflicted.”⁸⁶⁹ Corporal punishments were purposely designed to inflict pain and to shame and humiliate offenders.⁸⁷⁰

But over time, as societal attitudes changed, corporal punishments withered away.⁸⁷¹ Ear cropping, hand and forehead branding, and flogging had been punishments in colonial times and in America’s early years, as judicial opinions from the time make clear.⁸⁷² In *State v. Henderson*,⁸⁷³ the

ears and noses; and hanging.”); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 348-49, 353 (1982) (recounting that eighteenth-century punishments including whipping and public shaming).

⁸⁶⁶ Act of Mar. 2, 1799, ch. 43, § 15, 1 Stat. 736-737 (up to 40 lashes, as well as up to 10-years imprisonment, could be imposed for first mail-robbery conviction; up to 30 lashes or imprisonment not exceeding two years, or both, was the punishment for attempted robbery of the mails); see also *Duncan v. State of Louisiana*, 391 U.S. 145, 191-92 (1968) (Harlan, J., dissenting) (“Nor had the Colonies a cleaner slate, although practices varied greatly from place to place with conditions. In Massachusetts, crimes punishable by whipping (up to 10 strokes), the stocks (up to three hours), the ducking stool, and fines and imprisonment were triable to magistrates . . . New York was somewhat harsher. For example, ‘anyone adjudged by two magistrates to be an idle, disorderly or vagrant person might be transported whence he came, and on reappearance be whipped from constable to constable with thirty-one lashes by each.’”); *United States v. Barnett*, 376 U.S. 681, 711-12, 749-50 (1964) (describing various seventeenth- and eighteenth-century laws that imposed ear cropping, hours in the stocks, the pillory, or lashes as forms of punishment).

⁸⁶⁷ E.g., MARVIN L. MICHAEL KAY & LORIN LEE CARY, *SLAVERY IN NORTH CAROLINA, 1748-1775*, at 82 (1999).

⁸⁶⁸ *Furman v. Georgia*, 408 U.S. 238, 262 n.6 (1972) (Brennan, J., concurring) (citing Act of Apr. 30, 1790, §§ 15-18, 1 Stat. 115-16).

⁸⁶⁹ An Act to establish the Judicial Courts of the United States, 1 Stat. 73 (1789) (cited in *United States v. Comstock*, 130 S. Ct. 1949, 1969 nn.3-4 (2010) (Alito, J., concurring)).

⁸⁷⁰ See *Smith v. Doe*, 538 U.S. 84, 98 (2003) (“Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public.”).

⁸⁷¹ See Rita K. Lomio, *Working against the Past: The Function of American History of Race Relations and Capital Punishment in Supreme Court Opinions*, 9 J. L. SOCIETY 163, 165 n.8 (2008) (“Certain practices such as branding, pillorying, and ear-cropping have fallen out of use and law even without Eighth Amendment invocation.”).

⁸⁷² GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 175 (1960) (noting that ear cropping and whipping were punishments imposed by colonial magistrates); TERANCE D. MIETHE & HONG LU, *PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE* 35 (2005) (“The early American

Supreme Court of North Carolina faced this issue: “whether one convicted of manslaughter may be sentenced to be burned in the hand.”⁸⁷⁴ The court, citing English statutes, gave its answer as follows: “we are all of the opinion, that he may.”⁸⁷⁵ Colonial New Jersey likewise punished burglary by branding the offender’s hand for a first offense, and the offender’s forehead for subsequent offenses.⁸⁷⁶ In an earlier era, a murderer escaping the gallows might be branded with an “M” and a thief not punished capitally might be branded with a “T.”⁸⁷⁷ “A common form of mutilation or maiming was the detachment of an ear,” a judge on the U.S. Court of Appeals for the Third Circuit once explained, noting that “[t]he effect of branding, mutilation, or maiming was often to cast the offender out of society once and for all.”⁸⁷⁸

But as noted, such punishments fell out of use over time.⁸⁷⁹ For example, flogging fell into disuse at both the federal and state levels over the

colonists also burned particular letters on offenders’ hands and forehead.”); Abner Mikva, *What Justice Brennan Gave Us to Keep*, 32 *LOY. L.A. L. REV.* 655, 661 (1999) (“Ear-cropping, which involved clipping off a piece of the ear, was a common punishment in the colonial days for people who stole or did other terrible things.”); Erwin Chemerinsky, *Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?*, 29 *U. DAYTON L. REV.* 201, 214 (2004) (“ear cropping and flogging were also in existence in 1787”); Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 *OHIO N.U. L. REV.* 517, 520 (2000) (“Flogging and ear cropping were just two forms of mutilation and torture that were commonly available in 1789”); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 *U. PA. L. REV.* 989, 1031 (1978) (“Whipping and ear-cropping were thought perfectly proper, neither torturous nor excessive, when the Bill of Rights was born.”); J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823-1835*, 32 *N.C. CENT. L. REV.* 27, 41 (2009) (listing “ear cropping” as a punishment in the Cherokee Nation in a section about criminal procedure in the 1820s and 1830s); *State v. Webb*, 680 A.2d 147, 228 n.6 (1996) (Berdon, J., dissenting) (noting that a judge of the Connecticut Superior Court in 1773 ordered that a burglar be “branded on his forehead” with a capital letter “B” with “a hot iron” and “have one of his Ears Nailed to a post and Cut off” and also be “Whipt on his Naked body fifteen Stripes”); *compare State v. Frink*, 1 Bay 168, 1791 WL 210 *1 (S.C. Com. Pl. Gen. Sess. 1791) (a man convicted of manslaughter “was brought up to receive sentence of burning in the hand, which had been usually inflicted instanter in open Court,” but as the jury had recommended him as a fit object for mercy, punishment was delayed pending a review by the governor in Charleston); *State v. Grisham*, 2 N.C. 12, 1792 WL 50 *1 (N.C. Super. L. & Eq. 1792) (noting that the judge “gave judgment that the prisoner should be branded in the hand; which was accordingly done in presence of the court”).

⁸⁷³ 2 *Dev. & Bat.* 543, 1837 WL 498 (N.C. 1837).

⁸⁷⁴ *Id.* at *1.

⁸⁷⁵ *Id.*

⁸⁷⁶ *E. B. v. Verniero*, 119 F.3d 1077, 1116 (1997) (Becker, J., concurring in part and dissenting in part).

⁸⁷⁷ *Id.*

⁸⁷⁸ *Id.*

⁸⁷⁹ MICHAEL NEWTON, *THE ENCYCLOPEDIA OF KIDNAPPINGS* 51 (2002) (noting that Delaware’s governor remitted the ear-cropping portion of a man’s sentence following his

The Anomaly of Executions

course of several decades.⁸⁸⁰ To encourage enlistment, Congress first abolished flogging in the army in 1812,⁸⁸¹ but then reinstated the punishment in 1833 in an attempt to prevent desertions.⁸⁸² A few years later, in 1839, Congress abolished flogging for all federal crimes,⁸⁸³ then outlawed flogging in the navy in 1850⁸⁸⁴ and again in the army in 1861.⁸⁸⁵ At the state level, flogging also came to be seen as unacceptable. For example, in 1847, New York's legislature abolished flogging in that state's prisons.⁸⁸⁶ For purposes of understanding the Eighth Amendment and judicial readings of it, such history is informative.

In fact, the Cruel and Unusual Punishments Clause has long been read to bar corporal punishments and abuse or mistreatment of inmates. The federal courts, cognizant that inmates are government wards, have repeatedly held that the Eighth Amendment requires that inmates be fed, clothed, and treated for illness. "To incarcerate," the U.S. Supreme Court has itself emphasized, "society takes from prisoners the means to provide for their own needs."⁸⁸⁷ As a result, prisoners are "dependent on the State for food, clothing, and necessary medical care."⁸⁸⁸ "Just as a prisoner may starve if

conviction in 1822); *State v. Cannon*, 190 A.2d 514, 157 (Del. 1963) (noting the abolition of branding and cropping of ears). For a discussion of ear cropping under Massachusetts law, see JANE KAMENSKY, *GOVERNING THE TONGUE: THE POLITICS OF SPEECH IN EARLY NEW ENGLAND* 251 n.132 (1997).

⁸⁸⁰ E.g., Brian Hauck, Cara Hendrickson & Zena Yoslov, *Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEGIS. 479, 481 n.16 (1999) ("In 1805, the Massachusetts legislature abolished whipping, branding, the stocks, and the pillory."); W. J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 829 (1987) ("In 1829 the Tennessee General Assembly, in accordance with a national reform movement, abolished traditional methods for the punishment of crimes. Imprisonment replaced whipping, branding, and stocks.").

⁸⁸¹ ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS, & INDIAN ALLIES* 348 (2011); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481, 483 n.13 (1999).

⁸⁸² Spak & Tomes, *supra* note 881, at 483 n.13.

⁸⁸³ DAVID FELLMAN, *THE DEFENDANT'S RIGHTS TODAY* 396 (1976) (citing Act of Feb. 28, 1839, 5 Stat. 322 ch. 36, § 5).

⁸⁸⁴ MYRA C. GLENN, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA* 9 n.* (1984) (citing Act of Sept. 28, 1850); KENNETH J. HAGAN, *IN PEACE AND WAR: INTERPRETATIONS OF AMERICAN NAVAL HISTORY* 70 (2008). Traditions died hard, however. See W. JEFFREY BOLSTER, *BLACK JACKS: AFRICAN AMERICAN SEAMEN IN THE AGE OF SAIL* 180 (1997) (noting that a seaman in 1853 overheard a captain telling another captain that "he sailed under the old law, & he should trust himself and that he should flog as much as ever").

⁸⁸⁵ CLAYTON R. NEWELL & CHARLES R. SHRADER, *OF DUTY WELL AND FAITHFULLY DONE: A HISTORY OF THE REGULAR ARMY IN THE CIVIL WAR* 46 (2011).

⁸⁸⁶ W. DAVID LEWIS, *FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848*, at 251 (1965).

⁸⁸⁷ *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

⁸⁸⁸ *Id.*

not fed,” the Supreme Court noted in *Brown v. Plata*,⁸⁸⁹ “he or she may suffer or die if not provided adequate medical care.”⁸⁹⁰ “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society,” the Court ruled as late as 2011.⁸⁹¹ “If a government fails to fulfill this obligation,” the Court held, “the courts have a responsibility to remedy the resulting Eighth Amendment violation.”⁸⁹²

As a result, the Eighth Amendment is often used in civil rights cases to remedy the failure of prison officials to meet prisoners’ basic health needs. In a recent case dealing with overcrowding in California’s prisons, the Supreme Court took note of the large number of prisoners being housed in squalid, sardine-like conditions.⁸⁹³ The overcrowding—and lack of sufficient staff and medical and mental health services within the prisons⁸⁹⁴—had led to rampant disease⁸⁹⁵ and preventable deaths,⁸⁹⁶ including a num-

⁸⁸⁹ 131 S. Ct. 1910 (2011).

⁸⁹⁰ *Id.* at 1928.

⁸⁹¹ *Id.*

⁸⁹² *Id.*

⁸⁹³ *Id.* at 1923 (“For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. Needless suffering and death have been the well-documented result.”); *id.* at 1923 (“The degree of overcrowding in California’s prisons is exceptional. California’s prisons are designed to house a population just under 80,000, but at the time of the three-judge court’s decision the population was almost double that. The State’s prisons had operated at around 200% of design capacity for at least 11 years. Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet.”) (citations omitted).

⁸⁹⁴ *Id.* at 1932 (“The record documents the severe impact of burgeoning demand on the provision of care. At the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists.”); *id.* at 1933 (“Delays are no less severe in the context of physical care. Prisons have backlogs of up to 700 prisoners waiting to see a doctor. A review of referrals for urgent specialty care at one prison revealed that only 105 of 316 pending referrals had a scheduled appointment, and only 2 had an appointment scheduled to occur within 14 days. Urgent specialty referrals at one prison had been pending for six months to a year.”) (citations omitted); *id.* at 1934 (“The effects of overcrowding are particularly acute in the prisons’ reception centers, intake areas that process 140,000 new or returning prisoners every year. Crowding in these areas runs as high as 300% of design capacity. Living conditions are ‘toxic,’ and a lack of treatment space impedes efforts to identify inmate medical or mental health needs and provide even rudimentary care.”) (citations omitted).

⁸⁹⁵ *Id.* at 1933 (“Crowding also creates unsafe and unsanitary living conditions that hamper effective delivery of medical and mental health care. A medical expert described living quarters in converted gymnasiums or dayrooms, where large numbers of prisoners may share just a few toilets and showers, as “breeding grounds for disease.”); *id.* at 1933-34 (“Cramped conditions promote unrest and violence, making it difficult for prison officials to monitor and control the prison population. On any given day, prisoners in the

The Anomaly of Executions

ber of suicides.⁸⁹⁷ Such conditions, not surprisingly, eventually draw the attention of lawyers and the courts.

general prison population may become ill ... and overcrowding may prevent immediate medical attention necessary to avoid suffering, death, or spread of disease. After one prisoner was assaulted in a crowded gymnasium, prison staff did not even learn of the injury until the prisoner had been dead for several hours.”); *id.* at 1934 n.7 (“Correctional officials at trial described several outbreaks of disease. One officer testified that antibiotic-resistant staph infections spread widely among the prison population and described prisoners ‘bleeding, oozing with pus that is soaking through their clothes when they come in to get the wound covered and treated.’ Another witness testified that inmates with influenza were sent back from the infirmary due to a lack of beds and that the disease quickly spread to ‘more than half’ the 340 prisoners in the housing unit, with the result that the unit was placed on lockdown for a week.”) (citations omitted).

⁸⁹⁶ *Id.* at 1925 n.4 (“In 2007, the last year for which the three-judge court had available statistics, an analysis of deaths in California’s prisons found 68 preventable or possibly preventable deaths. This was essentially unchanged from 2006, when an analysis found 66 preventable or possibly preventable deaths. These statistics mean that, during 2006 and 2007, a preventable or possibly preventable death occurred once every five to six days.”) (citations omitted).

⁸⁹⁷ *Id.* at 1924-25 (“Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had “‘no place to put him.’” Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California’s prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved ‘some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable.’”) (citations omitted); *id.* at 1925 (“Prisoners suffering from physical illness also receive severely deficient care. California’s prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population. A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12-by 20-foot cage for up to five hours awaiting treatment. The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with “‘constant and extreme” chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a ‘failure of MDs to work up for cancer in a young man with 17 months of testicular pain.’”) (citations omitted); *id.* at 1925-26 (“Many more prisoners, suffering from severe but not life-threatening conditions, experience prolonged illness and unnecessary pain.”); *id.* at 1933 (“This shortfall of resources relative to demand contributes to significant delays in treatment. Mentally ill prisoners are housed in administrative segregation while awaiting transfer to scarce mental health treatment beds for appropriate care. One correctional officer indicated that he had kept mentally ill prisoners in segregation for ‘6 months or more.’ App. 594. Other prisoners awaiting care are held in tiny, phone-booth sized cages. The record documents instances of prisoners committing suicide while awaiting treatment.”); *id.* at 1934 (“Living in crowded, unsafe, and unsanitary conditions can cause prisoners with latent mental illnesses to worsen and

In that particular case, *Brown v. Plata*,⁸⁹⁸ the Court noted that “[c]ourts must be sensitive to the State’s interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals.”⁸⁹⁹ Still, the Court held that “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.”⁹⁰⁰ As the Court stated: “The State’s desire to avoid a population limit, justified as according respect to state authority, creates a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong.”⁹⁰¹

Although prisoners lose the right to their freedom by virtue of their criminality,⁹⁰² the Supreme Court reiterated in *Brown* that “the law and the Constitution demand recognition of certain other rights.”⁹⁰³ As the Court put it: “Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”⁹⁰⁴ In its 2011 decision, the Court found that the need to remedy unconstitutional conditions in California’s prisons was so urgent because “[p]risoners in the general population will become sick . . . with routine frequency; and overcrowding may prevent the timely diagnosis and care necessary to provide effective treatment and to prevent further spread of disease.”⁹⁰⁵ “Even prisoners with no present physical or mental illness may become afflicted,” the Court noted, adding: “all prisoners in California are at risk so long as the State continues to provide inadequate care.”⁹⁰⁶

develop overt symptoms. Crowding may also impede efforts to improve delivery of care. Two prisoners committed suicide by hanging after being placed in cells that had been identified as requiring a simple fix to remove attachment points that could support a noose. The repair was not made because doing so would involve removing prisoners from the cells, and there was no place to put them.”).

⁸⁹⁸ 131 S. Ct. 1910, 1928 (2011).

⁸⁹⁹ *Id.*

⁹⁰⁰ *Id.* at 1928-29.

⁹⁰¹ *Id.* at 1941.

⁹⁰² *Id.* at 1928 (“As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty.”).

⁹⁰³ *Id.*

⁹⁰⁴ *Id.*

⁹⁰⁵ *Id.* at 1940.

⁹⁰⁶ *Id.* As the Supreme Court wrote: “Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness. Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth Amendment, but in no sense are they remote bystanders in California’s medical care system. They are that system’s next potential victims.” *Id.*

The Anomaly of Executions

The concept of “human dignity”—also referred to as the “dignity of man”—has long been a touchstone of the Court’s Eighth Amendment jurisprudence.⁹⁰⁷ Thus, it is well established that “state prisoners are entitled to reasonably adequate food”⁹⁰⁸—one thing needed for basic survival. “A prison’s failure to provide sustenance for inmates,” the Supreme Court has determined, “may actually produce physical ‘torture or a lingering death.’”⁹⁰⁹ An Eighth Amendment violation will therefore be found—even in the death penalty-prone Fifth Circuit—where a denial of food constitutes a denial of the “minimal civilized measure of life’s necessities.”⁹¹⁰ “Because depriving a prisoner of adequate food is a form of corporal punishment,” the Fifth Circuit specifically ruled in 1991, “the [E]ighth [A]mendment imposes limits on prison officials’ power to so deprive a prisoner.”⁹¹¹ Death-row inmates traditionally get a last meal, but executions—by their very nature—deprive inmates of *all* rights whatsoever. If new evidence of innocence—or a constitutional violation that occurred at trial—comes to light later, nothing can be done; it is too late.

Just as non-lethal corporal punishments are considered unconstitutional, so too should executions be treated as such. Indeed, the concepts of cruelty and unusualness—linked together as they are in the Eighth Amendment—both point to that conclusion. On the cruelty front, this is especially so given that lethal punishments are more severe than non-lethal ones. How can it be less cruel, for instance, to take someone’s life than it is to cut off that person’s ear? Given how arbitrary, discriminatory and error-ridden America’s death penalty has proven to be, the Fourteenth Amendment guarantees to due process and equal protection only reinforce the conclusion that executions are unconstitutional. Not only is it cruel to inject another human being with lethal chemicals, but when such a punishment is carried out so sporadically and arbitrarily that it resembles a state-run lottery, the punishment of death must be considered unusual in the extreme.

⁹⁰⁷ *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting that language from *Trop*).

⁹⁰⁸ *Cooper v. Sheriff, Lubbock Cnty.*, 929 F.2d 1078, 1084 (5th Cir. 1991); *see also* *Marquez v. Woody*, No. 10-40378, 2011 WL 3911080 *4 (5th Cir., Sept. 6, 2011) (“It is clearly established that ‘state prisoners are entitled to reasonably adequate food.’”).

⁹⁰⁹ *Brown*, 131 S. Ct. at 1928 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) & *In re Kemmler*, 136 U.S. 436, 447 (1890)).

⁹¹⁰ *Talib v. Gilley*, 138 F.3d 211, 214 n.3 (5th Cir. 1998); *accord* *Marquez v. Woody*, No. 10-40378, 2011 WL 3911080 *4 (5th Cir., Sept. 6, 2011) (“Accepting Marquez’s competent summary judgment evidence as true, as we must at this stage, Lemaster’s actions clearly violated the Eighth Amendment because she refused to provide Marquez with a soft food despite the fact that a doctor prescribed him such a diet. It would be difficult to argue that Marquez did not need to eat soft food when it is apparent that Marquez has no teeth and when Marquez presented a prescription for a soft food diet to Lemaster which indicated that such a diet was medically necessary.”).

⁹¹¹ *Cooper v. Sheriff, Lubbock Cnty.*, 929 F.2d 1078, 1083 (5th Cir. 1991).

Significantly, the U.S. Supreme Court has already held that the punishment of denationalization may not be imposed on a prisoner as it deprives a person of the “right to have rights.”⁹¹² Ironically, the death penalty does just that. It deprives the convicted inmate of the Eighth Amendment right to food, shelter and basic medical care, and it deprives the inmate of the “right of access to the courts.”⁹¹³ Once executed, an inmate can no longer assert any rights at all. An execution, for example, deprives the inmate of the right to prove his or her innocence—and to be adjudged not guilty—should new, exculpatory evidence be brought to light after the inmate’s execution.⁹¹⁴ Indeed, executions deprive inmates of every single right inmates typically have. In so doing, executions fly in the face of existing and long-settled Eighth Amendment precedents aimed at *safeguarding* inmates from harm.

The question that the U.S. Supreme Court needs to squarely confront is whether this contradiction in the law makes any sense? Stated differently, should the Supreme Court rule that the death penalty must go the way of the stocks, the pillory, and the whipping post⁹¹⁵ and be ruled “cruel and unusual,” just as corporal punishments in prisons are already a relic of the past?⁹¹⁶ In early America, the *lex talionis* principle—an eye for an eye, a tooth for a tooth—was still in vogue, with Jefferson himself once proposing that offenders who maimed be maimed themselves.⁹¹⁷ Yet, Jefferson candidly acknowledged that this approach to crime and punishment would fall out of favor, telling his mentor George Wythe: “The ‘Lex talionis’ will be

⁹¹² *Trop v. Dulles*, 356 U.S. 86, 101-2 (1958) (plurality opinion). *But see* *People v. Potter*, 4 N.Y. Leg. Obs. 177, 1 Edm. Sel. Cas. 235 (N.Y. Sup. Ct. 1846) (“[T]he governor may grant a pardon on a condition which does not subject the prisoner to an unusual or cruel punishment. Banishment is neither. It is sanctioned by authority, and has been inflicted, in this form, from the foundation of our government.”); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (“Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.”) (citing *Turner v. Williams*, 194 U.S. 279, 290 (1904); *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Mahler v. Eby*, 264 U.S. 32 (1924)).

⁹¹³ *Furman v. Georgia*, 408 U.S. 238, 290 (Brennan, J., concurring).

⁹¹⁴ In Texas, questions have already been raised as to whether that state recently convicted and executed an innocent man based on faulty evidence. *See* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009.

⁹¹⁵ *E.g.*, *Hadix v. Caruso*, 461 F. Supp.2d 574, 591–92 (W.D. Mich. 2006) (noting that Congress abolished the pillory in 1839); *Ex parte Wilson*, 114 U.S. 417, 427 (1885) (same); Daniel E. Hall, *When Caning Meets the Eighth Amendment: Whipping Offenders in the United States*, 4 WIDENER J. PUB. L. 403, 421 n.103 (1995) (“The Act of February 28, 1839, abolished whipping and standing in the stocks.”) (citing Act of Feb. 28, 1839, ch. 36, § 5, 25 Stat. 321, 322 (1839)).

⁹¹⁶ The death penalty’s constitutionality was debated in the 1970s. *See, e.g.*, Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970). However, American society has changed a lot since then, as has our understanding of mental illness and human rights issues generally.

⁹¹⁷ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 142.

The Anomaly of Executions

revolting to the humanized feelings of modern times.” “An eye for an eye, and a hand for a hand,” Jefferson wrote, “will exhibit spectacles in execution, whose moral effect would be questionable.”⁹¹⁸ With the exception of executions, which continue to sporadically occur, Jefferson’s prediction came true. The American judicial system no longer tolerates the lopping off of offenders’ limbs or the maiming of inmates, just as no judge today would order that, as a punishment for rape, a rapist be raped. Why then should a killer be killed?

If the meaning of *cruel* is carefully considered, executions—the intentional killing of human beings—must thus be found to fall within that rubric. That executions are inherently cruel must also, in some fashion, be taken into account when judges determine if executions are *unusual*. That is because it would be highly unusual for any civilized society to inflict a cruel and unnecessary punishment, especially in a more or less random fashion. The American people are living at a time when there is a greater awareness of human rights principles than ever. Although the Constitution requires a punishment be both cruel *and* unusual to be unconstitutional, the cruelty of a punishment must surely be found to contribute to its unusualness. Conversely, the rarity and sheer unusualness of executions mutually reinforces the notion that they are cruel. It is inherently cruel and inhumane, after all, to arbitrarily or discriminatorily inflict the punishment of death.

C. To Kill or Not to Kill?

The Supreme Court’s Eighth Amendment jurisprudence is in a state of chaos and confusion. Instead of construing the actual phrase “cruel and unusual punishments” in the Eighth Amendment, the Court has adopted a nice-sounding legal standard—the “evolving standards of decency” test—to evaluate Eighth Amendment claims. In doing so, the Court has lost its way by failing to focus on what the Constitution states in no uncertain terms: that “cruel and unusual punishments” are unconstitutional. While early American jurists grappled with what “cruel” and “unusual” meant in particular factual contexts such as the ducking of scolds, today’s Justices grapple not with the meaning and proper interpretation of the words “cruel” and “unusual,” but with somehow trying to divine the “evolving standards of decency of a maturing society.” Instead of just focusing on whether executions are “cruel” and have become “unusual,” as the Constitution requires, the Court tries to gauge trends, the consistency of the direction of the change, or if a “national consensus” has been reached. In the twenty-first century, a return to first principles—interpret *the text*, not decades-old judicial gloss *imposed on it*—seems to be in order.

*Turnipseed v. State*⁹¹⁹—an 1844 case decided before slavery was abolished through Abraham Lincoln’s Thirteenth Amendment—illustrates how

⁹¹⁸ *Id.* at 141.

⁹¹⁹ 6 Ala. 664, 1844 WL 301 (Ala. 1844).

American judges, though operating in a completely different time, once focused on the *words* of a legal provision to decide upon its meaning. In that case, a person was indicted by an Alabama grand jury for inflicting “on a negro woman named Rachel, a slave,” a “cruel and unusual punishment.”⁹²⁰ The accused contested the indictment but was tried by a jury and found guilty of the crime, with the punishment being the assessment of a fifty dollar fine.⁹²¹ The Alabama law under which the accused was indicted provided: “No cruel or unusual punishment shall be inflicted on any slave, and any master, or other person having charge of a slave, who shall be guilty of inflicting such punishment, or authorizing, or permitting the same, shall be subject to indictment therefor, and on conviction thereof, be punished by a fine not less than fifty, and not exceeding one thousand dollars; and in addition thereto, be required to give security for his good behavior for the space of twelve months.”⁹²²

When the jury’s verdict was appealed, the convicted defendant argued that “[t]he indictment is double in charging the infliction of punishment both *cruel* and *unusual*”⁹²³ and that “[t]he indictment is too general: it should have stated what and how the punishment was inflicted.”⁹²⁴ As to the first objection, the Alabama Supreme Court acknowledged that “[i]t is certainly a *general* rule, that the defendant cannot be charged, in one count of an indictment, with two distinct offenses.”⁹²⁵ In rejecting the “objection of duplicity,” the Alabama court held, however, that the law did not require two separate indictments and that the indictment in question “is not bad for duplicity.”⁹²⁶ The court first emphasized: “True, the statute makes two offences, or rather does not require that the punishment inflicted upon a slave shall be both *cruel* and *unusual* to subject the offender to its sanctions: it is enough if the proof show it to be either the one or the other. To punish cruelly is one, and unusually is another breach of criminal law.”⁹²⁷ “The statute, it is apprehended,” the court then held, “does not use the epithets as synonymous, nor in contrast with each other; but it was merely intended to make the enactment sufficiently broad to embrace a high offence against good morals, no matter under what circumstances committed.”⁹²⁸

In so holding, the Alabama Supreme Court—in that unsavory factual context—focused on the concept of cruelty and unusualness separately. As

⁹²⁰ *Id.* at *1.

⁹²¹ *Id.*

⁹²² *Id.* (citing Clay’s Dig. 431).

⁹²³ *Id.* The defendant—described as “[t]he plaintiff in error” on appeal—contended on appeal that “[t]o punish cruelly is one offense, and unusually is another; and they should have been so charged.” *Id.*

⁹²⁴ *Id.*

⁹²⁵ *Id.*

⁹²⁶ *Id.* at *2.

⁹²⁷ *Id.* at *1.

⁹²⁸ *Id.*

The Anomaly of Executions

the 1844 ruling stated: “*Cruel*, as indicating the infliction of pain of either mind or body, is a word of most extensive application; yet every cruel punishment is not, perhaps, unusual; nor, perhaps, can it be assumed that every uncommon infliction is cruel.”⁹²⁹ “But be this as it may,” the court then held, “there may be punishment that is both cruel and unusual; thus, if a slave should be punished, even without bodily torture, in a manner offensive to modesty, decency and the recognized proprieties of social life, the offender would be chargeable in the broad terms employed in the indictment.”⁹³⁰ “An offence, committed under such circumstances,” the court concluded, “might be charged according to its true character, without subjecting the indictment to the imputation of duplicity; and upon conviction, the accused would be liable to but one penalty.”⁹³¹

As to the defendant’s second objection—that the indictment was too vaguely worded—the Alabama Supreme Court agreed.⁹³² “In the present case,” the court began, “the statute merely denounces the cruel and unusual punishment of a slave as a public offence, and prescribes the punishment.”⁹³³ “It does not,” it said of the statute, “declare with particularity what are its elements; and consequently, in framing the indictment the statute affords but little aid.”⁹³⁴ Under the circumstances, the Alabama Supreme Court held that “the general terms in which the charge is made against the defendant, is not sufficient; but it should be alleged what punishment was inflicted and how, that the court might judge whether the accused should have been put upon his trial; that he may know what he is to defend against, and the jury know how to apply the evidence.”⁹³⁵ “This brings us to the conclusion,” the court wrote, “that the indictment is defective, because of the generality of the terms in which the defendant is charged.”⁹³⁶ The court—beholden to the Deep South’s peculiar institution of slavery—thus reversed the conviction, finding that the “defect” in the indictment warranted that result.⁹³⁷

In this day and age, state-sanctioned killing—the ultimate penal sanction—must be considered unconstitutional. Executions are cruel, and they have become unusual. The U.S. Supreme Court has already held, in fact, that “the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”⁹³⁸ Not only do executions carry with them the risk of serious *physical* pain and

⁹²⁹ *Id.* (italics in original).

⁹³⁰ *Id.*

⁹³¹ *Id.*

⁹³² *Id.* at *3.

⁹³³ *Id.*

⁹³⁴ *Id.*

⁹³⁵ *Id.*

⁹³⁶ *Id.*

⁹³⁷ *Id.*

⁹³⁸ *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

suffering,⁹³⁹ but the *psychological* injury associated with death sentences—which amounts to a threat of possible execution—must be taken into consideration in gauging their cruelty.⁹⁴⁰ The overall harm, equivalent to cruel and inhumane treatment or torturous conduct,⁹⁴¹ must no longer be countenanced by American law despite prior court rulings to the contrary.⁹⁴² A judicial death sentence places the inmate at risk for the future deprivation of life—something far more credible and serious than, say, idle threats or verbal abuse of inmates by prison officials which normally does not result

⁹³⁹ Karin Buhmann, *Damned If You Do, Damned If You Don't? The Lundbeck Case of Pentobarbital, the Guiding Principles on Business and Human Rights, and Competing Human Rights Responsibilities*, 40 J.L. MED. & ETHICS 206, 208 (2012).

⁹⁴⁰ *Compare* Newman v. Alabama, 466 F. Supp. 628, 635 (D. Ala. 1979) (“The cumulative effect of these deficiencies and abuses is a threat to life and limb that violates the Eighth Amendment.”); Crawford v. Wisconsin Dep’t of Corr., No. 09-C-0616G *7 (E.D. Wis., Sept. 30, 2011) (“Threats and harassment may constitute cruel and unusual punishment.”) (citing DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000)); French v. Owens, 777 F.2d 1250, 1257 (7th Cir. 1985) (where prison conditions included prison rapes, assaults, and one prisoner being doused with lighter fluid and attempted to be set aflame, the court held that “[t]he constitution cannot countenance such widespread abuses”) with Pabon v. Lemaster, Civil Action No. 07-805, 2008 WL 1830500 *3 (W.D. Pa. 2008) (“To the extent that Plaintiff claims these verbal threats, abuse and harassment constituted cruel and unusual punishments, Defendants are entitled to dismissal of the claims because such verbal threats and abuse do not constitute a sufficiently objective deprivation under the Eighth Amendment.”) (citations omitted); Williams v. Fleming, Civil Action No. 7:07CV00199, 2007 WL 2693644 *3 n.5 (Sept. 13, 2007) (“To the extent that Williams alleges that the threat of force feeding was cruel and unusual punishment, in violation of the Eighth Amendment, his claim fails because he does not allege any physical or mental injury.”); Walton v. Terry, 38 Fed. Appx. 363, 364-65 (9th Cir. 2002) (“verbal threats do not constitute cruel and unusual punishment”); Grant v. Fernandez, No. C 96-1788, 1997 WL 118257 *2 (N.D. Cal., Mar. 5, 1997) (“allegations of harassment and threats generally fail to state a cognizable claim under § 1983”).

⁹⁴¹ See, e.g., State v. Fielder, No. W2009-CCA-R3-CD, 2011 WL 3689134 *13 (Tenn. Crim. App. 2011) (“Among the facts found by the trial court to constitute exceptional cruelty to the victim was the manner of use of the Skil saw to threaten amputation of the victim’s hand and cutting his face, and the threats to the lives of the victim’s family. This mental torture was clearly beyond the elements of the offenses.”); *id.* (“The proof showed that Defendant immobilized the victim’s hand while the Skil saw was operated in the threatening manner it was used. Furthermore, the proof supports the inference that Defendant allowed the victim to be frightened by serious threats to his life and the lives of his family.”).

⁹⁴² See Lucas v. State, 841 So.2d 380, 389 (Fla. 2003) (twenty-five years on death row does not constitute cruel and unusual punishment); Foster v. State, 810 So.2d 910, 916 (twenty-three years on death row does not constitute cruel and unusual punishment); Knight v. State, 746 So.2d 423, 437 (Fla. 1998) (more than two decades on death row does not constitute cruel and unusual punishment); United States v. Walker, 66 M.J. 721, 756 (N.M. Ct. Crim. App. 2008) (“no American court appears to have found that a lengthy confinement followed by execution constitutes cruel and unusual punishment under the Eighth Amendment”).

The Anomaly of Executions

in an Eighth Amendment violation.⁹⁴³ Just as American physicians have concluded that participation in executions violates their solemn ethical oaths,⁹⁴⁴ so too should American lawyers and judges decide that executions are not compatible with their profession—or the practice of law.

By extinguishing the inmate's life, executions inflict the most harm that one can possibly do to an inmate. In its *existing* Eighth Amendment case law, however, the Supreme Court has already firmly rejected the notion that “significant injury”—let alone death—is even a “threshold” requirement for stating an excessive force claim.⁹⁴⁵ “What is necessary to establish an ‘unnecessary and wanton infliction of pain,’” the Court has ruled, “varies according to the nature of the alleged constitutional violation.”⁹⁴⁶ When prison officials fail to attend to an inmate's serious medical needs, the appropriate inquiry is whether officials exhibited “deliberate indifference.”⁹⁴⁷ “This standard is appropriate,” the Court states, “because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.”⁹⁴⁸ “Because society does not expect that prisoners will have unqualified access to health care,” the Court held in *Hudson v. McMillian*,⁹⁴⁹ “deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’”⁹⁵⁰

Because death sentences inflict severe mental anguish and torment on par with other acts of psychological cruelty, they should be declared unconstitutional. Judicial precedents, in fact, already recognize Eighth Amendment claims based on psychological⁹⁵¹ or emotional distress,⁹⁵² in-

⁹⁴³ Hahn v. Bauer, No. 09-2220, 2010 WL 396228 *10 (D. Minn. Jan. 27, 2010) (citing cases).

⁹⁴⁴ Travis Cade Armstrong, “Veneer of Medical Respectability”: *How Physician Participation in Lethal Injections Perpetuates the Illusion of a Humane Execution*, 51 S. TEX. L. REV. 469, 484-85 (2009); Emily Pokora, *Should State Codes of Medical Ethics Prohibit Physician Participation in State-Ordered Executions?*, 37 W. ST. U. L. REV. 1, 2 (2009).

⁹⁴⁵ Wilkins v. Gaddy, 130 U.S. 1175, 1178 (2010).

⁹⁴⁶ Hudson v. McMillian, 503 U.S. 1, 5 (1992). “What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends upon the claim at issue, for two reasons.” Hudson v. McMillian, 503 U.S. 1, 8 (1992). First, “[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should ... be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.” *Whitley*, 475 U.S. at 320. Second, “the Eighth Amendment's prohibition of cruel and unusual punishments ‘draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,’ and so admits of few absolute limitations.” *Hudson*, 503 U.S. at 8 (citations omitted).

⁹⁴⁷ *Hudson*, 503 U.S. at 5-6 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

⁹⁴⁸ *Hudson*, 503 U.S. at 6 (citing *Whitley*, 475 U.S. at 320).

⁹⁴⁹ 503 U.S. 1 (1992).

⁹⁵⁰ *Id.* at 9.

⁹⁵¹ *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003) (allegation of strip search of male prisoner in front of female prison guards sufficed to state an Eighth Amendment

humane or undignified punishments,⁹⁵³ or—in some cases—threatening conduct.⁹⁵⁴ And the suffering of death-row inmates, many of whom attempt suicide or abandon their appeals and choose to die,⁹⁵⁵ is only exacerbated by the many years or decades they spend on death row in relative isolation. In this regard, the failure of the Supreme Court to take up the question of whether it is “cruel and unusual” punishment to execute inmates who have spent in some cases more than 25 years on death row is inexplicable.⁹⁵⁶ In a dissent in *Solesbee v. Balkcom*,⁹⁵⁷ a case decided more than sixty years ago, Justice Felix Frankfurter himself noted that the “onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”⁹⁵⁸

claim if the search was “conducted in a harassing manner intended to humiliate and inflict psychological pain”; “physical injury need not result for the punishment to state a cause of action, for the wanton infliction of psychological pain is also prohibited”); *Jordan v. Gardner*, 986 F.2d 1521, 1522–31 (9th Cir. 1993) (en banc) (severe “psychological” pain and trauma can violate the Eighth Amendment); *Northington v. Jackson*, 973 F.2d 1518, 1522–25 (10th Cir. 1992) (placing a revolver to a prisoner’s head without justification and threatening to kill the inmate create an actionable Eighth Amendment claim based on “psychological injury”); *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (“It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment.”); *Madrid v. Gomez*, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) (“[I]f the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.”).

⁹⁵² *Chandler v. Baird*, 926 F.2d 1057, 1066 (11th Cir. 1991) (inmate’s statement that “I’m sure I was depressed from it” was sufficient, when coupled with allegations of harsh conditions of administrative confinement, to state a claim for violation of the Eighth Amendment standards for prison conditions); *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993) (“[I]n order to withstand summary judgment on an Eighth Amendment challenge to prison conditions a plaintiff must produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions.”).

⁹⁵³ *Estelle*, 429 U.S. at 102 (“Our more recent cases ... have held that the [Eighth] Amendment proscribes more than physically barbarous punishments. The Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency ...’”) (citations omitted) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

⁹⁵⁴ *Burton v. Livingston*, 791 F.2d 97 (8th Cir. 1986) (where complaint alleged that a guard pointed a lethal weapon at the prisoner, cocked it, and threatened him with instant death accompanied by racial epithets, the court held that “a prisoner retains at least the right to be free from the terror of instant and unexpected death at the whim of his allegedly bigoted custodians”).

⁹⁵⁵ John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939 (2005).

⁹⁵⁶ See *Thompson v. McNeil*, 129 S. Ct. 1299 (2009); *Johnson v. Bredesen*, 130 S. Ct. 541 (2009); *Lackey v. Texas*, 514 U.S. 1045 (1995).

⁹⁵⁷ 339 U.S. 9 (1950) (Frankfurter, J., dissenting).

⁹⁵⁸ *Id.* at 14.

The Anomaly of Executions

The Supreme Court's "deliberate indifference" standard actually already applies to Eighth Amendment claims about conditions of confinement.⁹⁵⁹ To make out a conditions-of-confinement claim, the Court has determined, extreme deprivations are required because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society."⁹⁶⁰ As the Supreme Court held in *Wilson v. Seiter*,⁹⁶¹ "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation."⁹⁶² Because the death penalty, however, deprives an inmate of his or her life, it, if anything, must certainly be considered an extreme—and therefore unconstitutional—deprivation. And because death sentences—the terrifying prerequisite to the execution of inmates—also appear deliberately indifferent to the physical and mental health of inmates, they, too, should be considered unlawful.

The law makes crystal clear that, in a prison setting, prison officials can protect themselves. At the same time, though, they must not cross the line into the *gratuitous* infliction of inmate suffering. Officials confronted with a prison disturbance, the Supreme Court has held, "must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force."⁹⁶³ In *Whitley v. Albers*,⁹⁶⁴ the Court specifically ruled that the "deliberate indifference" standard is inappropriate where force is used to quell a prison disturbance.⁹⁶⁵ In dealing with prison riots or unrest, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"⁹⁶⁶

The *Whitley* standard was extended to all excessive force claims in *Hudson v. McMillian*.⁹⁶⁷ Under *Whitley*, the Court ruled in *Hudson*, "the extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation, 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness

⁹⁵⁹ *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Hudson*, 503 U.S. at 8.

⁹⁶⁰ *Hudson*, 503 U.S. at 9 (quoting *Rhodes*, 452 U.S. at 347).

⁹⁶¹ 501 U.S. 294 (1991).

⁹⁶² *Id.* at 298 (quoting *Rhodes*, 452 U.S. at 347).

⁹⁶³ *Hudson*, 503 U.S. at 6 (citing *Whitley*).

⁹⁶⁴ 475 U.S. 312 (1986).

⁹⁶⁵ *Id.* at 320-21.

⁹⁶⁶ *Hudson*, 503 U.S. at 6-7 (citations omitted). The "core judicial inquiry," the Court re-emphasized in *Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010), is "not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Id.* at 1178.

⁹⁶⁷ 503 U.S. 1, 7 (1992).

that it occur.”⁹⁶⁸ “In determining whether the use of force was wanton and unnecessary,” the Court added, “it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to temper the severity of a forceful response.’”⁹⁶⁹ The utter lack of necessity for executions within prisons make them unconstitutional as there is no need to kill an incarcerated inmate, particularly one tied down to a prison gurney.

Executions, because they are unnecessary, are nothing more than acts of sadistic vengeance. “When prison officials maliciously and sadistically use force to cause harm,” the Court has ruled in another context, “contemporary standards of decency always are violated.”⁹⁷⁰ “Otherwise,” the Court has determined, “the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.”⁹⁷¹ Under the Court’s precedents, even injuries far less significant than death are already expressly prohibited. As Justice Harry Blackmun wrote in 1992 in his concurrence in *Hudson*, explaining the ruling’s significance: “The Court today appropriately puts to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with ‘significant injury,’ e.g., injury that requires medical attention or leaves permanent marks.”⁹⁷²

At executions, of course, the level of injury is off the charts: the inmate’s death. And the intent to harm the inmate is clear: the state, through its judicial process and using execution protocols to carry out its will, methodically plans the inmate’s death, often for years or decades in advance. Bizarrely, the Supreme Court has held that executions pass constitutional muster even though injuries characterized as “minor”—as the Fifth Circuit described the prisoner’s in *Hudson*—can be Eighth Amendment violations.⁹⁷³ Though the Supreme Court acknowledged in *Hudson* that not every “malevolent touch by a prison guard gives rise to a federal cause of action,”⁹⁷⁴ it expressly excluded only *de minimis* uses of force from the Eighth Amendment’s scope.⁹⁷⁵ As the Court ruled: “The Eighth Amendment’s prohibition of ‘cruel and unusual’ punishments necessarily excludes

⁹⁶⁸ *Hudson*, 503 U.S. at 9 (quoting *Whitley*, 475 U.S. at 321).

⁹⁶⁹ *Id.* (quoting *Whitley*, 475 U.S. at 321).

⁹⁷⁰ *Id.* at 9. “This is true,” the Court emphasized, “whether or not significant injury is evident.” *Id.*

⁹⁷¹ *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1178 (2010).

⁹⁷² *Hudson*, 503 U.S. at 13-14 (Blackmun, J., concurring).

⁹⁷³ *Id.* at 10 (citation omitted).

⁹⁷⁴ *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (“Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates a prisoner’s constitutional rights.”)).

⁹⁷⁵ “An inmate who complains of a ‘push or shove’ that causes not discernible injury almost certainly fails to state a valid excessive force claim,” the Supreme Court emphasized in *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1178 (2010).

The Anomaly of Executions

from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’”⁹⁷⁶

A comparison of the injuries suffered by the inmate in *Hudson*—and found to be actionable—should be contrasted with those inflicted at executions. “The blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate,” the Court concluded in *Hudson*, “are not *de minimis* for Eighth Amendment purposes.”⁹⁷⁷ Thus, the Court in *Hudson* refused to dismiss the prisoner’s section 1983 claim alleging the use of excessive force.⁹⁷⁸ “Injury and force,” the Court also emphasized in its per curiam opinion in *Wilkins v. Gaddy*,⁹⁷⁹ “are only imperfectly correlated, and it is the latter that ultimately counts.”⁹⁸⁰ As the Court wrote in that 2010 decision: “An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.”⁹⁸¹ Executions, by contrast, inflict death itself.

VI. Conclusion

The history of the death penalty is one of successive restrictions on its use. The death penalty was once inflicted for a whole host of offenses. England’s “Bloody Code” made more than 200 crimes punishable by death, and laws in the American colonies were modeled on English practice.⁹⁸² In the late eighteenth century, however, many of America’s founders and framers read and were inspired by the writings of an Italian philosopher, Cesare Beccaria. In the 1760s, Beccaria wrote *On Crimes and Punishments*, a book in which he called for proportion between crimes and pun-

⁹⁷⁶ *Hudson*, 503 U.S. at 10 (citations omitted).

⁹⁷⁷ *Id.*

⁹⁷⁸ *Id.*

⁹⁷⁹ 130 S. Ct. 1175 (2010).

⁹⁸⁰ *Id.* at 1178.

⁹⁸¹ *Id.* at 1178-79. In *Wilkins*, the inmate alleged that he was “punched, kicked, kneed, choked, and body slammed ‘maliciously and sadistically’ and ‘[w]ithout any provocation.’” *Id.* at 1179. The District Court in that case dismissed the inmate’s action *sua sponte* because the purported assault—which allegedly left the inmate with “a bruised heel, pack pain, and other injuries requiring medical treatment”—involved “*de minimis* force.” *Id.* After the U.S. Court of Appeals for the Fourth Circuit summarily affirmed the district court’s ruling, *id.* at 1177, the U.S. Supreme Court reversed. *Id.* at 1176. In reserving judgment on the inmate’s specific allegations, the Court in *Wilkins* held as follows: “In holding that the District Court erred in dismissing Wilkins’ complaint based on the supposedly *de minimis* nature of his injuries, we express no view on the underlying merits of his excessive force claim. In order to prevail, Wilkins will ultimately have to prove not only that the assault actually occurred but also that it was carried out “maliciously and sadistically” rather than as part of “a good-faith effort to maintain or restore discipline.” *Id.* at 1180.

⁹⁸² Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 223 (2001).

ishments and opposed both torture and capital punishment. That treatise influenced Europeans such as Sir William Blackstone and Jeremy Bentham, as well as leading American revolutionaries, including John Adams, Dr. Benjamin Rush, and Thomas Jefferson.⁹⁸³

Today, executions are seen in other parts of the world—including in England, America's mother country—as human rights violations. Europe has treaties in place that already forbid the use of executions,⁹⁸⁴ and the unmistakable trend worldwide is toward abolition.⁹⁸⁵ Some countries even refuse to extradite offenders to the United States unless assurances are given that the death penalty will not be sought.⁹⁸⁶ And here in the United States, the number of executions and death sentences has declined markedly. The number of U.S. executions fell from 98 in 1999 to 43 in 2012, and the number of American death sentences fell from more than 300 per year in 1995 and 1996 to 78 in 2011.⁹⁸⁷ In truth, executions are rarely and arbitrarily imposed—and often in a racially discriminatory manner.

The death penalty has a long, sordid history, dating back to the very beginnings of recorded history.⁹⁸⁸ In the United States, executions were once used to quell slave rebellions, and their use has long been associated with racial prejudice.⁹⁸⁹ Executions are now heavily concentrated in the South, the same region where slavery was once so stubbornly entrenched and where racially motivated extra-judicial lynchings were prevalent.⁹⁹⁰ In fact, multiple studies show that the odds of receiving a death sentence increase dramatically for African Americans who kill whites. This disturbing state of affairs runs counter to basic precepts of U.S. law, including equal protection of the laws, though—to date—the U.S. Supreme Court has insisted on more than statistical proof to demonstrate racial bias in capital cases.⁹⁹¹

⁹⁸³ BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 48-49, 70-71.

⁹⁸⁴ Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, opened for signature Apr. 28, 1983, E.T.S. No. 114 (entered into force Mar. 1, 1985); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, opened for signature May 3, 2002, E.T.S. No. 187 (entered into force July 1, 2003).

⁹⁸⁵ *Figures on the Death Penalty*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/death-penalty/numbers> (last visited Feb. 18, 2013).

⁹⁸⁶ Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 U.C. DAVIS J. INT'L L. & POL'Y 273, 311 (2010).

⁹⁸⁷ *Facts about the Death Penalty*, *supra* note 48.

⁹⁸⁸ GARY P. GERSHMAN, *DEATH PENALTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS* 16 (2005).

⁹⁸⁹ DOUGLAS R. EGERTON, *GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802*, at 111-12, 187 (1993).

⁹⁹⁰ PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2007).

⁹⁹¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The Anomaly of Executions

Although the Founding Fathers did not abolish all death penalty laws, they actively explored alternatives to executions.⁹⁹² Indeed, it was during their time—as well as that of succeeding generations—that America’s penitentiary system, on a state-by-state basis, began to be built and then progressively developed.⁹⁹³ The Walnut Street Prison in Philadelphia opened only a year before the ratification of the U.S. Bill of Rights,⁹⁹⁴ though other states were soon to follow Pennsylvania’s example.⁹⁹⁵ New York passed legislation in 1796 providing for the construction of the Newgate state prison in Greenwich Village⁹⁹⁶; New Jersey completed its state penitentiary in 1797; and penitentiaries in Virginia and Kentucky opened in 1800, the same year Massachusetts appropriated money for one.⁹⁹⁷ The Maryland Penitentiary was opened in 1811,⁹⁹⁸ and construction of other state penitentiaries began in that decade and the ones that followed.⁹⁹⁹ In Adam Hirsch’s *The Rise of the Penitentiary*, the author states that “[t]he penitentiary had its heyday in the United States in the 1830s” as “[f]acilities proliferated.”¹⁰⁰⁰

Today, state and federal penitentiaries around the country—built with concrete and iron—are readily available to house violent offenders, making executions anachronistic and obsolete. In fact, in America, life-without-parole sentences—now available as a sentencing option in all death penalty states—have already largely displaced executions as society’s preferred method of punishment.¹⁰⁰¹ There are now more than 41,000 offenders in the U.S. serving life-without-parole sentences.¹⁰⁰² In comparison, as of January 1, 2013, there were 3,125 death row inmates in the United States, with even fewer executions—1,343 to be exact—having occurred in the United States since 1976.¹⁰⁰³ When those numbers are thoughtfully consid-

⁹⁹² BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 66-161.

⁹⁹³ ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* (1992).

⁹⁹⁴ Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 496 (2009).

⁹⁹⁵ *Id.* at 470.

⁹⁹⁶ Leonard G. Levenson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination*, 18 HARV. C.R.-C.L. L. REV. 409, 415 (1983).

⁹⁹⁷ James M. Binnall, *Respecting Beasts: The Dehumanizing Quality of the Modern Prison and an Unusual Model for Penal Reform*, 17 J.L. & POL’Y 161, 171 n.68 (2008) (citation omitted).

⁹⁹⁸ Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 990 (2003).

⁹⁹⁹ Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO STATE J. CRIM. L. 53, 62-63 (2011).

¹⁰⁰⁰ HIRSCH, *supra* note 993, at 112 (1992).

¹⁰⁰¹ Marilyn Peterson Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 MARQ. L. REV. 1, 5-6 & n.10 (2012).

¹⁰⁰² Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 223 (2012).

¹⁰⁰³ *Facts about the Death Penalty*, *supra* note 48.

ered, the inescapable conclusion is that life-without-parole sentences have become the typical—or usual—choice of juries, while death sentences and executions are now unusual, less preferred, and no longer the norm.

At the Jefferson Memorial in Washington, D.C., a series of quotes are inscribed under the dome. On one panel, Jefferson's familiar and immortal words from the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."¹⁰⁰⁴ But another panel contains a lesser-known quotation, an excerpt from a letter Thomas Jefferson wrote in 1816.¹⁰⁰⁵ That excerpt reads: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind."¹⁰⁰⁶ As Jefferson's letter read: "As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors."¹⁰⁰⁷ Jefferson's words, written as part of the American Enlightenment, serve as a valuable reminder that the right to life is to be protected—and that equality and human progress are important American values.

The genius of the U.S. Constitution's Cruel and Unusual Punishments Clause is that it allows each generation of American judges, in their own time, to evaluate anew what punishments are "cruel and unusual." Every generation must decide for itself what societal practices will be allowed, and in that respect, Jefferson's words should be taken to heart. While crime is about what the offender does, punishment is about how society behaves and reacts. The absence of cruel and unusual punishments in a society is a sign of progress that also furthers human dignity, that long-standing Eighth Amendment touchstone. Indeed, the Constitutional Court of the Republic of South Africa ruled back in 1995—more than fifteen years ago—that the death penalty violated principles of human dignity and was thus unconstitutional in that society.¹⁰⁰⁸

In America, the time has finally come for the U.S. Supreme Court to put an end to capital punishment once and for all. The death penalty—whether seen as a product of the Dark Ages or a step-child of the peculiar institutions of slavery or apartheid—must be seen as a vestige of a bygone

¹⁰⁰⁴ Declaration of Independence (July 4, 1776).

¹⁰⁰⁵ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816).

¹⁰⁰⁶ *Quotations on the Jefferson Memorial*, THOMAS JEFFERSON'S MONTICELLO, <http://www.monticello.org/site/jefferson/quotations-jefferson-memorial> (last visited Feb. 16, 2013).

¹⁰⁰⁷ Letter from Thomas Jefferson, *supra* note 1005.

¹⁰⁰⁸ *S. v. Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391.

The Anomaly of Executions

era. Because it has no place in a civilized society, be it in Africa or America, it should go the way of the stocks, the pillory, and the whipping post. Just as American society no longer tolerates ear cropping or hand-branding, it should no longer tolerate executions. Penitentiaries and life-without-possibility-of-parole sentences are more than sufficient to protect the public from violent offenders while allowing us to maintain our own respect for human dignity and human rights.

LAW AND THE LIVELY EXPERIMENT IN COLONIAL
RHODE ISLAND

Scott D. Gerber*

Ohio Northern University

ABSTRACT

Historians of the law of colonial America long have appreciated that each colony must be examined individually. For example, George Lee Haskins wrote in the Preface to his classic book Law and Authority in Early Massachusetts (1960) that “it is essential that the character and growth of the several colonial legal systems be studied individually and be separately described,” and Richard B. Morris opined in the Foreword to George Athan Billias’s groundbreaking collection Law & Authority in Colonial America (1965) that “no monolithic interpretation will suffice to explain the course and reception of the law in America—whether we are dealing with seventeenth-century seaboard colonies as disparate as Puritan Massachusetts and the plantation colonies of Maryland and Virginia, or the later western territories.”

The instant article—the first in a series of case studies on law and the animating principles of each of the original British American colonies—explores the relationship between the animating principle of colonial Rhode Island and the colony’s laws. A perusal of the compacts of Rhode Island’s original four towns, of the Patent for Providence Plantations of 1643/4, and of the Charter of Rhode Island and Providence Plantations of 1663 leaves no doubt about the colony’s foundational commitment to religious liberty. However, an investigation of the legal history of colonial Rhode Island reveals a number of inconsistencies in the implementation of that animating principle, especially with respect to the law’s treatment of Catholics, Jews, and Quakers. The article concludes by reconciling those inconsistencies through a famous parable authored by Rhode Island’s founder, Roger Williams.

*Professor of Law, Ohio Northern University. Ph.D., J.D., University of Virginia; B.A., College of William and Mary. I thank Marianella Medelius for superb research assistance and Teresa Bejan, Bill Casto, Ed Eberle, Bruce French, Stan Gerber, Mark Hall, Ray Person, and Ted White for comments on a draft. I also thank Brown University’s Political Theory Project for hosting me while I finished the article.

CONTENTS

I. INTRODUCTION 454

II. THE ANIMATING PRINCIPLE OF RELIGIOUS FREEDOM IN COLONIAL RHODE ISLAND..... 455

 A. *The Original Four Towns*455

 i. Providence..... 455

 ii. Portsmouth, Newport, and Warwick..... 457

 B. *Patent for Providence Plantations of 1643/4*459

 C. *Charter of Rhode Island and Providence Plantations of 1663*.....460

III. LAW AND RELIGIOUS FREEDOM IN COLONIAL RHODE ISLAND462

 A. *Laws Issued Pursuant to the 1663 Charter*462

 i. Statutes 462

 ii. Common Law 464

 B. *Legalities and the Protection of Quakers*..... 465

 C. *Legislation Targeting Specific Religious Groups*468

 i. Catholics 468

 ii. Jews 471

 iii. Quakers, revisited 472

IV. CONCLUSION..... 473

I. INTRODUCTION

Montesquieu famously concluded in *The Spirit of the Laws* that each form of government has an animating principle—a set of “human passions that set it in motion”—and that each form can be corrupted if its animating principle is undermined.¹ For Rhode Island, of course, the animating

¹CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 21, 30 (Anne M. Cohler et al. eds. & trans., 1989) (1748). It is conceivable that a regime might have more than one animating principle.

principle was religious freedom, an individual's right to believe and worship according to his conscience without restraint. What has gone unexplored to date, however, is the extent to which the laws enacted in the colony either facilitated or impeded the "lively experiment."² The purpose of this article is to investigate the relationship between law and religious freedom in colonial Rhode Island.

At present, the writing of early American legal history tends to be dominated by cultural and social approaches.³ This article—the first in a series of case studies on law and the animating principles of each of the original British American colonies—is an exegesis in intellectual legal history.⁴ Part II chronicles how central religious freedom always was in the organic laws—the town compacts, the patent of 1643/4, the charter of 1663—of colonial Rhode Island. Part III describes whether the laws enacted pursuant to those organic laws were consistent with that animating principle. Part IV assesses the tensions identified in Parts II and III.

II. THE ANIMATING PRINCIPLE OF RELIGIOUS FREEDOM IN COLONIAL RHODE ISLAND

A. *The Original Four Towns*

The founders of the four original towns in what was to become Rhode Island were all religious dissidents from Massachusetts Bay Colony and sought a refuge in which they could follow their own particular religious ideals. They also were tolerant of persons of other beliefs.⁵

i. Providence

Providence was founded in 1636 when Roger Williams and a small group of disciples fled to Narragansett Bay and purchased land from Native Americans. Williams named the settlement "Providence" because he believed that God's providence had brought him to the region. He declared

²The phrase "lively experiment" originated in a 1662 letter from John Clarke on behalf of the people of Rhode Island to Charles II. *See* Second Address from Rhode Island to King Charles the Second (1662), *reprinted in* 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND, 1636–1663, at 489, 490 (John Russell Bartlett ed., Providence, A. Crawford Greene and Brother 1856) (hereinafter "R.I. RECORDS").

³*See generally* Scott D. Gerber, *Bringing Ideas Back In: A Brief Historiography of American Colonial Law*, 51 AM. J. LEGAL HIST. 359 (2011).

⁴For an intellectual history of the origins of an independent judiciary in America that focuses on each of the original British American colonies, see SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787* (2011). The judicial history of Rhode Island is detailed in chapter 8 of that book.

⁵*See, e.g.,* MARTIN E. MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* ch. 6 (1984).

that Providence was to be a haven for those “distressed of conscience,”⁶ and it soon attracted a host of religious dissenters and other like-minded individuals.

The bulk of legal records for early colonial America are found in town archives. Unfortunately, most of Providence’s early records were destroyed in the King Philip’s War of 1675-76 when the Narragansett Indians burned the town.⁷ The two main documents that established Providence are the Providence Agreement of 1637 and a 1640 amendment to that original compact. Both documents emphasize freedom of conscience.

The Providence Agreement of 1637 was the original compact of the initial settlers. It contained the first expression of the separation of church and state in America, allowing townspeople to decide civil matters only: “all such orders and agreements as shall be made for public good of the body in an orderly way, by the major consent of the present inhabitants, masters of families incorporated together in a Towne fellowship, and others whom they shall admit into them only in civil things.”⁸

The original compact was amended in 1640 by a report of Providence arbitrators recommending that disputes between townspeople be addressed initially by five men called “disposers.” Persons unhappy with a decision of the disposers remained free to appeal the decision to a “generall towne meeting.” Most important for present purposes, the 1640 report reiterated that “Wee agree, as formerly hath bin the liberties of the town, so still, to hould forth liberty of Conscience.”⁹

⁶Confirmatory Deed of Roger Williams and his wife, of lands transferred by him to his associates in the year 1638, *reprinted in* 1 R.I. RECORDS, *supra* note 2, at 22.

⁷Gail I. Winson, *Researching the Laws of the Colony of Rhode Island and Providence Plantations: From Lively Experiment to Statehood*, in 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 1029, 1031 (Michael Chiorazzi & Marguerite Most eds., 2005).

⁸Providence Agreement (Aug. 20, 1637), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 151, 151 (Donald S. Lutz ed., 1998), *available at*

http://oll.libertyfund.org/index.php?option=com_content&task=view&id=1038&Itemid=264. Most of the documents discussed in this article are reprinted in more than one source. Spelling, punctuation, and the like often vary amongst the different sources. The phrase “only in civil things” did not appear in the first draft of the compact. *See* 2 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 7 (1936). At least one scholar of Baptist history suggests that the phrase’s initial absence indicates that Providence was not as committed to freedom of conscience as is typically maintained. *See* John C. C. Clarke, *The Pioneer Baptist Statesman*, 10 BAPTIST Q. 180, 199 (1876).

⁹Report of Arbitrators at Providence (Aug. 27, 1640), *reprinted in* COLONIAL ORIGINS, *supra* note 8, at 157, 158, *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=694&chapt=102586&layout=html&Itemid=27.

The case of Joshua Verin—“the only one of record”¹⁰—provides an early example of the extent to which Providence protected freedom of conscience.¹¹ Verin was one of the men who joined Roger Williams when Williams founded Providence. Verin and his wife Jane obtained the lot next to that of Williams. Williams, who famously established the first Baptist church in America, held services at his house. Verin refused to attend, a decision with which Williams disagreed but, not surprisingly, tolerated. Williams wrote: “we have bene long afflicted by a young man, boysterous & desparate, Philip Verins sonn of Salem, who, as he hath refused to heare the word with us (wch we molested him not for)”¹² Verin’s wife attended the services at Williams’s house for a time, but Verin eventually forbade it, which led to a complaint against him. On May 21, 1638, the town fellowship decided against Verin for breaching his wife’s freedom of conscience. The town record for that day read: “It was agreeede that Joshua Verin upon ye breach of a covenant for restraining of ye liberty of conscience shall be with held from the liberty of voting till he shall declare ye contrary.”¹³ Verin left Providence and returned to Massachusetts Bay. He brought his wife with him. She was eventually punished in Massachusetts for refusing to attend church, a result 180 degrees contrary to the animating principle of Providence.¹⁴

ii. Portsmouth, Newport, and Warwick

The town of Portsmouth was founded by additional religious exiles from the Massachusetts Bay Colony, chief among whom were Anne Hutchinson, William Coddington, and John Clarke. They settled on Aquidneck Island—then known as “Pocasett” by the Native Americans from whom it was acquired and as “Rhode Island” by the planters—in 1638 at the suggestion of Roger Williams. As Antinomians, the Portsmouth founders believed that Christians were not bound by Biblical prescriptions if God told them to do otherwise. On March 7, 1637/8, before leaving Boston, they signed an agreement now known as the Portsmouth Compact, which was more of a religious than a political charter. Its unmistakable purpose was to establish an independent Christian community.¹⁵ The Portsmouth Compact provided:

We whose names are underwritten do hereby solemnly in the presence of Jehovah incorporate ourselves into a Bodie Politick and as He shall help,

¹⁰1 THOMAS WILLIAMS BICKNELL, *THE HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS* 200 (1920).

¹¹The case is discussed in, among other places, Edward J. Eberle, *Another of Roger Williams’s Gifts: Women’s Right to Liberty of Conscience: Joshua Verin v. Providence Plantations*, 9 *ROGER WILLIAMS U. L. REV.* 399 (2004).

¹²1 BICKNELL, *supra* note 10, at 201 (quoting Roger Williams).

¹³*Id.*

¹⁴Eberle makes a convincing argument that the Verin case was an early landmark for women’s rights. See Eberle, *supra* note 11, at 404-07.

¹⁵See, e.g., 1 BICKNELL, *supra* note 10, at 292-93.

will submit our persons, lives and estates unto our Lord Jesus Christ, the King of Kings, and Lord of Lords, and to all those perfect and most absolute laws of His given in His Holy Word of truth, to be guided and judged thereby.¹⁶

Samuel Greene Arnold, author of one of the classic histories of Rhode Island, concluded that the plans of the Portsmouth founders were “more matured” than those of Providence.¹⁷ According to Thomas Williams Bicknell, author of another venerable history of Rhode Island, “in all the subsequent history of Aquidneck Colony, there was never a single instance of the abridgement of the liberties of the people in their civil or soul concerns, except in restraint of criminal acts.”¹⁸

There was, however, occasional controversy. When William Coddington was deposed as “Judge” of Portsmouth, he left the town with John Clarke in 1639 and founded Newport.¹⁹ The two towns were united in 1640, with Coddington elected governor.²⁰ The animating principle remained religious toleration. For example, in a 1641 town court session it was “ordered, by the authority of this present Courte, that none bee accounted a Delinquent for Doctrine, Provided it be not directly repugnant to ye Government or Lawes established.”²¹ In the next session it was decreed that the “law of the last Court, made concerning Libertie of Conscience, in point of Doctrine, is perpetuated.”²²

Few records exist detailing the founding of the town of Warwick, primarily because Warwick’s leader, Samuel Gorton, believed that as English subjects the planters had no lawful right to establish a government without formal permission from the Crown. Consequently, no town government was instituted and no officers were elected until 1647, three years after the

¹⁶Portsmouth Compact (Mar. 7, 1637/8), *reprinted in* THOMAS W. BICKNELL, *STORY OF DR. JOHN CLARKE: THE FOUNDER OF THE FIRST FREE COMMONWEALTH OF THE WORLD* 96 (1915), *available at* <http://www.rootsweb.ancestry.com/~rinewpor/compact.html>.

¹⁷1 SAMUEL GREENE ARNOLD, *HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS* 125 (1858). For a more recent general history, see SYDNEY V. JAMES, *COLONIAL RHODE ISLAND: A HISTORY* (1975).

¹⁸1 BICKNELL, *supra* note 10, at 294. Bicknell regards John Clarke, rather than Roger Williams, as the most important of Rhode Island’s founders. For a well regarded biography of Clarke, see SYDNEY V. JAMES, *JOHN CLARKE AND HIS LEGACIES: RELIGION AND LAW IN COLONIAL RHODE ISLAND, 1638–1750* (Theodore Dwight Bozeman ed., 1999).

¹⁹*See, e.g.*, PATRICK T. CONLEY, *DEMOCRACY IN DECLINE: RHODE ISLAND’S CONSTITUTIONAL DEVELOPMENT, 1776–1841*, at 16 (1977).

²⁰Att the Generall Courte of Election held on the twelfth day of the first month, 1640, in the Towne of Nieuport (Mar. 12, 1639/40), *reprinted in* 1 R.I. RECORDS, *supra* note 2, at 100, 101.

²¹The Generall Court of Election began and held at Portsmouth, from the 16th of March, to the 19th of the same mo., 1641, *reprinted in* 1 R.I. RECORDS, *supra* note 2, at 111, 113.

²²The Orders and Lawes made at the Generall Courte, held at Newport, the 17th of September, Ano. 1741, *reprinted in* 1 R.I. RECORDS, *supra* note 2, at 116, 118.

Patent for Providence Plantations of 1643/4.²³ It is important to note, however, that Gorton rejected organized forms of religion, believed in the divinity of humankind, and had been the object of persecution because of his beliefs. He wrote: “I yearned for a country where I could be free to worship God according to what the Bible taught me, as God enabled me to understand it. I left my native country (England) to enjoy libertie of conscience in respect to faith toward God and for no other end.”²⁴ In short, Gorton’s personal history suggests a commitment to government based on the principle of religious toleration.²⁵

B. Patent for Providence Plantations of 1643/4

The only formal bases the towns had for their governments were a Native American title for their lands and a social compact, a state-of-affairs that became problematic after neighboring colonies in New England formed an alliance—the “United Colonies”—that excluded the Narragansett Bay towns of Providence, Portsmouth, Newport, and Warwick.²⁶ Roger Williams therefore set sail for England to secure a patent from Parliament. The March 14, 1643/4 patent that resulted was the first organic law that recognized what is now the state of Rhode Island. (The official name remains to this day “Rhode Island and Providence Plantations.”) The people of Rhode Island were afforded:

full Power and Authority to rule themselves ... by such a Form of Civil Government ... they shall find more suitable to their Estate and Condition ... Provided nevertheless, that the said Laws, Constitutions, and Punishments, for the Civil Government of the said Plantations, be conformable to the Laws of England, so far as the Nature and Constitution of the place will admit.²⁷

Thomas Williams Bicknell made much of the absence of any explicit reference to religious liberty in the 1643/4 patent as support for his provocative claim that Roger Williams has been given more credit than he deserves for championing the cause in Rhode Island. In one of Bicknell’s more generous passages—Bicknell was uncompromisingly critical of Williams throughout—he wrote that “Whatever Mr. Williams may have thought or believed about soul liberty, he did not secure its adoption or protection in the patent.”²⁸

This proves too much. Although the separation of church and state was not explicitly mentioned in the patent, it can be inferred from the re-

²³See, e.g., Amasa M. Eaton, *The Development of the Judicial System in Rhode Island*, 14 YALE L.J. 148, 149 (1905).

²⁴1 BICKNELL, *supra* note 10, at 92 (quoting Samuel Gorton).

²⁵See, e.g., BERNARD BAILYN, *THE BARBAROUS YEARS: THE CONFLICT OF CIVILIZATIONS, 1600–1675*, at 435–37 (2012).

²⁶See, e.g., 2 ANDREWS, *supra* note 8, at 17.

²⁷Patent for Providence Plantations (Mar. 14, 1643/4), *reprinted in* 1 R.I. Records, *supra* note 2, at 143, 145.

²⁸1 BICKNELL, *supra* note 10, at 405.

peated use of “civil government.” Recall, for example, that the Providence Agreement of 1637 employed the phrase “only in civil things.” Moreover, the Acts and Orders of 1647—a code of laws that addressed subjects from battery and assault, to high treason, to the probate of wills—that was enacted pursuant to the 1643/4 patent ended with the following words:

These are the Lawes that concerne all men, and these are the Penalties for the transgression thereof, which by common consent are Ratified and Established throught this whole Colonie; and otherwise than thus what is herein forbidden, all men may walk as their consciences perswade them, every one in the name of his God. And lett the Saints of the Most High walk in this Colonie without Molestation in the name of Jehovah, their God for Ever and Ever, &c., &c.²⁹

C. Charter of Rhode Island and Providence Plantations of 1663

The 1643/4 parliamentary patent secured by Roger Williams was devoid of a royal seal. When the Stuart dynasty was restored to the English throne in 1660, the people of Rhode Island decided to request a royal charter from the new king, Charles II. John Clarke was tasked with the assignment.³⁰ Clarke petitioned the king in now famous language that the colony be permitted “to hold forth a lively experiment, that a flourishing civill State may stand, yea, and best be maintained, and that among English spirits, with a full liberty in religious concernments[.]”³¹

The king granted the petition. The 1663 charter remained the organic law of Rhode Island until the constitution of 1843 went into effect.³² The charter’s commitment to religious liberty is worth quoting at length:

And whereas, in their humble addresse, they have ffreely declared, that it is much on their hearts (if they may be permitted), to hold forth a livlie

²⁹Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, Anno. 1647, for the Colonie and Province of Providence, *reprinted in* 1 R.I. RECORDS, *supra* note 2, at 147, 190. *See generally* G. B. Warden, *The Rhode Island Civil Code of 1647*, in SAINTS & REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY 138 (David D. Hall et al. eds., 1984) (discussing how the 1647 Rhode Island code addresses freedom of conscience).

³⁰*See, e.g.*, 2 ANDREWS, *supra* note 8, at 37-46.

³¹Second Address from Rhode Island to King Charles the Second (1662), *supra* note 2, at 490-91.

³²Rather than do what almost all of the other newly independent states did in 1776—write a constitution for the state—Rhode Island did no more than abolish the oath of allegiance to the Crown. *See, e.g.*, PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE 14 (2007). Conley and Flanders’s reference book contains a detailed bibliographical essay. Many of the leading historical analyses of the lively experiment are summarized on pages 291-94 of their book. A useful overview of general histories of Rhode Island’s colonial era is found on pages 280-81.

experiment, that a most flourishing civill state may stand and best bee maintained, and that among our English subjects, with a full libertie in religious concernements; and that true pietye rightly grounded upon gossell principles, will give the best and greatest security to sovereignty, and will lay in the hearts of men the strongest obligations to true loyaltye: Now know ... that wee beinge willinge to encourage the hopefull undertakeinge of oure sayd loyall and loveinge subjects, and to secure them in the free exercise and enjoyment of all their civill and religious rights, appertaining to them, as our loveing subjects; and to preserve unto them that libertie, in the true Christian ffaith and worshipp of God, which they have sought with soe much travaill, and with peaceable myndes, and loyall subjectione to our royall progenitors and ourselves, to enjoye; and because some of the people and inhabitants of the same colonie cannot, in their private opinions, conforme to the publique exercise of religion, according to the littyurgy, formes and ceremonyes of the Church of England, or take or subscribe the oaths and articles made and established in that behalfe; and for that the same, by reason of the remote distances of those places, will (as wee hope) bee noe breach of the unitie and unifformitie established in this nation: Have therefore thought ffit, and doe hereby publish, graunt, ordeyne and declare, That our royall will and pleasure is, that noe person within the sayd colonie, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinionie in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and their owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peaceable and quietlie, and not using this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbance of others; any lawe, statute, or clause, therein contayned, or to bee contayned, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding. And that they may bee in the better capacity to defend themselves, in their just rights and libertyes against all the enemies of the Christian ffaith, and others, in all respects, wee have further thought fit, and at the humble petition of the persons aforesayd are grateously pleased to declare, That they shall have and enjoye the benefitt of our late act of indempnity and ffree pardon, as the rest of our subjects in other our dominions and territoryes have; and to create and make them a bodye politique or corporate, with the powers and priviledges hereinafter mentioned.³³

³³Charter of Rhode Island and Providence Plantations (July 15, 1663), *reprinted in 2 R.I. RECORDS, 1664–1677*, at 1, 4-6 (John Russell Bartlett ed., Providence, A. Crawford Greene and Brother 1857). A series of public events were sponsored in Rhode Island during 2013 to celebrate the 350th anniversary of the charter. See <http://www.spectacleoftoleration.org/>.

III. LAW AND RELIGIOUS FREEDOM IN COLONIAL RHODE ISLAND

A. Laws Issued Pursuant to the 1663 Charter

i. Statutes

Not many laws were enacted in early colonial America. Instead, the planters focused primarily on survival.³⁴ Although Rhode Island famously adopted a code of laws in 1647 that was derived from the laws and statutes of England,³⁵ what internal disputes initially occurred in the original four towns tended to be resolved on a case by case basis in town meetings and, in some instances, by “disposers” (in Providence)³⁶ or a “judge” assisted by town elders and, occasionally, juries (in Portsmouth and Newport)³⁷ rather than via broader ordinances.³⁸ Statutory enactments became more commonplace after the 1663 charter went into effect, and several of them were specifically designed to protect the “livlie experiment.”³⁹ (An inordinate amount of time was devoted under the 1643/4 patent to inter-town bickering.)⁴⁰

For example, at the first regular May 1664 legislative session of the Rhode Island general assembly convened pursuant to the charter of 1663, the assembly deemed it appropriate to reiterate the colony’s animating principle: “that noe person within the Colony, at any time hereafter, shall be in any ways molested, punished, disquieted, or called in question for any difference of opinion in matters of religion and do not actually disturb the civil peace of the Colony.”⁴¹ The assembly repeated the colony’s animating principle in the May 1665 legislative session.⁴²

³⁴See, e.g., BAILY, *supra* note 25.

³⁵The preamble to the 1647 code of laws reiterated the importance of freedom of conscience, as did the previously described conclusion to the code. The preamble provided in pertinent part that “each man’s peaceable and quiett enjoyment of his lawfull right and Libertie, we doe agree vnto, and by authoritie above said, Inact, establish, and confirme[.]” Acts and Orders, *supra* note 29, at 156-57.

³⁶A clerk was elected in Providence to keep a record “of all things belonging to the Towne and lieing in Comon.” It was agreed that “as formerly hath been the libertyes of the Towne, so still to hold forth Liberty of Conscience.” 1 BICKNELL, *supra* note 10, at 224 (quoting the town record).

³⁷Portsmouth and Newport were similar in this regard because the latter was founded by onetime leaders of the former. *See id.* at 307.

³⁸See GERBER, A DISTINCT JUDICIAL POWER, *supra* note 4, at 160-62.

³⁹Colonies not under the direct administration of the Crown, including Rhode Island, operated for years under the threat of having their charters revoked for enacting laws that were repugnant to the laws of England. As a result, the early statutes of colonial Rhode Island sometimes concealed their true meaning so as to avoid scrutiny by the Crown. *See* MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE ch. 3 (2004).

⁴⁰See, e.g., 1 BICKNELL, *supra* note 10, at ch. 18.

⁴¹Newport, March 10, 1663–64, To our much Honoured and Highly Esteemed ffriend John Winthrop, Esqr., Governour of Quonecticott, &c., and to the Councill or

Law and the Lively Experiment in Colonial Rhode Island

With respect to more specific pieces of legislation, in 1673 the Rhode Island legislators enacted the broadest law in colonial America permitting members of religions who were pacifists, as well as anyone religiously opposed to war, not to train, fight, or bear arms. The Rhode Island statute was broader than those enacted in other colonies because it applied both to those whose objections were religiously based and to those whose consciences did not permit them to bear arms. But the statute also provided that religious and conscientious objectors could be required to perform civil service in times of war. The statute was enacted primarily to protect Quakers, who at the time comprised almost half of Rhode Island's population and for whom pacifism was a central religious tenet. The statute provided in pertinent part:

Voted, and further needfull to be considered for this present occasion a more certain peaceable settlement for the ending of strife and unprofitable contention, which hath too long continued, as to the liberty of some men's consciences, which others are not willing to allow or permit concerning trayninge and fightinge to kill thereby. And forasmuch as from the beginninge of these Plantations law hath been enacted as to liberty of conscience then senceable of others oppression of their owne conscience; and consideringe that every one, ought both toward God and man to have a conscience unspotted, by doing that which God requireth to be done, or not doing that which he requires not to be done toward man, and pure religion before God the Father, is to visitt the fatherless and the widow, and to keep ourselves unspotted of this world or worldly things ... If marrynge of a wife shall excuse a man from war, how much more any such who are perswaded in their consciences that they are espoused to Christ, and that if they should learne war or war, would occasion a difference and distance between them forever ... Bee it therefore enacted, and hereby it is enacted by his Majestys authority, that noe person nor persons (within this Collony), that is or hereafter shall be persuaded, in his, their conscience or consciences, that henor they cannot nor ought not to trayne, to learne to fight, nor to war, nor to kill any persons nor persons ... nor shall suffer any punishment, fine, distraint, pennalty nor imprisonment, who cannot in conscience traine, fight, nor kill any person nor persons for the aforesaid reasons⁴³

Assistants there, *reprinted in* 2 R.I. RECORDS, *supra* note 33, at 36, 37 (quoting the legislative record).

⁴²*See, e.g.*, 1 A HISTORY OF NEW ENGLAND 401 (R. H. Howard & Henry E. Crocker eds., Boston, Crocker & Co. 1879), *available at* <http://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t8rb7df16;view=1up;seq=12>.

⁴³Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 13th of August, 1673, *reprinted in* 2 R.I. RECORDS, *supra* note 33, at 488, 495-98. The statute was repealed in May 1676 during wartime and re-enacted six months later at the October session of the general assembly. The October 1676 iteration of the law allowed only people belonging to a "religion" (as opposed to private conscience alone) to benefit from the exemption. Nevertheless, this Rhode Island law was broader than similar laws enacted in other colonies. For example, in New York only those persons belonging to a well recognized

In 1716, the general assembly enacted a statute regulating the maintenance of ministers in the colony. The law provided that:

what maintenance of salary may be thought needful or necessary by any of the churches, congregations, or societies of people now inhabiting, or that hereafter may inhabit within any part of this government, for the support of their, or either of their minister or ministers, may be raised by free contribution, and no other ways.⁴⁴

The assembly averred in the preamble that the purpose of the law was to prevent one congregation or sect from being favored above another. In fact, the law opened by reiterating the animating principle of the colony: “there was a charter granted to this His Majesty’s colony, in which were contained many gracious privileges for the encouragement and comfort of the inhabitants thereof; amongst them, that of free liberty of conscience in religious concernments, being the most principal[.]”⁴⁵ The statute also decreed that its objective was “the timely preventing of any and every church, congregation and society of people ... their endeavoring for pre-eminence or superiority of one over the other, by making use of the civil power for the enforcing of a maintenance for their respective ministries[.]”⁴⁶

ii. Common Law

The early common law of Rhode Island appears to have facilitated Rhode Island’s commitment to religious liberty. I say “appears to have” because there was a paucity of litigation in the early years for the reasons described above, and court records are difficult to come by for what little litigation there was.⁴⁷ Indeed, William E. Nelson—who has done more work with colonial court records than any legal historian of the present day—does not cite a single case from Rhode Island about the separation of church and state in his ambitious book *The Common Law in Colonial America: Volume 1: The Chesapeake and New England*. Instead, Nelson surmises from the dog that did not bark in the night: “the judicial records of the colony contain none of the cases of enforced contribution, excommunication, schism, and subordination of the clergy that occurred in Connecticut and Massachusetts.”⁴⁸

religion were exempted, while Rhode Island’s provision applied to smaller sects and religions that were not necessarily widely recognized.

⁴⁴Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 2d day of May, 1716, *reprinted in* 4 R.I. RECORDS, 1707–1740, at 205, 206 (John Russell Bartlett ed., Providence, Knowles, Anthony & Co. 1857).

⁴⁵*Id.* at 205.

⁴⁶*Id.* at 206.

⁴⁷See WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: VOLUME 1: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660*, at 97-98 (2008).

⁴⁸*Id.* at 97. See generally Arthur Conan Doyle, *Silver Blaze*, at 10, available at <http://sherlock-holmes.classic-literature.co.uk/silver-blaze/ebook-page-10.asp> (story in

Mary Sarah Bilder's work utilizing colonial Rhode Island as a case study of the so-called transatlantic constitution—the notion that a colony's laws could not be repugnant to the laws of England but could differ from them for justifiable reasons of people and place⁴⁹—provides support for Nelson's supposition. More specifically, Bilder devotes an entire chapter of her book to a thirty-year case involving three hundred acres of land in which the Privy Council ultimately concluded that the New England colonies could diverge from the laws of England that promoted the Church of England as the established religion.⁵⁰ Bilder writes:

The thirty-year case asked which interpretation of *orthodox* applied in Rhode Island: that of (1) the Church of England, (2) the presbyterian/congregationalists, or (3) individual determination. James MacSparran, an ordained minister of the Church of England, thought that Rhode Island should interpret *orthodox* as in England so that the land would support him. Joseph Torrey, a Harvard-educated congregational minister, thought that Rhode Island should follow Massachusetts's divergent interpretation of orthodoxy and that the land should support him. The significance of the decision was great. If Rhode Island had to follow the laws of England supporting the Church of England, Rhode Island's nonestablishment and Massachusetts's religious establishment would both end. If the Massachusetts dissenters were accepted as orthodox, Rhode Island could become an extension of the Massachusetts establishment. The three hundred acres provided a rhetorical space for a battle between the missionary arms of Massachusetts presbyterian/congregationalism and the Church of England, each seeking to define a place in the founding of America. Amid legal machinations, published spin control, and massive fund-raising, accusations flew and history was rewritten.⁵¹

The Privy Council's preference for option 3 in 1752 was an indirect endorsement of the animating principle of Rhode Island. As such, a "colony founded without orthodoxy, without establishment, and without state support for religion could continue."⁵²

B. Legalities and the Protection of Quakers

Historians of early American law have been focusing in recent years on "legalities" rather than law.⁵³ As Christopher L. Tomlins defines it, "legalities are not produced in formal settings alone. They are social products, generated in the course of virtually any repetitive practice of wide ac-

which Sherlock Holmes solves a mystery on the basis of the dog that did not bark in the night).

⁴⁹BILDER, *supra* note 39, at 1.

⁵⁰*See id.* at ch. 7.

⁵¹*Id.* at 147.

⁵²*Id.* at 167.

⁵³*See, e.g.,* THE CAMBRIDGE HISTORY OF LAW IN AMERICA, VOLUME 1: EARLY AMERICA (1580-1815) (Michael Grossberg & Christopher L. Tomlins eds., 2008); THE MANY LEGALITIES OF EARLY AMERICA (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

ceptance within a specific locale, call the result rule, custom, tradition, folkway or pastime, popular belief or protest.”⁵⁴ Colonial Rhode Island was replete with legalities, including with respect to its animating principle. The protection afforded to Quakers is a compelling illustration of this fact: although, with the possible exception of the conscientious objector statute of 1673 described above, no specific legislation was enacted protecting Quakers and their religious beliefs, the legalities that developed in the colony did precisely that.

Quakers began fleeing to Rhode Island in 1657 so as to avoid the persecution they were suffering in other colonies, especially Massachusetts, where many were hanged and tortured.⁵⁵ Rhode Island became so popular with Quakers that, in 1651, The Yearly Meeting for Friends in New England was established in Newport.⁵⁶ Members of the Society of Friends from several parts of New England would travel to Newport to attend the yearly meeting.⁵⁷ A number of influential Rhode Islanders became members of the Society of Friends. For example, by 1675 Governor William Coddington, deputy governor John Easton, and assistants Walter Clarke and Henry Bull were Quakers.⁵⁸ Ten of the twelve council members at that time were Quakers and of the thirty men in the assembly, at least sixteen were Quakers.⁵⁹ And while Quakers were criticized by many in Rhode Island, by 1672 they controlled the politics of the colony.⁶⁰ By 1700, one half of the inhabitants of the colony were Quakers.⁶¹

On September 12, 1657, the commissioners of the United Colonies of New England issued a request to the governor of Rhode Island that Quakers be banned from the colony because of the danger Quakers allegedly posed to the religious integrity of New England.⁶² The commissioners threatened Rhode Island with the closure of the channels of inter-colonial trade if their request was denied.⁶³ On October 13, 1657, Rhode Island an-

⁵⁴Christopher Tomlins, *Introduction* to THE MANY LEGALITIES OF EARLY AMERICA, *supra* note 53, at 1, 2-3.

⁵⁵*See, e.g.*, CRAIG A. DOHERTY & KATHERINE M. DOHERTY, RHODE ISLAND 37 (2005).

⁵⁶*See, e.g.*, RUFUS M. JONES, THE QUAKERS IN THE AMERICAN COLONIES 54 n.1 (1923).

⁵⁷*Id.*

⁵⁸*See, e.g.*, MEREDITH BALDWIN WEDDLE, WALKING IN THE WAY OF PEACE: QUAKER PACIFISM IN THE SEVENTEENTH CENTURY 138 (2001).

⁵⁹*Id.*

⁶⁰*See* 1 ARNOLD, *supra* note 17, at 399.

⁶¹*See, e.g.*, WILLIAM BABCOCK WEEDEN, EARLY RHODE ISLAND: A SOCIAL HISTORY OF THE PEOPLE 269 n.8 (1910) (citing GEORGE CHAMPLIN MASON, ANNALS OF TRINITY CHURCH: NEWPORT, RHODE ISLAND, 1698-1821, at 10 (Philadelphia, Evans Printing House 1890), available at <http://archive.org/details/annalsoftrinityc00maso>).

⁶²CHARLES FREDERICK HOLDER, THE QUAKERS IN GREAT BRITAIN AND AMERICA: THE POLITICAL AND RELIGIOUS HISTORY OF THE SOCIETY OF FRIENDS FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 387-88 (1913).

⁶³IRVING BERDINE RICHMAN, RHODE ISLAND: ITS MAKING AND ITS MEANING 83 (1902).

swered the United Colonies.⁶⁴ Although at this point in Rhode Island's history there was little sympathy for Quakers in the colony, President Benedict Arnold and the court of trials refused to persecute them. The Rhode Island leaders were unambiguous in their commitment to the animating principle of the lively experiment:

Our desires are, in all things possible, to pursue after and keep fair and loving correspondence and intercourse with all the colonies and all our countrymen in New England ... [but] as concerning these Quakers, (so called,) which are now among us, we have no law among us whereby to punish any for only declaring by words, &c., their minds and understandings concerning the ways and things of God as to salvation and an eternal condition.⁶⁵

Five months later, the Rhode Island general assembly sent another letter reiterating to the neighboring colonies of New England that freedom of conscience was "the principal ground of our Charter" and it was the freedom "we still prize as the greatest hapines that men can possess in this world."⁶⁶ The assembly conceded, however, that Quakers, like all persons residing in Rhode Island, would be expected to fulfill their civil duties so that there would be "noe damadge, or infringement of that chiefe principle in our charter concerninge freedom of consciences."⁶⁷

Roger Williams himself held strong views about Quakerism, something that manifested itself in particularly dramatic fashion when Williams learned that George Fox, the founder of the Society of Friends, would be traveling to Newport in 1672 at the invitation of Governor Nicholas Easton. Rhode Island was the only New England colony that Fox ever visited,⁶⁸ and he remarked that, in Rhode Island, there was "no restriction to any particular way of worship."⁶⁹ The Puritans famously accused the Quakers of antinomianism—going "against the law"—because the Quakers were notorious for ignoring common social conventions (such as keeping their hair cropped) and public laws of decency (such as clothing themselves

⁶⁴JAMES D. KNOWLES, *MEMOIR OF ROGER WILLIAMS: THE FOUNDER OF THE STATE OF RHODE-ISLAND* 294 (Boston, Lincoln Edmands and Co. 1834), *available at* <http://archive.org/details/memoirofrogerwil00kn>.

⁶⁵ISAAC BACKUS, *A HISTORY OF NEW ENGLAND: WITH PARTICULAR REFERENCE TO THE DENOMINATION OF CHRISTIANS CALLED BAPTISTS* 250 n.1 (Newton, Mass., Backus Historical Society 2d ed. 1871) (reprinting Rhode Island's response), *available at* <http://ia601205.us.archive.org/29/items/newengl01back/newengl01back.pdf>.

⁶⁶Letter from the General Assembly of the Colony of Providence Plantations to the Massachusetts, in reply to the letter of the Commissioners concerning the Quakers (Mar. 13, 1658/9), *reprinted in* 1 R.I. RECORDS, *supra* note 2, at 378, 379.

⁶⁷*Id.*

⁶⁸WEEDEN, *supra* note 61, at 89.

⁶⁹SAMUEL M. JANNEY, *THE LIFE OF GEORGE FOX: WITH DISSERTATIONS ON HIS VIEWS CONCERNING THE DOCTRINES, TESTIMONIES, AND DISCIPLINE OF THE CHRISTIAN CHURCH* 330 (Philadelphia, Lippincott, Grambo & Co. 1853) (quoting George Fox), *available at* <http://archive.org/stream/lifeofgeorgefox00jann#page/n7/mode/2up>.

in public).⁷⁰ Williams disagreed with many of these Quaker practices.⁷¹ When Williams learned that Fox would be traveling to Rhode Island, he challenged Fox to a debate on fourteen points of doctrine, seven to be publicly discussed in Newport and seven in Providence.⁷² Williams took Fox's visit so seriously that, even though Williams was seventy years old at the time, he rowed from Providence to Newport—approximately thirty miles on a boat—to meet Fox. Unfortunately for Williams, Fox had already left,⁷³ and Williams ended up debating three of Fox's followers (John Burnyeat, John Stubbs, and William Edmondson) instead.⁷⁴ Williams described the outcome of the debates in a volume entitled *George Fox Digged Out of His Burrowes*. Williams insisted that some Quaker customs were “incivilities” that needed to be “restrained and punished,” and that such restraint and punishment would not amount to “persecution,” even though the “incivilities” themselves were committed under an alleged command of conscience.⁷⁵ Williams also wanted to punish the Quakers' use of “thou” and “thee”.⁷⁶ All of this said, and this is the critical point as far as legalities are concerned, despite Williams's personal distaste for Quaker theology, he felt obligated to extend to Quakers the same protections from state persecution that he had sought for himself by responding to their beliefs through intellectual debate rather than governmental power.⁷⁷

C. Legislation Targeting Specific Religious Groups

i. Catholics

Although Rhode Island's 1663 charter proclaimed that “noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion,”⁷⁸ a statute that some scholars insist was anti-Catholic (and anti-Jewish) was contained in the Digest of Rhode Island Laws of 1719, which was Rhode Island's first published codification of the laws of the colony. The statute provided in pertinent part that:

all men professing Christianity and of competent estates and of civil conversation who acknowledge and are obedient to the civil magistrate

⁷⁰See, e.g., ON RELIGIOUS LIBERTY: SELECTIONS FROM THE WORKS OF ROGER WILLIAMS 35 (James Calvin Davis ed., 2008).

⁷¹*Id.*

⁷²WEEDEN, *supra* note 61, at 90.

⁷³See, e.g., 6 APPLETONS' CYCLOPÆDIA OF AMERICAN BIOGRAPHY *Roger Williams* 531, 533 (James Grant Wilson & John Fiske eds., New York, D. Appleton and Company 1889), available at <http://ia600301.us.archive.org/3/items/appletonscyclo06wilsrich/appletonscyclo06wilsrich.pdf>.

⁷⁴JONES, *supra* note 56, at 118.

⁷⁵*Id.*

⁷⁶RICHMAN, *supra* note 63, at 101.

⁷⁷Davis, *supra* note 70, at 35.

⁷⁸Charter of Rhode Island and Providence Plantations, *supra* note 33.

Law and the Lively Experiment in Colonial Rhode Island

though of different judgments in Religious Affairs (Roman Catholics only excepted) shall be admitted Freemen and shall have liberty to choose and be chosen Officers in the Colony both military and civil.⁷⁹

The central question in the longstanding debate surrounding this provision concerns the date of its enactment. Because it was printed in the Digest of 1719, some scholars maintain that the provision was enacted prior to that date; more specifically, they contend that it was passed at the March 1663/4 session of the general assembly. Other students of Rhode Island colonial history insist, in contrast, that the provision's placement in the 1719 digest was a mistake and that it was unlikely that the law was enacted so soon after—*immediately* after—the issuance of the 1663 charter. Most recently, Patrick T. Conley and Robert G. Flanders, Jr.—the former being the leading living historian of Rhode Island, the latter a respected former Rhode Island supreme court justice—contend that it is “highly improbable” that this anti-Catholic legislation was enacted at any time prior to 1719 because no evidence of its existence is available in the original general assembly proceedings for 1663/4, or for any subsequent session. They also point out that the law was not recorded in the manuscript Laws and Acts of 1705, the colony's first manuscript digest. Moreover, the fact that Roger Williams was a member of the committee of the general assembly that revised the law in which the anti-Catholic provision was purported to be a part makes it doubtful that it was enacted in 1663/4, because Williams would have forbade it.⁸⁰

Additional arguments exist against the anti-Catholic legislation having been enacted in 1663/4, or at any point prior to 1719. A few scholars claim, for example, that the law could not have been enacted in 1663/4 because no Catholics lived in Rhode Island at the time. Some evidence is available that supports this claim. In 1680, for instance, Governor Peleg Sanford wrote to the English Board of Trade that “as for Papists, we know of none amongst us.”⁸¹ But Reverend Lucian Johnson, for one, found this argument unpersuasive. After all, he averred in a book on the subject, anti-Catholic legislation was enacted in a number of other colonies—Georgia,

⁷⁹SIDNEY S. RIDER, AN INQUIRY CONCERNING THE ORIGIN OF THE CLAUSE IN THE LAWS OF RHODE ISLAND (1719–1783) DISENFRANCHISING ROMAN CATHOLICS 25 (Providence, E.A. Johnson & Co. 1889) (quoting the provision), *available at* <http://archive.org/stream/rhodeislandhist01ridegoog#page/n5/mode/2up>.

⁸⁰See CONLEY & FLANDERS, *supra* note 32, at 59. The most detailed account disclaiming the existence of the anti-Catholic provision in 1663/4 remains RIDER, *supra* note 79. John Richard Meade concluded that the provision was *required* to be added to the Rhode Island statute in question in 1719 so that Rhode Island's laws would not be repugnant to the laws of England. At the time, English law provided that no Catholic could serve in Parliament, inherit or purchase land, or enjoy the rights of citizenship. See John Richard Meade, *The Truth Concerning the Disenfranchisement of Catholics in Rhode Island*, 19 AM. CATHOLIC Q. REV. 169, 175–76 (1894).

⁸¹LUCIAN JOHNSON, RELIGIOUS LIBERTY IN MARYLAND AND RHODE ISLAND 40 (1903) (quoting Governor Sanford's letter).

Massachusetts Bay, New Jersey, and Plymouth, to mention four—prior to the arrival of Catholics in those colonies.⁸²

Another argument against the contention that the anti-Catholic provision was enacted in 1663/4 is that in 1684 the Rhode Island general assembly granted protection to Jews (“good protection here as any other resident foreigners”). Thus, it is maintained, it is unlikely that a law denying Catholics political rights could have existed at the time. The response to this contention is that the anti-Catholic provision still could have been enacted in 1663/4 because it did not mandate persecution of anyone or deny any kind of protection to anyone, but merely failed to permit Jews and Catholics from becoming freemen, voters, and elected officials. As Reverend Johnson succinctly put it, “If anything, this [1684] act of the Assembly proves plainly that Jews were denied citizenship, and thus confirms the law of 1663.”⁸³

But, according to Johnson, the strongest argument for the anti-Catholic provision existing in 1663/4 is this: that the Aquidneck settlements of Portsmouth and Newport were less tolerant than the Providence settlement, and when all the settlements united in 1663, it is conceivable that the representatives from Aquidneck constituted a majority of the Rhode Island general assembly and thereby outvoted their more tolerant colleagues from Providence.⁸⁴ Johnson likewise credited the anti-Catholic agitation of 1696 that engulfed England as support for the contention that there long had been anti-Catholic sentiment in Rhode Island. More specifically, after the plot against the life of King William, anti-Catholic agitation reached a fever pitch in England, which included letters being circulated throughout the colonies of English America condemning “popish conspirators.”⁸⁵ These letters were published “with great parade and joy in Rhode Island, and promises were made to apprehend the conspirators should they come to the colony.”⁸⁶ As a result, Johnson concluded, the Rhode Island anti-Catholic provision in question was “a straw showing the direction of the river’s current.”⁸⁷ Last but far from least, the anti-Catholic provision was, at a minimum, “re-enacted” in 1719, 1730, 1745, 1752, and 1767, and was repealed only in 1783, which was *after* Rhode Island became a state.⁸⁸

⁸²*Id.* at 41. Johnson’s venerable book nicely catalogs the arguments for and against the view that the anti-Catholic provision was enacted in 1663/4 and this section of this article benefited from it.

⁸³*Id.* at 42.

⁸⁴*Id.* at 43. As Part II.A of this article indicates, scholars also disagree about which of the Rhode Island towns was the most tolerant.

⁸⁵*Id.* at 46.

⁸⁶*Id.*

⁸⁷*Id.* at 47.

⁸⁸*Id.* at 46.

ii. Jews

A strong argument can be made that the enactment in 1673 of a Sunday-Observance law is further proof that freedom of religion in Rhode Island was enjoyed by Christians only. Reverend Johnson was unambiguous on the matter. He wrote:

In 1673, a law was enacted to restrain “gaming and tipping” on Sunday (Arnold, 367). Whatever may be our aversion to both gaming and tipping, still any law making a misdemeanor punishable because committed on *Sunday, ipso facto*, makes Christianity a law of the State, introduces a union of Church and State to the prejudice of Jews, atheists, pagans, etc., who for their own reasons may wish to treat Sunday with no more reverence than any other day.⁸⁹

A plausible response to the above concern would be that the law was specifically intended to protect freedom of conscience by ensuring that Rhode Islanders who wished to worship on Sunday would be undisturbed by those who did not. The statute itself provided support for this proposition:

although wee know by man not any can be forced to worship God or forced to keep holy or not to keep holy any day; but forasmuch as the first dayes of weeks, it is usuall ... Therefore, this Assembly, not to oppose or propagate any worship, but as by preventinge debaistnes, although wee know masters or parents cannot and are not by violence, to indeavor to force any under their government, to any worshipper from any worshipping, that is not debaistnes or disturbant to the civill peace, but they are not to require them, and if that will not prevaile, if they can they should compell them not to doe what is debaistnes, or uncivill or inhuman, not to frequent any imodest company or practices.⁹⁰

But the fact that the law in question applied to Sundays only does make it appear as if Christianity was afforded special treatment in the colony. Moreover, that was how the law was enforced by the government. For example, a July 28, 1739, directive *The Sunday Law in Newport* contained “instructions to the Sunday constables of Newport, in relation to the enforcement of the [Sunday observance law] regulating the proper observance of the Sabbath.”⁹¹ The directive was signed by the governor, his assistants, and two justices of the peace.⁹² They requested that the Sunday law be strictly enforced in Newport because “there are daily complaints of riotous and disorderly persons meeting together in taverns, making routs and noises in the streets and using many other diversions contrary to said law to the

⁸⁹*Id.* The statute itself is available at Proceedings of the Generall Assembly of the Colony of Rhode Island and Providence Plantations, held at Newport, September the 2d, 1673, reprinted in 2 R.I. RECORDS, *supra* note 33, at 500, 503-04.

⁹⁰Sunday-Observance Law, *supra* note 89, at 503.

⁹¹The Sunday Law in Newport, 1739, reprinted in 1 NEWPORT HIST. MAG. 251, 251 (1880–81).

⁹²*Id.* at 253.

dishonor of God and to the great scandal of government.”⁹³ The directive also asked the constables “to walk through the streets each First Day of the week, during the whole day, and more especially during the time of divine service ... and return the names of all persons whom you shall find transgressing the said laws, particularly.”⁹⁴

The case of Aaron Lopez and Isaac Elizer provides additional evidence that Jews were sometimes treated unfavorably in Rhode Island. The case traced to the British Naturalization Act of 1740, which made it possible for a Jew in any colony in British America to become naturalized after residing in the particular colony for seven years or more, without being absent more than two consecutive months.⁹⁵ However, the Act was not always implemented, including in Rhode Island. With respect specifically to Lopez and Elizer, the superior court of Rhode Island rejected their petitions for citizenship as inconsistent with the animating principle of the colony. The court wrote:

by the charter granted to this Colony, it appears that the free and quiet *enjoyment of the Christian religion and a desire of propagating the same, were the principal views with which this colony was settled*, and by a law made and passed in 1663 no person who does not profess the Christian religion can be admitted free of this Colony. This court therefore *unanimously* dismiss this petition as *wholly inconsistent with the first principles upon which the Colony was founded*.⁹⁶

It is difficult to find anything tolerant of non-Christians in that pronouncement from the superior court.⁹⁷ That said, it should be noted that Catholics were with some regularity naturalized upon petition to the Rhode Island general assembly, and some Jews were also naturalized by the assembly.⁹⁸ Apparently, the legislators were more committed to the animating principle of the colony than the judges were.

iii. Quakers, revisited

As described above, Quakers, who had been chastised and occasionally tortured in other colonies, found freedom in Rhode Island. By 1672,

⁹³*Id.* at 251.

⁹⁴*Id.* at 252.

⁹⁵*See, e.g.*, JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 74 (1978).

⁹⁶JOHNSON, *supra* note 81, at 43–44 (quoting the decision).

⁹⁷*See, e.g.*, David C. Adelman, *Strangers: Civil Rights of Jews in the Colony of Rhode Island*, 13 R.I. HIST. 65 (1954). *See generally* MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* (1984) (chronicling the ways in which many mainstream Protestants worked to maintain preferential treatment for Christians in common law, state constitutions, and federal practices).

⁹⁸2 SAMUEL GREENE ARNOLD, *HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1700–1790*, at 494 (New York, D. Appleton & Company 1860), available at <http://archive.org/stream/historystaterho03arnogoog#page/n504/mode/2up>.

they controlled the politics of the colony and, by 1700, half of the inhabitants of Rhode Island were Quakers. But some commentators have nevertheless maintained that, in 1665, the Rhode Island government passed an order to outlaw Quakers and seize their estates because of their refusal to bear arms.⁹⁹

As with the 1663/4 anti-Catholic legislation, however, other historians have questioned the status of the 1665 so-called anti-Quaker law. In *Memoir of Roger Williams*, for example, James D. Knowles insisted that the law was not anti-Quaker per se.¹⁰⁰ Rather, it traced to the decree from the Crown that “all householders, inhabiting this colony [Rhode Island] take the oath of allegiance.”¹⁰¹ The Rhode Island general assembly replied that it had been the uniform practice of the colony, in pursuance of its foundational commitment to religious liberty, to allow persons who objected to oath taking to make an engagement, under the penalty for false swearing. The resulting engagement required a promise to bear true allegiance to the Crown and “due obedience unto the laws established from time to time.” Quakers objected to the latter provision because it required obedience to the militia laws. The assembly also had specified that persons who did not take the engagement would not be permitted to “vote for public officers or deputies, or enjoy any privilege of freemen,”¹⁰² which, of course, impacted Quakers directly. But, as Knowles pointed out, the law was not specifically intended to punish Quakers and therefore should not be classified as an “anti-Quaker” law.¹⁰³ Moreover, an “engagement to obey the laws would, of course, mean such laws only as were consistent with the laws of God and with the rights of conscience.”¹⁰⁴ Perhaps most tellingly of all, the engagement was amended the very next year to eliminate the disenfranchisement penalty and a Quaker was elected deputy governor of the colony.¹⁰⁵

IV. CONCLUSION

Freedom of religion remains Rhode Island’s animating principle to the present day, at least formally. Article I, Section 3 of the Rhode Island State Constitution provides in pertinent part:

whereas a principal object of our venerable ancestors, in their migration to this country and their settlement of this state, was, as they expressed it, to hold forth a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concerns; we, therefore, declare that no person shall be compelled to frequent or to support

⁹⁹See, e.g., 1 ABIEL HOLMES, AMERICAN ANNALS 331 (1805) (tracing the claim to Frances Brinley, who had constructed the famous White Horse Tavern in Newport in 1652).

¹⁰⁰KNOWLES, *supra* note 64, at 324.

¹⁰¹*Id.* (quoting the decree).

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Id.* at 325.

¹⁰⁵*Id.*

any religious worship ... nor enforced, restrained, molested, or burdened in body or goods ... and that every person shall be free to worship God according to the dictates of such person's conscience¹⁰⁶

As a historical matter, however, Rhode Island's commitment to religious liberty is not unambiguous. Although it is undeniable that every town compact, parliamentary patent, royal charter, and constitution since Rhode Island's founding has proclaimed that freedom of religion is the animating principle of the polity,¹⁰⁷ a number of laws were enacted during the colonial period that were inconsistent with the animating principle, especially those that penalized Catholics, Jews, and/or Quakers.¹⁰⁸ Perhaps the founders of Rhode Island were no less hypocritical than the founders of the United States. After all, America's founders decreed in the Declaration of Independence that "all men are created equal," while they simultaneously enslaved blacks and dis-empowered women.¹⁰⁹ Abraham Lincoln defended America's founders by suggesting that the Declaration set forth an *ideal* for which the Nation should strive in the *future*.¹¹⁰ Are we compelled to conclude likewise about the founders of Rhode Island and the animating principle of religious liberty?

Not necessarily. Perhaps Rhode Island's founders understood the distinction between liberty and license better than those of us who sometimes mistakenly equate liberty with the absence of all restraint. Roger Williams certainly understood the distinction between the two, and there is no better way to conclude an exegesis on law and the lively experiment in colonial Rhode Island than with Williams's parable articulating what he regarded as the true meaning of freedom of conscience.

Williams often wrote about the tension between freedom of conscience and civil order, in large part because many of the early settlers of Providence had believed from the beginning that freedom of religion meant the absence of all restraint, civil as well as religious.¹¹¹ For example, a riot in Providence during the winter of 1654-55 over the colony's attempt to establish a regular militia persuaded Williams to publish a letter about

¹⁰⁶R.I. CONST. art. 1, § 3.

¹⁰⁷Because the animating principle of religious liberty was included in Rhode Island's first charter, Rhode Island's organic law enjoys greater significance than, for example, the Act Concerning Religion, a statute enacted by Maryland's general assembly in 1649.

¹⁰⁸The Acts and Orders of 1647 included provisions forbidding witchcraft, sodomy, buggery, and adultery and fornication that were based on Christian religious or moral principles. See *supra* note 29 (citing the Acts and Orders of 1647). See generally THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 103 (Daniel L. Dreisbach & Mark David Hall eds., 2009) (reprinting the provisions).

¹⁰⁹To make the point more gently, people are not perfect. They sometimes place self-interest above principle. See, e.g., Adelman, *supra* note 97, at 66-67.

¹¹⁰See, e.g., SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 166 (1995).

¹¹¹See, e.g., 2 RICHMAN, *supra* note 63, at 69.

what freedom of conscience meant to him. Williams framed the letter as a parable in which his beloved Providence was compared to a ship filled with a crew and passengers of various religious denominations. He explained that, while the crew and passengers may not be rightfully compelled by the captain to attend the ship's prayer services or to refrain from the practice of their own particular faiths, everyone onboard was subject to the captain's commands with regard to issues of common peace and safety. Williams wrote:

if any of the seamen refuse to perform their services or passengers to pay their freight; if any refuse to help in person or purse towards the common charge of defence; if any refuse to obey the common laws and orders of the ship ...; if any shall mutiny and rise up against their commander and officers; if any should preach or write that there ought to be no commander and officers because all are equal in Christ ... the commander or commanders may judge, resist, compel, and punish such transgressors, according to their deserts and merits.¹¹²

In short, Williams maintained that "civility" necessitated that all inhabitants of the colony, regardless of denomination—for Williams, Quakers in particular—must abide by a basic sense of common morality that sometimes required curtailment of certain religious *practices*, although never of the underlying *theology*.¹¹³ To make the point more directly, while it can be argued that the animating principle of religious freedom was relaxed on occasion via laws affecting particular religious groups, it seems reasonable to conclude that Rhode Island never truly abandoned its animating principle. Rather, specific laws impacting Catholics, Jews, and Quakers, such as the Sunday laws and the laws relating to military service, were an attempt by the polity to address the conflict between religious freedom and civil order that Williams addressed so eloquently in his voluminous writings.¹¹⁴ Moreover, no law was ever enacted in Rhode Island prohibiting a particular religion or providing for the persecution of persons based on their religious faith. No colony was perfect—far from it—but Rhode Island's commitment to freedom of religion was constantly reiterat-

¹¹²*Id.* (quoting Roger Williams's letter).

¹¹³See, e.g., Davis, *supra* note 70, at 37. For an insightful discussion of what Roger Williams meant by civility, see Teresa M. Bejan, "The Bond of Civility": Roger Williams on Toleration and Its Limits, 37 HIST. EUR. IDEAS 409 (2011).

¹¹⁴Some fine recent work on Roger Williams's views about freedom of conscience has been done by Rhode Island law professor Edward J. Eberle. See generally Edward J. Eberle, *Roger Williams on Freedom of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289 (2005); Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425 (1999); EDWARD J. EBERLE, ROGER WILLIAMS' GIFT: RELIGIOUS FREEDOM IN AMERICA (book manuscript based on articles). See also JOHN M. BARRY, ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL: CHURCH, STATE, AND THE BIRTH OF LIBERTY (2012); W. Clark Gilpin, *Building the "Wall of Separation": Construction Zone for Historians*, 79 CHURCH HIST. 871 (2010).

ed from the time the original four towns were settled to the moment the colony became a state.

BEYOND SUMPTUARY: CONSTITUTIONALISM, CLOTHES, AND BODIES IN ANGLO-AMERICAN LAW, 1215-1789

RUTHANN ROBSON*

City University of New York School of Law

CONTENTS

I. INTRODUCTION	478
II. FROM THE MAGNA CARTA TO THE TUDORS	479
III. CONSTITUTIONAL CONCERNS AND TUDOR REGULATION OF ATTIRE	485
IV. NATIONAL DRESS.....	489
V. COLONIAL HIERARCHIES	492
VI. THE ENDS OF EMPIRE	502
VII. CONCLUSION.....	509

ABSTRACT

Current scholarship is peppered with casual references to “sumptuary laws” whenever regulations of clothing or bodies are at issue. Too often, these references are incorrect, or at best incomplete. This Article is a careful consideration of the various regulations of attire and bodily markings from the Magna Carta in 1215 to the adoption of the United States Constitution in 1789. This Article situates bodily regulation within Anglo-American constitutionalism, including nascent constitutional Tudor-era struggles between the monarch and Parliament, the status of colonial laws, the American Revolution, pre-constitutional slavery, and the formation of the Constitution, including a proposed “Sumptuary Clause.”

I. INTRODUCTION

It has become common to link current regulation of attire or grooming with former practices known as sumptuary laws.¹ The classic definition of a sumptuary law is one directed at excess consumption. Such a law was arguably in the service of religious or ethical conceptions of the “good life,” and often, but not necessarily, the conceptions of excess varied by status.

Yet we recognize that even medieval regulations of dress were rarely solely sumptuary. Mixed motive regulations contained proscriptions of excess, even as they addressed trade imbalances or other economic concerns. Moreover, many laws governing apparel, as well as regulations of hairstyles and bodily markings, were not directed at consumption. Instead, such laws policed other hierarchies, such as those involving sexuality, gender, poverty, criminality, and slavery. Additionally, they served the interests of nationalism and empire in both economic and political ways.

Thus, all laws governing dress or grooming, whether solely sumptuary or not, implicate constitutionalism with regard to individual rights as well as the structures of governments. This Article centers the constitutional and nascent constitutionalism surrounding regulations of attire, grooming, and bodily markings, beginning with the Magna Carta in 1215 and ending with the creation of the United States Constitution in 1789. Section One begins with the regulation of textiles in the Magna Carta and continues through the Tudor era, describing the various provisions and their purposes. Section Two continues a focus on the Tudor era, arguing that disputes regarding the regulation of attire implicate nascent constitutionalism and democracy. The third section explores how the English used the regulation of dress, hair, and textiles as a method of national definition. Section Four moves to the American colonies, looking at laws and literature that structured society through the regulation of attire and the practice of branding, including in the important pre-Constitutional 1736 case of *Rex v. Mel-*

* Professor of Law and University Distinguished Professor, City University of New York School of Law. I am grateful to Anne Richardson Oakes, editor of BJALS for her thoughtful edits, to Dean Michelle Anderson for financial support for the completion of this research, to Emile Primeaux and Madeline Porta, CUNY School of Law graduates 2013 and the librarians at CUNY School of Law for research assistance, and to Sarah E. Valentine for suggestions on various drafts. This article is adapted from *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* (Cambridge University Press, 2013).

¹ Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010); Ramya Kasturi, *Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations*, 29 YALE J. REG. 419 (2012); Lucille M. Ponte, *Echoes of the Sumptuary Impulse: Considering the Threads of Social Identity, Economic Protectionism, and Public Morality in the Proposed Design Piracy Prohibition Act*, 12 VAND. J. ENT. & TECH. L. 45 (2009).

*lichamp*² and its relationship to slavery. Finally, Section Five examines the role of textiles in Revolutionary War rhetoric and politics and the rejected Sumptuary Clause of the United States Constitution. At the heart of these examinations and explorations is the intertwinement of the regulation of appearance with matters of democracy, sexuality, and hierarchy.

II. FROM THE MAGNA CARTA TO THE TUDORS

The Magna Carta of 1215 is a foundational document of Anglo-American democracy and still resonates as a quasi-constitution that allocates power and recognizes individual liberties. It also contained a specific provision regulating textiles: “There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells within the selvedges.”³ This attention to textiles would continue for centuries of English law-making, often implicating the rise of constitutionalism and democracy.

For example, the sole law passed by the English Parliament in the year 1337 was devoted to matters of wool, cloth, and fur.⁴ Although there were certainly ancient Greek, Roman, and Asian laws as well as medieval European and Asian laws governing attire, this law promulgated by Parliament in the eleventh year of the reign of Edward III is the first recorded attire statute in the English realm. The statute forbade the exportation of wool and the importation of foreign cloth, as well as governing the “Clothworkers of strange Lands,” who would be welcome in the realm and granted franchises. Taken together, these provisions evince a government concerned with the economy: the statute banned exports and imports, but encouraged foreign entrepreneurs to relocate within the realm. The remaining two sections of the statute, however, expressed slightly different concerns. They banned the wearing of imported cloth and the wearing of fur and they included exemptions to these bans.

This 1337 statute might be considered an extension of the earliest known English sumptuary law - - - passed the year before and aimed at curbing the consumption not of clothing but of food - - - limiting meals to two courses except on feast days when “three courses at the utmost” were permitted.⁵ The 1336 food law recognized the harms caused by “excessive and over-many sorts of costly Meats,” even as it stated that these harms affected different classes of persons differently: “the great men, by these excesses, have been sore grieved, and the lesser People, who only endeavor to imitate the great ones in such sort of Meats, are much impoverished.”

² *Rex v. Mellichamp*, S.C. GAZETTE (CHARLESTOWNE), May 1-8, 1736 at 1 col. 1. available at www.accessible-archives.org.

³ Magna Carta, para. 35. Initially known as the Charter of Liberties, the 1215 Magna Carta was confirmed in 1217 with the clauses concerning the use of the royal forests separated, so that it became known as the Great Charter to distinguish it from the Charter of the Forest. The 1215 document’s less famous precursor is the 1100 Charter of Liberties, executed when Henry I ascended the throne.

⁴ 11 Edward III, c. 1-5 (1337), reprinted in 1 STATUTES OF THE REALM 280-81.

⁵ 10 Edward III, Stat. 3 (1336), reprinted in 1 STATUTES OF THE REALM 278-79.

The law embodied a hierarchical structure, but also made explicit its purpose: the impoverishment of the “lesser People” was troubling because they were “not able to aid themselves or their liege Lord in time of need, as they ought.” Nevertheless, the law cited a concern with “Souls” and applied to men democratically: “no man, of whatever estate or condition soever he be, shall cause himself to be served” more than two courses.

The provisions of the 1337 law of attire were even more hierarchical. The statute of attire did not merely articulate different harms, but promulgated different rules for the different estates. The distinctions were articulated by means of exceptions to the general rules of prohibition. The proscription against wearing imported cloth contained an exception for “the King, Queen, and their Children.” The banning of wearing fur contained a more extensive exception for “the King, Queen, and their Children, the Prelates, Earls, Barons, Knights, and Ladies” as well as “People of Holy Church” who had benefices worth a hundred pounds per year. There was no mention of souls.

Edward III’s Parliament would substantially expand on these laws in A Statute Concerning Diet and Apparel promulgated twenty-six years later.⁶ The 1363 statute begins with a confirmation of the Magna Carta. After addressing other matters including the price of poultry and gilding in silver, the statute proscribes the dress of various classes: servants; people of handicraft and yeomen; esquires and gentlemen; merchants, citizens, and burgesses; knights; clerks; clergy; and ploughmen and oxherds. The classes are defined in the statute not only by occupation, but also by their net worth. The “Wives, Daughters, and Children” were generally subject to the same conditions as the men, but specific attire for women such as veils, or what might now be called kerchiefs or headscarves, were mentioned. The clothes were defined by their cost as well as their attributes, with attempts at specificity, such as “no higher price for their Vesture or Hosing, than within Forty Shillings the whole Cloth, by way or buying, or otherwise,” and “no Manner of Furr, nor of Budge, but only Lamb, Cony, Cat, and Fox.”⁷ The penalty for violation was forfeiture of the offending clothes, a rather hefty economic penalty in an era where clothes were not only expensive but also scarce. The statute exhorted “Makers of Cloths within the Realm” and the Drapers to maintain the law, although they were to be “constrained by any Manner way that best shall seem to the King and his Council.”

English law spent considerable energy over the next several centuries regulating dress in accordance with social hierarchies. The laws were generally comprehensive statutory schemes, such as those passed during the reign of Edward IV in 1463 and 1482.⁸ There were also occasional laws

⁶ 37 Edward III (1363), A Statute Concerning Diet and Apparel, *reprinted in* 1 STATUTES OF THE REALM 378 – 83.

⁷ *Id.* (Chapter 9, applicable to “People of Handicraft and Yeoman”).

⁸ 3 Edward IV c. 5 (1463), Act for Regulating Apparel, *reprinted in* 2 STATUTES OF THE REALM 399-402; 22 Edward IV c. 1 (1482), *reprinted in* 2 STATUTES OF THE REALM 468-70.

such as during the reign of Henry V, limiting silver for use in knights' spurs or all the apparel for Barons or higher estates.⁹ The statutory schemes reached their apex during the long reign of Henry VIII. During Henry VIII's first year as King, 1510, Parliament passed "An Act against wearing of costly Apparrell."¹⁰ Repealing earlier statutes of apparel, the 1510 Act portrayed a complexly hierarchical society. The statute prohibited purple "cloth of gold" and silk except for those in the royal family, prohibited sables to those under the degree of earl, prohibited blue or crimson velvet to those under the degree of Knight of the Garter, prohibited foreign furs to those under the degree of Gentleman, and prohibited foreign wool to those under the degree of Lord or Knight of the Garter. As in earlier statutes, the punishment was generally forfeiture, although servants of Laborers who wore hose above the price of "x d. the yerde" did so "uppon payne of imprisonment in the Stokkys by thre days." Subsequent acts of apparel from Henry VII's Parliament were passed in 1514, 1515, and 1533.¹¹ Each of these acts reserved certain types of attire to people of a certain status, prohibiting appropriation by persons of lesser rank. In her multifaceted study of clothing during the reign of Henry VIII, scholar Maria Hayward provides an excellent comparison, in table form, of the extensive and shifting details in the four acts of apparel, the first three acts of which are separated by only five years.¹² Despite the minutia, the stated rationale in the statutes was not the maintenance of hierarchy, but the prevention of poverty and crime. As the 1510 statute explained, and the next two statutes repeated, "the greate and costly array and apparrell used wythin this Realme contrary to good Statute therof made hath be the Occasion of grete improvissing of divers of the Kinge Sugieft and evoked meny of them to robbe and to doo extorcon and other unlawfull Dedes to maynteyne therby ther costeley arrey."

After Henry VIII's death in 1547, royal leadership was in disarray; Henry VIII's only son, Edward VI, a minor, ruled 1547-1553, and Henry VIII's daughter, Mary ("Bloody Mary") ruled 1553 – 1558. It would be Henry VIII's other daughter, Elizabeth (whose mother was the executed Anne Boleyn), who would reign the longest, from 1558 until 1603. Under all of these monarchs, statutes of apparel continued to be passed.¹³

⁹ 8 Henry V c. 3 (1420), *reprinted in* 2 STATUTES OF THE REALM 170.

¹⁰ 1 Henry VIII c. 14 (1510), Act against Wearing of Costly Apparrell *reprinted in* 3 STATUTES OF THE REALM 8-9.

¹¹ 6 Henry VIII c. 1 (1514), Act of Apparel, *reprinted in* 3 STATUTES OF THE REALM 121-22; 7 Henry VIII c. 6 (1515), Act of Apparel *reprinted in* 3 STATUTES OF THE REALM 179-82; 24 Henry VIII c. 13, (1533), Act for Reformation of Excess in Apparel *reprinted in* 3 STATUTES OF THE REALM 430-32.

¹² MARIA HAYWARD, RICH APPAREL: CLOTHING AND THE LAW IN HENRY VIII'S ENGLAND 29-39 (2009).

¹³ 1&2 Phil. & Mary c. 2-6 (1553), An Act for the Reformation of Excess in Apparel (1553), *reprinted in* 4(1) STATUTES OF THE REALM 239. The 1553 Act was targeted at the lower classes; it prohibited the wearing of silk in hats, bonnets, nightcaps, girdles, hose, shoes, scabbards, or spur leathers, by any person who was not heir apparent of a Knight, or

These statutes – with their hierarchy of social classes and their reservations of purple and ermine – are recognizable as paradigmatic sumptuary statutes. Under the guise of preventing crime and forestalling excess consumption, the laws regulate societal status. Yet the laws portray a society as much in flux as its sovereigns. The laws rely not only on title or “estate,” such as Knight of the Garter, but also economic worth, such as possessing lands and annuities to the value of £100 a year. The inclusion of new occupations such as “merchant” also marks a shift toward recognition of a rising urban class. As preeminent sumptuary scholar Alan Hunt has noted, sumptuary law was directed at images of the social order, including attempts to protect hierarchical conceptions of social relations by resisting change deemed inconsistent with the prevalent vision of the social order.¹⁴

However, even paradigmatic sumptuary acts of apparel reveal other governmental interests, including economic ones. Indeed, the economic is inextricably intertwined with any sumptuary provision, for definitions of luxury rest upon economic considerations. The economic fitness of the realm, including the balance of trade between imports and exports, is evident in laws prohibiting imports, or reserving imported cloth for only certain classes.

Parliament occasionally sought to mandate the wearing of local products, particularly English wool. For example, a 1666 Act entitled “An Act for Burying in Wool Only” prohibited the burial shirt, shift, or sheet to be made of anything other than wool, and similarly prohibited the coffin from being lined with anything other than wool.¹⁵ While this may be called a sumptuary law, the stated rationale was not excess in apparel or overconsumption, but the encouragement of woolen manufacturers of the kingdom and the prevention of spending money on the importation of linen. Importantly, it applied uniformly across classes; the only exception was if the person had died of the plague.

An earlier and more well-known law was the Elizabethan Cap Act. A serious decline in employment for “cappers” and other wool workers was the stated motivation for the “Act for the making of Cappes,” passed by Parliament in 1571 during the reign of Elizabeth I.¹⁶ The Act’s remedy for the decline in the wool trades was to require “every person” above the age of six years to wear a cap upon Sabbath and Holy Days. However, although the Act recited that the wearing of the caps was decent and comely for all estates and degrees, the Act specifically exempted “Maydens Ladies

entitled to twenty pounds per year in land rental fees, or possessed assets of two hundred pounds. The penalty was imprisonment of three months and a fine of ten pounds for every day of violation.

¹⁴ ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW 143 (1996).

¹⁵ 18 & 19 Car. II c. 4 (1666), An Act for Burying in Wool Only *reprinted in* 5 STATUTES OF THE REALM 885-86.

¹⁶ 13 Eliz I c. 19 (1571), Act for the Making of Cappes *reprinted in* 4(1) STATUTES OF THE REALM 555.

and Gentlewomen,” as well as those who were noble personages, Lords, Knights, and Gentlemen of possession of twenty marks land by the year, as well as their heirs.” Thus, the Act essentially mandated the cap as a marker for lower class status.

A similar marking of the lower classes occurred by the practice of “badging” the poor, prompted by economic interests of a different sort. Beggars were required to wear badges indicating their eligibility for alms in some English parishes and towns since the reign of Henry VIII, and the famous Elizabethan poor law of 1563 required licenses for those receiving poor relief in some cases.¹⁷ However, the “badging” requirement imposed by a Parliamentary statute of the realm in 1697 provided that every person receiving relief, including the wife and children of such person, shall

upon the Shoulder of the right Sleeve of the uppermost Garment of every such Person in an open and visible manner weare such Badge or Mark as is herein after mentioned and expressed that is to say a large Roman P, together with the first Letter of the Name of the Parish or Place whereof such poor Person is an Inhabitant cutt either in red or blew Cloth as by the Churchwardens and Overseers of the Poor it shall be directed.¹⁸

The impoverished were subject not only to badging, but also to branding, which might be considered a permanent type of attire. During the brief reign of Edward VI, Parliament in 1547 passed An Act for the Punishment of Vagabonds and for the Relief of the Poor, providing that the punishment for both male and female loiterers who did not apply themselves to honest labor was to be marked with a hot iron in the breast with the letter V and to serve as a “slave” for two years to the person who captured him or her. If the vagabond attempted to run away, he or she would be branded again, this time with the letter S on the forehead or ball of the cheek and would then be a slave forever. A second attempted escape would result in the death penalty.¹⁹ Indeed, branding was not an especially harsh punishment, especially in comparison with an earlier statute under Henry VIII that provided the punishment of being tied to the end of a cart naked and beaten with whips throughout the town until the “Body be bloody” or standing on the pillory and having an ear cut off.²⁰ Slavery, however, was extreme, and soon repealed, although vagabond children over the age of 5 were allowed to be “taken into service.”²¹ A series of vagabond statutes throughout the

¹⁷ 5 Eliz. I c. 3 (1563), An Act for Relief of the Poor, (1563), *reprinted in* 4 STATUTES OF THE REALM 411- 14; Steve Hindle, *Dependency, Shame and Belonging: Badging the Deserving Poor, c. 1550- 1750*, 1 CULTURAL & SOC. HIST. 6 (2004).

¹⁸ 8 & 9 Will. III c. 30, cl. II (1697), An Act for Supplying Some Defects in the Laws for the Relief of the Poor of this Kingdome, *reprinted in* 7 STATUTES OF THE REALM 281-83.

¹⁹ 1 Edward VI, c. 3 (1547), An Act for the Punishment of Vagabonds and for the Relief of the Poor, *reprinted in* 4 STATUTES OF THE REALM 5-8.

²⁰ 22 Hen. VIII c. 12 (1530), An Act Concerning Punishment of Beggars and Vagabonds *reprinted in* 3 STATUTES OF THE REALM 328-32.

²¹ 3 & 4 Edward VI, c. 16 (1549), An Act Changing the Punishment of Vagabonds and Other Idle Persons *reprinted in* 4 STATUTES OF THE REALM 115-17.

Tudor era criminalized the impoverished, migratory laborers, and those who “refused” to work in an era that witnessed the end of feudalism, the plague, and the beginnings of manufacturing.²²

In addition to economic hierarchies, statutes of attire addressed gendered ones, although often less explicitly. Most notably, the English acts of apparel were directed primarily at males, with the 1510 statute specifically exempting women (as well as, among others, minstrel players).²³ Perhaps this was because males were more preoccupied by clothes than women, or perhaps it was because males in the targeted classes were more visible than women, or perhaps men were deemed to be citizens worthy of regulation while women were subsumed into their male-headed households. However, the statutes of apparel implicitly and at times explicitly presume a gendered division of attire, even if their regulatory focus was otherwise.

The acts of apparel occasionally address sexuality. For example, in 1463 the Parliament of Edward IV criminalized men’s sexually revealing attire. It prohibited the wearing of any gown, jacket, or coat, “unless it be of such Length that the same may cover his privy Members and Buttocks.” The act applied to Knights who were less than Lords, Esquires, and Gentlemen, as well as other persons, and extended the prohibition to tailors who made garments of this short length.²⁴ Women’s sexuality was also subject to attire regulations, although not in the major acts of apparel. The Parliament of Scotland passed a law in 1458 that regulated silk and furs in a familiar hierarchical manner, and provided that “no labourers or husbands wear any colour except grey or white on work days; and on holy days only light blue, green or red,” but also contained a specific prohibition for women: “no woman come to church nor market with her face hidden or muffled so that she may not be known, under pain of escheat of the cap.”²⁵ More than a century later, the sumptuary laws were augmented with a moralistic imperative for women expressed in an exceedingly terse statute: “it be lawful for no women to wear above their estate except whores.”²⁶ By providing an exemption from the sumptuary hierarchy to “whores,” this brief statute regulates other women, who, as Alan Hunt

²² Karl Marx extensively discusses this history in the chapter entitled ‘Bloody Legislation against the Expropriated, from the End of the 15th Century. Forcing down of Wages by Acts of Parliament,’ in KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY*, Vol. 1 (Friedrich Engels ed., Samuel Moore & Edward Aveling trans., Charles H. Kerr & Co., 1906) (1867). Other scholarly works include William T. Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12(1) SOC. PROBS. 67 (1964); C.S.L. Davies, *Slavery and Protector Somerset: The Vagrancy Act of 1547*, 19(3) ECON. HIST. REV. 533 (1966).

²³ 1 Hen. VIII (1510) (“Provided also that this acte be not prejudicial nor hurtfull to eny Woman or to ...”).

²⁴ 3 Edward IV c. 5 (1463), Act for Regulating Apparel, *reprinted in* 2 STATUTES OF THE REALM 399-402. A shorter version of this prohibition was included in Edward IV c. 1 (1482), *reprinted in* 2 STATUTES OF THE REALM 468-70.

²⁵ THE RECORDS OF THE PARLIAMENTS OF SCOTLAND TO 1707, K.M. Brown et al. eds. (St Andrews, 2007-2011), 1458/3/14, *available at* <http://www.rps.ac.uk/trans/1458/3/14>.

²⁶ *Id.*, 1567/12/53, *available at* <http://www.rps.ac.uk/trans/1567/12/53>.

notes, must conform to the social class regulations of attire in order to “protect and confirm their own respectability.”²⁷ The City of London took a different tactic; in a Proclamation by Edward III in 1351, it prohibited “common lewd women” from furs and silk linings, while also mandating the women wear striped and unlined hoods.²⁸

III. CONSTITUTIONAL CONCERNS AND TUDOR REGULATION OF ATTIRE

The regulation of clothing plays a pivotal role in the developing democratic principles regarding constitutional separation of powers between the legislature and the royal “executive.” As Edward III’s proclamation for London demonstrates, the matter of dress was not only a subject of parliamentary concern, but also of royal edicts. Indeed, many monarchs were quite attentive to matters of apparel and cloth; the definitive collection of Tudor proclamations evinces such attention amidst the 851 royal documents that address various other matters such as food, guns, traitors, religion, wages, wars, coinage, and the plague. There are four proclamations from Henry VIII “enforcing” statutes of apparel, including two in the same year of 1534, as well as several relating to wool. The brief reign of Henry VIII’s son, Edward VI, and then the equally brief reign of Henry VII’s daughter, Mary, witnessed only a few proclamations concerning the wool trade and none regarding statutes of apparel. However, the available royal decrees from Henry VIII’s other daughter, Elizabeth I, include nine separate proclamations entitled “Enforcing Statutes of Apparel,” as well as several other proclamations on apparel, two specifically enforcing the “Act for the making of Cappes,” and a few mitigating or enforcing statutes regarding wool manufacturing, and one focused on patents for luxury cloth. Not only are Elizabeth I’s proclamations the most numerous on the subject of dress, but they also illuminate the constitutional tension between Parliament as legislature and the Queen as “executive.”

This constitutional tension did not begin with Elizabeth I. The rise of democracy occurred in juxtaposition to the absolute rule of the monarch, with the Magna Carta being a notable document shifting the balance. However, the balance was always a tenuous one. The Statute of Proclamations in 1539 under Henry VIII’s reign resulted from intense negotiations between Parliament and the Crown, and ultimately gave enhanced powers to the Crown to legislate through proclamation. While there is an argument that the Statute marked a turn towards despotism, the Crown’s precise powers and their nascent constitutional significance remain subject to

²⁷ HUNT, *supra* note 14 at 242.

²⁸ Proclamations as to the Dress of Common Women within the City, 24 Edward III. A.D. 1351. Letter-Book F. fol. ccviii. (Norman French), available at <http://www.british-history.ac.uk/report.aspx?compid=57692#s2>; HUNT, *supra* note 14 at 243.

debate centuries later.²⁹ In any event, the repeal of the Statute of Proclamations under Henry VIII's successor, the child Edward VI, did not prevent subsequent monarchs -- especially Elizabeth I -- from issuing proclamations that might be viewed as usurping Parliament's more democratic role.

Elizabeth I's proclamations enforcing the statutes of apparel illustrate the trajectory of her royal power. In her second year as Queen, Elizabeth I sought to enforce the extant statutes of apparel -- 24 Henry VIII and 1&2 Philip & Mary -- by directing the Privy Council, the mayors, sheriffs and justices of the peace, and noblemen to enforce the laws, that are then encapsulated.³⁰ Two years thereafter, a 1562 proclamation declared there was a "monstrous abuse of apparel almost in all estates, but principally in the meaner sort."³¹ The stated target of the poorer classes may have been disingenuous given the proclamation's focus on attire of the higher classes. This proclamation was accompanied by three additional proclamations designated as action from the Queen's Privy Council.³² Arguably, the imprimatur of the Privy Council lent a less imperious tenor to the proclamations, although the council was a body of the Queen's advisors who served at her pleasure and political judgment. Taken together, these proclamations from Elizabeth I's fourth year as Queen attempt to streamline the array of specific attire regulations in previous statutes as well as address new outrages, including men wearing double ruffs or billowing hose.³³

Eighteen years later, Elizabeth I's 1580 proclamation quite obviously exceeded its title "Enforcing Statutes of Apparel." While it first recited the usual state of "mischief" "specially in the inferior sort" causing the need for enforcement, and then provided a basic outline of the regulations, its

²⁹ E. R. Adair, *The Statute of Proclamations*, 32 (125) *ENG. HIST. REV.* 34 (1917); M. L. Bush, *The Act of Proclamations: A Reinterpretation*, 27 *AM. J. LEGAL HIST.*, 33 (1983); G. R. Elton, *Henry VIII's Act of Proclamations*, 75 (295) *ENG. HIST. REV.*, 208 (1960).

³⁰ Proclamation 464, in 2 *TUDOR ROYAL PROCLAMATIONS* 136-38 (Paul L. Hughes & James F. Larkin, eds., Yale Univ. Press, 1969).

³¹ Proclamation 494, *Id.* at 192-94.

³² Proclamations 493, 495, 496, *Id.* at 187-92, 195-203.

³³ Proclamation number 496, entitled a "Briefing," provides a basic outline of the governing statutes, including the governing statute of Henry VIII, although the previous proclamation had begun with the declaration that "The Statute made in the 24th year of Henry VIII for the reformation of the abuse of apparel remaining now in force containeth so many articles and clauses as the same cannot be conveniently abridged, but is to be considered by reading and perusing the whole act at large." Proclamation 495, *Id.* p. 195. Yet Proclamation 493 introduced a new regulation necessary because of the "use of the monstrous and outrageous greatness of hose, crept alate into the realm to the great slander thereof." The prohibition did not relate to the cost color or fabric, but to the number of yards and even the style: men are prohibited from wearing (and tailors from making) hose with more than one yard and a half, or one yard and three-quarters at the most, and the lining of the hose "not to lie loose or be bolstered, but to lie just unto their legs as in ancient time was accustomed." The Proclamation also prohibited certain men from wearing the "outrageous double ruffs which now of late have crept in," at either the neck or sleeves of their shirts. Proclamation 493, *Id.* at 189.

third section announced “necessary additions.” This section reads like a Parliamentary statute. For example, numbered paragraph 9 provides:

Item, that all apprentices at the law and utter barristers of the Inns-of-Court, and all merchants of any society, and all that keep household in city or town, and such as may dispend £20 by the year, may wear a welt of velvet in their gowns, jackets, or coats.³⁴

Seventeen years later, Elizabeth I again issued an enforcement proclamation, but most interestingly this edict in 1597 does not limit itself to enforcing statutes, but is entitled “Enforcing Statutes *and Proclamations* of Apparel.” The text refers to “special parts and branches of the law now standing in force” and “her majesty’s said proclamations,” and then lists the specific regulations first for men’s apparel, then for women’s, that “her majesty straightly charge and command.”³⁵ In a separate proclamation, entitled “Dispensing Certain Persons from Statutes of Apparel,” Elizabeth I provides particular exemptions and rules for various classes of persons, including again “students of the Inns-of-Court or Chancery.”³⁶

Thus, the relative constitutional powers of Parliament and the Crown are deeply implicated in the regulation of dress in the English realm. Indeed, Alan Hunt and N.B. Harte argue that the demise of formal sumptuary regulation during the first year of the reign of James I, after the death of Queen Elizabeth, is attributable to the constitutional struggle between the Parliament, notably the Commons, and the Crown who would prefer to rule by proclamation rather than legislative actions.³⁷ This quasi-constitutional struggle occurred without a unitary written “constitution” and without a coequal judicial body to act as referee, since judges were generally under the power of the monarch. The contest was therefore political rather than adjudicatory. Parliament won, passing an extensive statute that repealed previous sumptuary laws, as well as a raft of other types of laws, while reaffirming a few laws and not recognizing the Crown’s right to issue proclamations.³⁸ Parliament did entertain several types of sumptuary bills, but there was no agreement about the allocation of powers between itself and the Crown. As both Hunt and Harte observe, this essentially ended paradigmatic sumptuary statutes in England much earlier than they might otherwise have been, and much earlier than they ceased in Continental Europe, although other regulations of attire persisted.³⁹

³⁴ Proclamation 646, *Id.* at 454-62.

³⁵ Proclamation 786, in 3 TUDOR ROYAL PROCLAMATIONS 174-79, *supra* note 30.

³⁶ Proclamation 787, *Id.* at 179-81.

³⁷ HUNT, *supra* note 14, at 312-13; N.B. Harte, *State Control of Dress and Social Change in Pre-Industrial England*, in TRADE, GOVERNMENT, AND ECONOMY IN PRE-INDUSTRIAL ENGLAND: ESSAYS PRESENTED TO F.J. FISHER, 132, 148 (D.C. Coleman & A.H. Henry, eds., 1976).

³⁸ 1 Jac. I c. 25, (1603-4), An Act for Continuing and Reviving of Diverse Statutes, and for Repealing of Some Others, *reprinted in* 4(2) STATUTES OF THE REALM 1050-52.

³⁹ HUNT, *supra* note 14, at 321-23; Harte, *supra* note 37, at 148-49.

In addition to constitutional structures, the English government's regulation of dress implicates questions of nascent constitutional rights. The Magna Carta specified several particular rights and liberties. None of these rights explicitly concern personal attire, although there are several mentions of property disposition that would include clothes as items of valuable property in this era, and there are also mentions of rights of marriage (and nonmarriage) that could be viewed as rights of personal autonomy, even as they are intertwined with rights of property.

However, notions of rights and liberties may have played a part in the overall efficacy of laws of attire. For example, a satirical critique of badging laws, as recounted by scholar Steve Hindle, advocated that the poor should disregard wearing badges because they were "established by act of parliament, and the common people knew that all such injunctions were 'great infringements of their liberties.'" ⁴⁰ Of course, the satirist's argument was exactly the opposite, but the invocation of infringement of liberties is telling. Perhaps this sentiment contributed to the lack of compliance with the badging of the poor. ⁴¹ And perhaps it contributed to lack of compliance with more paradigmatic laws of attire, for, as the numerous acts and proclamations indicate, enforcing regulations of dress was not easily accomplished. While the proclamatory bemoaning of the sad state of affairs caused by failure of the population to abide by previous regulations of apparel may be high rhetoric, it is nevertheless noteworthy. There seem to be very few records of actual enforcement proceedings; there is also no known invocation of a "right" to be free to wear what one pleased.

Any discussion of rights implicitly assumes an oppositional relationship between the government and the individuals asserting rights. The statutes of attire in medieval England would seem to be products of an oppressive government controlling the dress of its citizens to enforce social hierarchies. However, as medieval scholar Kim M. Phillips has compellingly argued, the calls for regulation of attire originated in Parliament's Commons (the lower house, composed of knights, esquires, gentlemen, burgesses and citizens of the towns), although it was certainly developed with collaboration from the Lords and Council.⁴² Focusing on knights, Phillips speculates regarding their petitions to limit their own attire, even as they, more understandably, sought to limit the attire of those beneath them in the social hierarchy. Phillips contends that there must have been economic and pragmatic considerations: "Given the extraordinary expense of high-status fabric, furs, and jewels it is likely that the petitioners were seeking a means by which they could prevent excessive demands on their incomes without losing face."⁴³ More provocatively, Phillips posits

⁴⁰ Hindle, *supra* note 17 at 18, citing East Sussex Record Office, Lewes, Shiffner Archives SHR/1556, unfol.

⁴¹ Hindle, *supra* note 17.

⁴² Kim M. Phillips, *Masculinities and the Medieval Sumptuary Laws*, 19(1) *GENDER & HIST.* 22, 28 (2007).

⁴³ *Id.* at 29.

that the knights were pleading for a “distinctiveness in dress” as a method to “assert a distinctive model of manliness” in the “homosocial networks and complex structures of masculine hierarchy.”⁴⁴ While Phillips does not use the word “democracy,” she contends that there was much for the knights to gain in their “collusion” with the broader governmental arrangements in exchange for losing the right to wear “cloth of gold, sables, pearls, and sexually revealing outfits.”⁴⁵

Likewise, there was something to gain for the poor who lost the right to wear clothes without also wearing the parish badge indicating poverty. As in the case of knights, there were practical and economic effects; a badge entitled an impoverished person to survival benefits and alms. But as Steve Hindle argues, the badge could be semiotically read not only as a sign of stigma, but also as a sign of belonging. Hindle analogizes it to livery - - - the badges, clothes, or colors that a landed noble bestowed on servants or tenants- - - symbolizing both subordination and patronage.⁴⁶ However, unlike the knights, there is little evidence that those who were impoverished participated in democratic institutions that resulted in regulating their choice of attire.

Moreover, regulations of the poor could not only badge and brand their bodies, but also serve to expel them from the body politic. It would be a vagabond statute that would introduce the punishment of transportation: dangerous rogues to be conveyed “unto such part beyond the Seas” as shall be determined for that purpose by the Privy Counsel, with a return to England being a felony punishable by death.⁴⁷ The same statute, under Queen Elizabeth, criminalized bringing vagabonds, rogues, and beggars from Ireland, Scotland, or the Isle of Man, into the Realm of England or Wales.⁴⁸

IV. NATIONAL DRESS

Questions of the place of the poor in the kingdom were accompanied by questions regarding the kingdom’s very boundaries. This nascent nation-building was at the heart of many of the laws of attire with their specific proscriptions regarding foreign cloths and furs for specific classes of persons. Yet even as the classes are subject to flux, so too are definitions of “foreign.” For example, the first act of apparel, passed in 1337, defined foreign as outside the “Lands of England, Ireland, Wales, or Scotland, within the King’s Power.”⁴⁹ Almost two centuries later, Parliament under Henry VIII, prohibited cloth made “oute of this Realme” to the lower classes in 1514, with a more specific definition of the realm as England, Ireland,

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Hindle, *supra* note 17, at 29.

⁴⁷ 39 Eliz. I, c. 4 (1597), An Act for the Punishment of Rogues, Vagabonds, and Sturdy Poor (1597), *reprinted in* 4 STATUTES OF THE REALM 899-902.

⁴⁸ *Id.*

⁴⁹ 11 Edward III, c. 1-5 (1337), *reprinted in* 1 STATUTES OF THE REALM 280-81.

Wales, Calice, and Berwik.⁵⁰ Notably absent is Scotland, although Berwick abutting Scotland is included. Notably present is Calice (Calais), across the English Channel, which was subsequently recaptured by France. In the next act of apparel under Henry VIII, passed only a year later, a provision prohibited the lower classes from wearing furs “whereof there is no like kind growing within this realm of England, Wales, or in any other land under the King’s obeisance.”⁵¹ Thus, the precarious predicament of English sovereignty is evident in the acts of apparel.

Regulations of dress as related to national identity are also evident in English attempts at defining hierarchies between the English and the Irish. Ireland, when known as the English Pale (borderlands), was subject to English rule, including proscriptions on dress. Initially, the law was directed at differentiating between the Irish and the English living in the Pale, because, according to a 1297 statute, “the killing of Englishmen and Irishmen requires different modes of punishment.”⁵² In this same statute, the Parliament held in Ireland declared that Englishmen had become “degenerate in modern times, attire themselves in Irish garments” and were wearing an Irish hairstyle, the *culan*, with the head half-shaven, but long hair in the back of the head. The Parliamentary solution was a prohibition of the *culan* and “that all Englishmen in this land wear, at least in that part of the head which presents itself most to view, the mode and tonsure of Englishmen,” to be enforced by seizure of lands and chattels, and arrest of body and imprisonment. Fifty years later, there were still anxieties about distinguishing the Irish and the English. The Statute of Kilkenny, passed by a Parliament held in Ireland in 1367, addressed the worry that the “conquest” of Ireland was being threatened by English settlers who were “forsaking the English language, manners, mode of riding” and were living “according to the manners, fashion, and language of the Irish enemies.” The third chapter of the statute - - - after a provision recognizing the Church and a provision prohibiting the English from sexual or family relations with the Irish, or selling the Irish horses or armor - - - mandates that the English use the English language and English name and “that every Englishman use the English custom, fashion, mode of riding apparel according to his estate.”⁵³

English law later became less concerned with preserving distinctions than imposing Irish assimilation. As scholar Margaret Rose Jaster has noted, English regulations regarding Irish apparel reveal the essential contradiction of colonization: an insistence on the inherent difference of the Irish

⁵⁰ 6 Henry VIII c. 1 (1514), Act of Apparel, *reprinted in* 3 STATUTES OF THE REALM 121-22.

⁵¹ 7 Henry VIII c. 6 (1515), Act of Apparel *reprinted in* 3 STATUTES OF THE REALM 179-82.

⁵² 25 Edward I ch. 11 (1297), *reprinted in* STATUTES AND ORDINANCES AND ACTS OF PARLIAMENT OF IRELAND: KING JOHN TO HENRY V, 211 (Henry F. Berry ed.).

⁵³ A Statute in the Fortieth Year of Edward the Third, Enacted in a Parliament Held in Kilkenny, AD 1367, 14-15 (James Hardiman ed.), *available at* <http://www.ucc.ie/celt/published/T300001-001.html>.

while mandating conformity through clothing to eliminate that difference.⁵⁴ Conformity in the legal arena received special attention in an act in 1495: The Lords, both spiritual and temporal, in the Parliament held in Ireland were admonished to appear in their Parliament robes, “in like manner and form as the lords of the foresaid realm of England doth appear to the Parliament,” upon penalty of a fine.⁵⁵ More famously, in 1537 the Parliament held in Ireland under Henry VIII, forbade very specific Irish styles to all of the populace, again regulating hair, in the style known as “glibbes” but previously called “culan,” as well as attire:

no person... shall be shorne, or shaven above the eares, or use the wearing of haire upon their heads, like unto long locks, called glibbes, or have or use any hair growing on their upper lippes, called or named a crommeal, or use or wear any shirt, smock, kerchor, bendel [band or ribbon], neckerchour, mocket [bib], or linnen cappe, coloured, or dyed with saffron, nor yet use, or wear in any their shirts or smockes above seven yards of cloth, to be measured according to the King's standard and that also no women use or wear any kyrtell, or cote tucked up, or embroidered or garnished with silk, or courched nor layd with usker [jewels], after the Irish fashion; and that no person or persons of what estate, condition, or degree they be, shall use or wear any mantles, cote or hood made after the Irish fashion.⁵⁶

The statute's stated purpose is not subjugation, but unity, an abolition of the diversity that is betwixt the peoples of Ireland in “tongue, language, order, and habit” and which “by the eye deceiveth the multitude” that the people are of separate countries instead of “wholly together” as one nation.⁵⁷ Within a few years, Parliament would pass the Crown of Ireland Act, declaring that the King of England was now the King, rather than the Lord, of Ireland.⁵⁸

The relationship between England and Scotland was also mediated through laws passed by the English to regulate appearance. Rather than moustaches, hairstyles, and mantles, however, the target of the Scottish attire regulations was tartan and plaid. After the 1688 deposing of the controversial and Catholic King James (known as James II as King of England and Ireland, and as James VII as King of Scotland), there were continuing battles and royal contestations regarding the relationships between Scotland and England. The Anglo-Scottish Treaty of Union in 1706 and the Acts of Union passed by both Scottish and English Parliaments did not

⁵⁴ Margaret Rose Jaster, *Breeding Dissoluteness and Disobedience: Clothing Laws as Tudor Colonist Discourse*, 13(3) *CRITICAL SURV.* 61, 65 (2001).

⁵⁵ 10 Henry VII ch. 16 (1495), *reprinted in* 1 *STATUTES AT LARGE PASSED IN THE PARLIAMENTS HELD IN IRELAND* 52-53.

⁵⁶ 28 Henry VIII ch. 15 (1537), *reprinted in* 1 *STATUTES AT LARGE PASSED IN THE PARLIAMENTS HELD IN IRELAND* 121. The statute became effective in 1539.

⁵⁷ *Id.*

⁵⁸ 33 Henry VIII ch. 1 (1542), *reprinted in Id.* at 176.

conclusively resolve the matter of a united kingdom of Great Britain.⁵⁹ In 1746, after another “uprising” in the north, Parliament under King George II passed an “An Act for the more effectually disarming the Highlands in Scotland; and for the more effectually securing the Peace of the said Highlands; and for restraining the Use of the Highland Dress; and for further indemnifying such Persons as have acted in Defence of His Majesty's Person and Government, during the unnatural Rebellion.”⁶⁰ While much of the Act concerns firearms, including permissible search and seizure processes, section 17 prohibits Scottish dress:

no man or boy, within that part of Great Briton called Scotland, other than shall be employed as officers and soldiers in his Majesty's forces, shall on any pretence whatsoever, wear or put on the clothes commonly called Highland Clothes (that is to say) the plaid, philibeg, or little kilt, trowse, shoulder belts, or any part whatsoever of what peculiarly belongs to the highland garb; and that no tartan, or partly-coloured plaid or stuff shall be used for great coats, or for upper coats.⁶¹

By its terms, the provision only applies to males, but it is otherwise quite different from the “acts of apparel” of two centuries before. The punishment to be imposed reflects the severity of the infraction as a crime of “unnatural Rebellion” as well as the status of “Great Briton” as an empire: a first offense is imprisonment without bail for six months; a second offense would render a person “liable to be transported to any of his Majesty's plantations beyond the seas, there to remain for a space of seven years.”⁶²

V. COLONIAL HIERARCHIES

Given this history, it is not surprising that English colonists to what would become the United States - - - whether they were transported to America for their crimes of plaid or came to the continent's shores under different circumstances - - - would include regulations of dress in their legal schemes. To be sure, the colonists did not have exclusive power to govern themselves. Many were essentially members of chartered companies, “one body corporate and politique in fact and name” as the Charter of the Col-

⁵⁹ Union with Scotland Act, 1706, 6 Ann., c. 11, art. XIX (Eng.); Union with England Act, 1707, c. 7, art. XIX (R.P.S.) For discussions of this fraught history, see Bob Harris, *The Anglo-Scottish Treaty of Union, 1707 in 2007: Defending the Revolution, Defeating the Jacobites*, 49 JOURNAL OF BRITISH STUDIES 28 – 46 (2010); William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1079-89 (2010).

⁶⁰ Act of Proscription, 19 Geo. II, ch. 39 (1746) in 6 THE STATUTES AT LARGE, FROM MAGNA CHARTA, TO THE END OF THE LAST PARLIAMENT, 1761 IN EIGHT VOLUMES, 704-10 (Owen Ruffhead ed., London : printed by Mark Baskett, and by the assigns of Robert Baskett; and by Henry Woodfall & William Strahan, 1768-70).

⁶¹ *Id.* Section 17.

⁶² *Id.* Earlier in the statute, being sent to America to serve as a soldier was included in the possible punishments for possessing arms. *Id.* p. sections I & II.

Beyond Sumptuary

ony of Massachusetts Bay phrased it.⁶³ Moreover, when colonists exercised lawmaking power, their laws had to be consistent with the laws of England, including their laws regarding attire.⁶⁴

In regulating dress, the colonists displayed their concerns regarding hierarchy, sexuality, and democracy. A classic of American literature, *The Scarlet Letter* by Nathaniel Hawthorne, illuminates some of these themes.⁶⁵ Published in 1850, the novel is set more than two centuries earlier in the Massachusetts Bay Colony. The novel's heroine, Hester Prynne, makes her first appearance walking out of the prison door with her three month old baby and an elaborately embroidered red "A" on her dress. She proceeds to the "scaffold of the pillory," although she is not subject to "that gripe about the neck and confinement of the head."⁶⁶ She returns to prison, and upon her release must wear a red A on her clothes for the rest of her life.

Hawthorne, who reputedly studied the records of the Massachusetts Bay Colony, described the Puritan founders as "a people amongst whom religion and law were almost identical, and in whose character both were so thoroughly interfused."⁶⁷ Early in the novel, Hawthorne communicates this intertwining through the dialogue amongst some townspeople objecting to Hester Prynne's punishment as too lenient. "At the very least, they should have put the brand of a hot iron on Hester Prynne's forehead," one person says, while another person voices the desire for an even harsher penalty - - she "ought to die" - - under the law "both in the Scripture and statute-book."⁶⁸

Hawthorne's twinning of the statute-book and scripture is substantiated by the colony's statute-book itself, which included an instruction in 1647 that the copying of the laws should be with two large margins, with one margin for the "heads of the law" and the other for any references, scriptures, or the like.⁶⁹

The crime of the character Hester Prynne - - seemingly adultery although the character's marital status is unclear and the word is not con-

⁶³ The Charter of the Colony of the Massachusetts Bay in New England, 1628-29, reprinted in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND: PRINTED BY ORDER OF THE LEGISLATURE 3, 10 (Nathaniel B. Shurtleff ed., 1853).

⁶⁴ 12 Geo. I, c. 34 (1725), An Act to Prevent Unlawful Combinations of Workmen Employed in the Woollen Manufactures, and For Better Payment of Their Wages, section II.

⁶⁵ Nathaniel Hawthorne, THE SCARLET LETTER (Boston: Ticknor, Reed & Fields, 1850). Page references are to The Centenary edition of the works of Nathaniel Hawthorne, Vol. 1, The Scarlet Letter, edited by Fredson Bowers (Columbus: Ohio State University Press, 1962).

⁶⁶ *Id.* at 52, 53.

⁶⁷ Charles Ryscamp, *The New England Sources of the Scarlet Letter*, 31 American Literature 257-72 (1959).

⁶⁸ HAWTHORNE, THE SCARLET LETTER, *supra* note 65, at 51-52.

⁶⁹ 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND: PRINTED BY ORDER OF THE LEGISLATURE 218 (1853) (Nathaniel Shurtleff, ed.).

tained in Hawthorne's novel - - - is punished by imprisonment, the pillory, and through a life sentence of "badging" with the appropriate letter. The Records of the Governor and Company of Massachusetts Bay include other such badging punishments. In 1634, one Robert Coles was disenfranchised and ordered to wear about his neck and hang outside his garment at all times a "D, made of red cloathe and sett upon white" and in 1636, one William Perkins to wear "a white sheete of pap on his brest, having a greate D made upon it." Their crimes were stated as drunkenness. For gross offenses in attempting lewdness with various women, in 1639 John Davies was censured to be severely whipped and to wear the "letter V vpon his breast vpon his vppermost garment."⁷⁰ Presumably the "V" represents the first letter of uncleanness.

Hawthorne's novel explores the various meanings of his heroine's wearing of the red letter A as her punishment. Interestingly, Hawthorne describes Hester Prynne's "badge" as violative of another aspect of the Colony's regulation of dress:

On the breast of her gown, in fine red cloth, surrounded with an elaborate embroidery and fantastic flourishes of gold thread, appeared the letter A. It was so artistically done, and with so much fertility and gorgeous luxuriance of fancy, that it had all the effect of a last and fitting decoration to the apparel which she wore; and which was of a splendor in accordance with the taste of the age, but greatly beyond what was allowed by the sumptuary regulations of the colony.⁷¹

Hester Prynne not only breaches the sumptuary laws by her embroidered A, but she also makes her living in their shadow. Hawthorne's only other mention of the colony's sumptuary laws in *The Scarlet Letter* is in the context of Hester Prynne's exercise of her livelihood of "needle-work," which, was "then as now, almost the only one within a woman's grasp."⁷² Prynne had elevated needlework to an art; one she advertised with her letter A and in the clothing of her child. Her work was in demand, because despite the Puritan's renowned "sable simplicity":

Public ceremonies, such as ordinations, the installation of magistrates, and all that could give majesty to the forms in which a new government manifested itself to the people, were, as a matter of policy, marked by a stately and well-conducted ceremonial, and a sombre, but yet a studied magnificence. Deep ruffs, painfully wrought bands, and gorgeously embroidered gloves, were all deemed necessary to the official state of men assuming the reins of power; and were readily allowed to individuals dignified by rank

⁷⁰ 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND: PRINTED BY ORDER OF THE LEGISLATURE 112,172, 248 (Nathaniel Shurtleff ed. 1853).

⁷¹ HAWTHORNE, *THE SCARLET LETTER*, *supra* note 65, at 50.

⁷² *Id.* at 74.

Beyond Sumptuary

or wealth, even while sumptuary laws forbade these and similar extravagances to the plebeian order.⁷³

The Records of the Governor and Company of the Massachusetts Bay Colony reveal several sumptuary regulations from the era in which the novel is set.⁷⁴ A 1634 order from the General Court, a body having both legislative and adjudicatory powers, discussed meals, beer, and tobacco, and then turned to the great, superfluous, and unnecessary expenses occasioned by new and immodest fashions, as well as the wearing of silver, gold, silk, and lace.⁷⁵ The order prohibited such apparel, upon penalty of forfeiture. The order addressed some specific problems: overly “slashed” clothes (though one slash in each sleeve and another in the back is specifically permitted); “cuttworks, imbroderied or needle worke capps, bands & rayles” (the last being most probably a type of neckerchief or scarf);⁷⁶ and gold or silver girdles (cords worn around the hips or waist), hatbands, belts, ruffs, and beaver hats. All of these were prohibited. An order in 1636 prohibited the making or selling of “bone lace, or other lace” to be worn on garments or linens, upon penalty of a fine, with an exception for “binding or small edging laces.”⁷⁷ In 1644, without explanation, the Records state: “It is ordered, that all those former orders made about apparel & lace are hereby repealed.”⁷⁸

This was not the end of laws of attire in the Massachusetts Bay Colony. Indeed, it is a law in 1651 that most closely mirrors the sumptuary legislation of Tudor England with a concern for enforcing hierarchies through apparel.⁷⁹ The General Court first conveyed its frustration that the previous declarations and orders “against excess in apparel” for both men and women had not been effective, but that “intolerable excess” had “crept in upon us.” The worst offenders were, not surprisingly, people of “meane condition.”⁸⁰ The General Court declared that it was detestable and intolerable that “men and women of mean condition should take upon them the garb of gentlemen by wearing gold or silver lace, or buttons, or points at their knees, or to walk in great boots; or women of the same rank to

⁷³ *Id.* at 74.

⁷⁴ The setting of the novel is generally dated as 1642 – 1649, Ryscamp, *supra* note 68 at 260-61.

⁷⁵ 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY, *supra* note 70, at 126.

⁷⁶ While a rayle could also be a cloak, the context here indicates it is closer to a scarf or neckerchief. A Tudor statute of 1482 similarly prohibited wives of men who were servants or laborers from wearing any “Reile called a Kerchief” whose price was more than twenty-pence. Edward IV c. 1 (1482), *reprinted in* 2 STATUTES OF THE REALM 468-70.

⁷⁷ 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY, *supra* note 70, at 183.

⁷⁸ 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY, *supra* note 69, at 84.

⁷⁹ 3 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND: PRINTED BY ORDER OF THE LEGISLATURE 243 (Nathaniel Shurtleff ed. 1853).

⁸⁰ *Id.*

wear silk or tiffany hoods, or scarves which, though allowable to persons of greater estates or more liberal education.”⁸¹ Therefore, the Court ordered that

no person within the jurisdiction, nor any of their relations depending upon them, whose visible estates, real and personal, shall not exceed the true and indifferent value of £200, shall wear any gold or silver lace, or gold and silver buttons, or any bone lace above 2s. per yard, or silk hoods, or scarves, upon the penalty of 10s. for every such offense.⁸²

However, unlike Tudor Parliaments, the General Court bemoaned the difficulty of setting down “exact rules” to govern all sorts of persons.⁸³ It avoided the multi-leveled hierarchies of many of the Tudor statutes in favor of vagueness and delegation. The order gave wide discretion to the selectmen in every town: whosoever the selectmen “shall judge to exceed their ranks and abilities in the costliness or fashion of their apparel in any respect, especially in the wearing of ribbons or great boots (leather being so scarce a commodity in this country) lace, points, etc., silk hoods, or scarves,” would be subject to fines assessed by those same selectmen. An expressed exemption befitted a society without royalty or landed gentry: “provided this law shall not extend to the restraint of any magistrate or public officer of this jurisdiction, their wives and children, who are left to their discretion in wearing of apparel, or any settled militia officer or soldier in the time of military service, or any other whose education and employment have been above the ordinary degree, or whose estate have been considerable, though now decayed.”⁸⁴ Nevertheless, the Massachusetts scheme sought to recognize and enforce class hierarchy as clearly as any Tudor sumptuary regulation that contained specific items of attire of the Knights of the Garter.

As in Tudor England, the existence of recognized liberties did not deter the promulgation of laws of attire. The precise legal status of the Massachusetts Body of Liberties of 1641 at that time remains subject to scholarly debate.⁸⁵ However, the Body of Liberties is now considered the Massachusetts Magna Carta and a precursor to not only the Massachusetts Constitution but also the United States Constitution’s Bill of Rights. The Massachusetts Body of Liberties contains some very progressive articulations of rights, especially with regard to due process and criminal procedure.⁸⁶ For example, it includes a right against double jeopardy,⁸⁷ a right

⁸¹ *Id.* (spelling updated).

⁸² *Id.* at 243-44. (spelling updated).

⁸³ *Id.* at 243.

⁸⁴ *Id.* at 243-44.

⁸⁵ See Massachusetts Body of Liberties, <http://www.mass.gov/anf/research-and-tech/legal-and-legislative-resources/body-of-liberties.html>.

⁸⁶ Body of Liberties (1641), *reprinted in* 1 COLONIAL LAWS OF MASSACHUSETTS (William Whitmore ed., Boston: Rockwell & Churchill, 1889).

included in the Fifth Amendment to the United States Constitution. However, almost three hundred years after the Massachusetts Body of Liberties, the United States Supreme Court would hold the double jeopardy right not sufficiently fundamental so as to be applicable to the states,⁸⁸ only reversing this conclusion in 1969.⁸⁹ Additionally, the Body of Liberties recognizes rights, albeit limited, for women, children, and animals.⁹⁰ However, the Body of Liberties was not limited to an articulation of rights, but set out a framework for religious society, including as it did a “Declaration of the Liberties the Lord Jesus hath Given to the Churches.” There was also a catalogue of “capital laws,” supported by marginal Biblical citations, enumerating twelve offenses that warranted the death penalty. These included worshipping “any other god but the lord god” after conviction, being a witch, blasphemy, murder, bestiality (in which the animal would also be slain and buried), male homosexuality, and adultery.⁹¹ Thus, taken as a whole the Body of Liberties provides little that would support a right of liberty or equality, and even less to support a right of conscience or speech, that would be sufficient to challenge a branding, badging, sumptuary, or dress regulation.

Reports of enforcements of the dress regulations are scattered amongst the records of the colony. In 1652 a session of the Salem Quarterly Court considered accusations against Jonas Fairbanks for “wearing great boots,” Henrye Bullocke for “excess in his apparel in boots, ribbons, gold and silver lace,” and Marke Hoscalle for “wearing broad lace.”⁹² The statements in the records are generally quite succinct, with women and silk seeming to be the most common offenders. For example, records for a session of court held at Ipswich in 1653 include several women summoned for wearing silk hoods. The women are unnamed except as “wife” of their named husbands, and the judgments of their cases depends upon their husbands’ worth:

⁸⁷ Section 40 provides, “No man shall be twice sentenced by Civill Justice for one and the same Crime, offense, or Trespasse.” Other examples include rights to trial, bail, and counsel, and against torture.

⁸⁸ *Palko v. Connecticut*, 302 U.S. 319 (1937).

⁸⁹ *Benton v. Maryland*, 395 U.S. 784 (1969).

⁹⁰ The Body of Liberties has two sections regarding “Liberties of Women,” including the freedom of married women from bodily correction or “stripes” from their husbands, several sections relating to children largely discussing inheritance, but also allowing children to complain to the authorities if parents exercise any “unnatural servertie” towards them, and two sections relating to “Bruite Creatures” that prohibit tyranny and cruelty. The Body of Liberties also has provisions protective toward servants and strangers, and outlawing slavery.

⁹¹ *Body of Liberties (1641)*, reprinted in *1 COLONIAL LAWS OF MASSACHUSETTS* (William Whitmore ed., Boston: Rockwell & Churchill, 1889).

⁹² *1 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASSACHUSETTS*, 1636-56, at 274.

Wife of John Hutchings, presented for wearing a silk hood, was discharged upon testimony of her being brought up above the ordinary rank.

Wife of Rich. Knight, presented for wearing a silk hood, discharged, her husband being worth above two hundred pounds.

Joseph Swett's wife fined ten shillings for wearing a silk hood.

Wife of William Chandlour fined ten shillings for wearing a silk hood.

Wife of John Whipple, presented for wearing a silk hood, discharged, her husband being worth two hundred pounds.⁹³

Although they are brief, it is sometimes obvious from the records that the court heard the testimony of witnesses or received letters. The court also evaluated the evidence: "Rich. Brabrooke's wife presented for wearing a silk scarf. Not proved."⁹⁴ Moreover, while the statutory element was the husband's worth, this was not necessarily determinative: "Thomas Harris, Thomas Wayte and Edward Browne, upon proof of their wives' education and bringing up, discharged of their presentments." This entry has a footnote, seemingly of testimony of one of the husbands, which not only discusses the wife's education and previous status, but also includes a legal argument. He noted that the purpose of the law was to eliminate the sins of pride and excess in apparel and argued that there was no pride in this case because she wore her scarf only during the seasons when it was cold or wet.⁹⁵ While not an invocation of rights, this argument reflects a notion of entitlement to fairness. Moreover, the argument was successful and included in the record.

Massachusetts may have been the most vigorous in its regulations of dress, but it was not alone. The first general assembly in Virginia, consisting of the colonial Governor, the council members appointed by the Governor, and elected burgesses from the colonists, was convened in 1619. It quickly reached the matter of enacting regulations against idleness, gaming, drunkenness, and excess of apparel. The enactment contains no definition of excess of apparel, but seems to delegate its definition and enforcement to religious authorities: every man was to be assessed "in the Church for all publique contributions" if he is unmarried for his own apparel and if married, for his own and his wife's apparel.⁹⁶

In South Carolina, there was concern for the clothing of slaves. The first "Act for the Bettering Ordering of Slaves," promulgated in 1690 by the colonial proprietors for Carolina, included a general directive that

⁹³ *Id.* at 303.

⁹⁴ *Id.* at 304.

⁹⁵ *Id.* at 304.

⁹⁶ 1 JOURNALS OF THE HOUSE OF BURGESSES, 1619-1658/59, 10 (H. R. McIlwaine, ed., The Colonial Press, E. Waddey Co, 1905.).

slaves be provided clothes.⁹⁷ In the Acts of 1735 and 1740, those legislating for the colony of South Carolina enacted a dress code for slaves.⁹⁸ The 1735 and 1740 acts, though separated by the Stono Rebellion, a notable slave uprising in 1739,⁹⁹ differ very little from each other with respect to their attention to attire. One notable exception was that the post-Stono Rebellion act in 1740 included a provision that those having responsibility for slaves should allow them sufficient clothing, although the act did not include any right of recourse for the slaves themselves.¹⁰⁰

Otherwise, both acts seek to remedy the same situation: “many of the slaves of this Province wear clothes above the condition of slaves.” Both laws essentially set an upper limit on the types of fabric permitted for slaves: nothing “finer, other, or greater value than Negro cloth, duffels, kerseys, osnabrigs, blue linen, check linen or coarse garlix, or calicoes, checked cottons, or Scotch plaids.” The only exception the laws provided was for “livery men or boys.”¹⁰¹

More permanent marks, such as branding as part of “benefit of clergy,” play an important part in pre-constitutional history. In 1712, the Lords and Proprietors of the Province of South Carolina selectively adopted a series of statutes of the English Parliament.¹⁰² While South Carolina did not include any of the acts of apparel, it did adopt the Great Charter (Magna Carta). It also incorporated various acts regarding benefit of clergy, developed in England to immunize religious officials from civil punish-

⁹⁷ No. 57, An Act for the Better Ordering of Slaves, 1790, *reprinted in* The Statutes at Large of South Carolina: Edited, Under Authority of the Legislature (1840), Vol. VII, 343 David J. McCord (ed.).

⁹⁸ No. 586, An Act for the Better Ordering and Governing Negroes and Other Slaves, section XXXVI, (1735), *Id.* at 385, 396; No. 670, An Act for the Bettering Ordering and Governing Negroes and Other Slaves in this Province, section XL, (1740), *Id.* at 397, 412.

⁹⁹ The Stono Rebellion in South Carolina was a slave insurrection in which perhaps a hundred slaves moved toward Florida and the hope of freedom, committing acts of violence along the way. Although the rebellion was quelled, numerous people died. See A. Leon Higginbotham, Jr., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* 61-82 (1978).

¹⁰⁰ No. 670, section XXXVIII. The act provided that “any person or persons, on behalf of such slave or slaves” could make a complaint to a justice. The provision included not only clothing but also “covering” and food. It is possible, however, that criminal sanctions were not unthinkable. In at least one case - - albeit from Tennessee and more than a century later - - the court affirmed a conviction for lewdness of a slave owner based on his failure to provide “decent” clothing for a female slave beyond tattered and dirty rags that did not adequately cover her. The criminal fine was \$25. *Britain v. State*, 22 Tenn. 203 (1842).

¹⁰¹ No. 586, An Act for the Better Ordering and Governing Negroes and Other Slaves, section XXXVI, (1735), *supra* note 99 at 385, 396; No. 670, An Act for the Bettering Ordering and Governing Negroes and Other Slaves in this Province, section XL, (1740), *Id.* at 397, 412.

¹⁰² No. 322, An Act to Put in Force in the Province the Several Statutes of the Kingdom of England or South Britain, Therein Particularly Mentioned, (1712), in *The Statutes at Large of South Carolina: Edited, under Authority of the Legislature Vol. II, 401-582* (Thomas Cooper ed., 1837).

ment. Benefit of clergy was extended to persons who were literate, or could imitate literacy, by “reading” from a particular passage of the Bible; Psalm 51 came to be known as the “neck verse” because it could save one’s neck from the noose. However, this benefit could be asserted only once. Hence, the person’s thumb or thumb joint was branded with an appropriate letter for the crime, such as M for manslaughter/murder; T for theft.

South Carolina made “of force” the 1623 Act of Parliament that extended the benefit of clergy to women committing “small felonies” (worth less than ten shillings). The punishment for the first offense was to be “branded and marked in the hand, upon the brawn of the left thumb, with a hot burning iron, having the Roman T upon said iron.” The branding was to occur in open court before the Judge and performed by the jailer. Further punishment such as whipping and imprisonment was also within the discretion of the judge.¹⁰³

Importantly, however, the law regarding benefit of clergy with its mark of branding for specific crimes was not identical in England and the colony of South Carolina. This led to what may be termed a constitutional conflict in the famous 1736 case of *Rex v. Mellichamp*.¹⁰⁴ Mellichamp was convicted of counterfeiting, but his attorney essentially argued that the South Carolina law that proscribed his punishment without benefit of clergy was unconstitutional, as it exceeded the powers of the colonial government and conflicted with British law. The Chief Judge invoked the Magna Carta and waxed eloquent on the British constitution: “founded on Reason and the Law of Nature, and extracted, refined and collected from the Laws of Nations, calculated as well for the Honour, Strength and Support of the Crown, as for the Freedom, Safety and Welfare of the People.” The judge referred to the English constitution as a singular entity: “This Constitution thus framed and settled by the Wisdom of our Ancestors, we have long experienced to be salutary and good, and may be esteemed the best in the World, being thereby secured in the peaceable Enjoyment of our Lives, Liberties, Estates, and Properties, free from Oppression and arbitrary Violence, and subject to no Laws but those of our own making, that is by King, Lords and Commons in Parliament assembled.”¹⁰⁵

The judge posited himself as a protector of individual rights, bound to “demand and protect all his Majesty’s Subjects in the safe and free Enjoyment of their Lives, Liberties, Estates and Properties, so far as by Law I may, and as I would by no means suffer the Prerogative of the Crown to be lessened, so I would be careful not to extend it to the prejudice of the People, nor to encroach on the Liberties of the Subject.” This autonomous judicial role might be contrasted with the criticism in the Declaration of Independence forty years later, that King George III had “made Judges de-

¹⁰³ An Act concerning Women convicted of small felonies, 21 Jac. I. c. 6 (1623), 4 STATUTES OF THE REALM 1216. The Act is reproduced as part of No. 322, *Id.* at 512.

¹⁰⁴ *Rex v. Mellichamp*, S.C. GAZETTE (CHARLESTOWNE), May 1-8, 1736 at 1 col. 1. available at: www.accessible-archives.org, and www.nypl.org.

¹⁰⁵ *Id.*

pendent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” Yet whether Thomas Mellichamp was accorded benefit of clergy and escaped the death penalty with only a branding is uncertain. The chief judge was alone in his conclusion, an assistant justice disagreed, and the Court adjourned “in expectation of a fuller Bench to decide the case by a Majority.”¹⁰⁶

It is difficult to imagine an analogous case involving a slave. South Carolina never allowed slaves to assert benefit of clergy, even assuming they could be deemed literate.¹⁰⁷ The slave code statutes of 1722 and 1735 provided that for crimes such as theft where “a white man is allowed benefit of clergy and ought to be punished by burning in the hand,” a slave “shall be burned with the letter R in the forehead.”¹⁰⁸ Indeed, theft by slaves might be considered “running away”: an assertion of rights and a form of escape from servitude.¹⁰⁹ As such, an indelible brand rather than a removable badge or rough textiles would serve as a marker of status, not only of being enslaved but also of being rebellious.

The same issue of the South Carolina Gazette in May of 1736 containing *Rex v. Mellichamp* also included this entry:

BROUGHT TO THE GAOL IN CHARLESTOWN

April 10. A Negro Fellow with white Negro Cloth Jacket and breeches, taken up by a Negro Fellow belonging to Wm. Bull Esq;

13. Jemmy a Negro Boy, has on a white Cloth Jacket and Trowsers, taken up by Peter Mason Tanner.

23. A Negro Girl, has on a Negro Blanket taken up by Jeremiah Taylor.

May 3. Primus a Negro Fellow belonging to Doctor Lewin taken up by Mr. Starling.

6. Tom A Negro Fellow has on a Negro Cloth Jacket & breeches, taken up by one of Mr. Harvey's Negros.¹¹⁰

¹⁰⁶ PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 266-68 (2008).

¹⁰⁷ The slave code of the state of South Carolina, in 1834, criminalized slaves learning to read, including penalties for teaching by whites and “free persons of color.” No. 2639, An Act to Amend the Laws in relation to Slaves and Free Persons of Color, section I, *reprinted in* The Statutes at Large of South Carolina: Edited under Authority of the Legislature Vol. VII, 468 David J. McCord (ed. 1840).. Earlier acts had criminalized writing by slaves, for example, in the Act of 1740, which also included a dress code, the act prohibited persons from teaching slaves to write or employing them as scribes, No. 670, *supra* note 101 at 413.

¹⁰⁸ No. 476, An Act for the Better Ordering and Governing Negroes and Other Slaves, section X, (1722), *reprinted in* The Statutes at Large of South Carolina: Edited under Authority of the Legislature Vol. VII, 371, 374 (David J. McCord ed., 1840). No. 586, *id.* at 385, 388.

¹⁰⁹ Alex Lichtenstein, “*That Disposition to Theft, with Which They Have Been Branded*”: *Moral Economy, Slave Management, and the Law*, 21J. SOC. HIST., 413-440 (1998),.

¹¹⁰ *Brought to the Jail in Charlestowne*, S.C. GAZETTE (CHARLESTOWNE), May 1-8, 1736 at 3 col. 2, *available at*: www.accessible-archives.org, and www.nypl.org.

Instead of *Rex v. Mellichamp* in which the judge invoked the Magna Carta and liberties, the docket of persons brought to the jail - - presumably in accordance with the slave codes that mandated temporary jailing for running away - - - contained no reference to rights or adjudication. People are merely described by their race, as well as by their gender; they are less likely to be accorded even a partial name than to be described by their attire.

VI. THE ENDS OF EMPIRE

Managing hierarchy in the colonies was a complex process, accomplished in part through regulation of attire and infliction of bodily marks. Similarly, managing the complications of morality and sexuality employed regulations of apparel and other appearances. However, in addition to the interests of maintaining hierarchy and morality, the colonists of British America had substantial economic interests regarding cloth. The plans to produce silk in the southern colonies, including South Carolina and Virginia proved unsuccessful.¹¹¹ In the Massachusetts Bay Colony, several laws promoted wool and other local textiles. Unlike the Elizabethan cap act mandating the wearing of wool caps, the Massachusetts approach championed production. For example, in 1645 an act referenced the brutal Civil War in England, noting there was a scarcity of wool by reason of the wars in Europe killing both the sheep and the workers of wool. The solution was a preservation of clothes, as well as allowing sheep to be kept on the commons.¹¹² An act a few years later mandated death by hanging for any dog that attacked a sheep.¹¹³

In 1656, with Charles I beheaded and England under the Protectorate of Oliver Cromwell, wool was apparently still in short supply in the colony, so the Massachusetts Court required an assessment of households for spinning capacity, a setting of a quota, and a possible penalty for failure to meet the quota. The same act encouraged local officials to encourage the sowing of hemp and flax, and the clearing commons for the keeping of sheep and breeding them.¹¹⁴

In the decades that followed, developments such as the “Glorious Revolution” in 1688, the establishment of a constitutional monarchy, and the Act of Settlement of 1701, stabilized England. So too did the possession of colonies. In its empire - - - what historian T.H. Breen has labeled an “empire of goods”¹¹⁵ - - - England employed its legal powers in the service of capitalism, especially with regard to wool. At home, Parliament’s Wool-

¹¹¹ See e.g., Ben Marsh, *Silk Hopes in Colonial South Carolina*, 78(4) JOURNAL OF SOUTHERN HISTORY 807 – 854 (2012).

¹¹² 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY, *supra* note 70, at Vol.II, 105.

¹¹³ *Id.* at 252.

¹¹⁴ *Id.* at Vol. III, 397.

¹¹⁵ T. H. BREEN, *THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE* (2004).

en Manufacture Act of 1725¹¹⁶ began the process of what scholar Christopher Tomlins names the “criminalization of employment contract breach.”¹¹⁷ Tomlins describes how Parliament transformed the employment relation into that of master-servant, with criminal consequences for uncooperative servants, solidifying a source of labor. For its possessions, England employed its legal powers to create colonies of customers. Insufficient wool in British America was not simply attributable to a lack of success in keeping the sheep safe from attacking dogs. For example, the Royal Privy Council used power to void colonial laws to veto two acts from the Virginia Assembly: An Act Prohibiting the Exportation of Any Iron, Wool, Woolfells, Skins, hides, or Leather; and An Act for Encouragement of the Manufactures of Linen and Wollen Cloth.¹¹⁸ More comprehensively, Parliament passed various “Navigation Acts” that sequestered the commercial activities of the colonies within the empire. First passed during the Protectorate of Oliver Cromwell, the navigation acts essentially provided that the American colonies could trade only with Great Britain.¹¹⁹

Not surprisingly, by 1773, American colonists purchased almost 26 percent of all the goods being domestically produced in Great Britain,¹²⁰ about half of these goods were various kinds of finished cloth, with a predominance of woolens.¹²¹ In the American colonies, England had finally found - - - or created - - - a reliable buyer for its manufactured wool. Additionally, America was a profitable stop in Great Britain’s global trade, a large portion of which featured textiles and articles of clothing.

Breen notes that this arrangement was widely admired: the “empire of goods” that “gained strength from equipoise” was analogized to the “crown, lords, and commoners” of England’s “famed balanced constitution” that was a “source of liberty and prosperity.”¹²² Breen quotes George

¹¹⁶ 12 Geo. I, c. 34 (1725), An Act to Prevent Unlawful Combinations of Workmen Employed in the Woollen Manufactures, and for Better Payment of Their Wages, section II.

¹¹⁷ CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING BRITISH AMERICA, 1580-1865*, 349 – 50 (2010).

¹¹⁸ Royal Instructions to British Colonial Governors, 1670-1776, Vol. I, 161 (Leonard W. Labaree ed., 1935).

¹¹⁹ An Act for Increase of Shipping, and Encouragement of the Navigation of this Nation, in Acts and Ordinances of the Interregnum, 1642-1660 (1911), 559-562, available at <http://www.british-history.ac.uk/report.aspx?compid=56457>; An Act for the Encouraging and Increasing of Shipping and Navigation, 12 Charles II ch. 18 (1660), 5 STATUTES OF THE REALM 246 – 50.

An Act for the Encouragement of Trade, 15 Charles II ch. 7 (1663), 5 STATUTES OF THE REALM 449 – 52.

An Act for the Encouragement of the Greenland and Eastland Trades, and for Better Securing the Plantation Trade, 25 Charles II ch. 7 (1673), 5 STATUTES OF THE REALM 792-93.

¹²⁰ BREEN, *supra* note 115 at 61.

¹²¹ *Id.* at 62-63.

¹²² *Id.* at 86.

Mason writing to George Washington in 1769: “Our supplying our Mother-Country with gross Materials, & taking her Manufactures in Return is the true Chain of Connection between us; these are the Bands, which, if not broken by Oppressions, must long hold us together, by maintain[ing] a constant Reciprocation of Interest.”¹²³

The “oppressions” that broke the “reciprocation of interest” were largely the result of the economic hierarchies between the “mother country” and the dependent American colonies. While tea may be the most famous of commodities fomenting the revolution of the British colonies of America, apparel played an important part. The British Parliament did single out textiles or clothes on a few occasions when it legislated for the colonies. In 1732, Parliament passed “An Act to prevent the exportation of hats out of any of His Majesty’s colonies or plantations in America and to restrain the number of apprentices taken by hat-makers in said colonies or plantations, and for the better encouragement of the making of hats in Great Britain.”¹²⁴ Not mentioned in the otherwise descriptive title of the act was a provision that prohibited any person “residing in any of his Majesty’s plantations in America” from making or causing to be made “any felt or hat of or with any wool or stuff whatsoever,” unless he had served as an apprentice for seven years.¹²⁵

More than forty years later, Thomas Jefferson referred to the Hat Act in his *A Summary View of the Rights of British America*, written in 1774 as a draft for the Virginia convention selecting representatives to the Continental Congress and considered a precursor to the Declaration of Independence. In *A Summary View*, Jefferson described the Hat Act as forbidding “an American subject” from making “a hat for himself of the fur which he has taken perhaps on his own soil.” He labeled this “an instance of despotism to which no parallel can be produced in the most arbitrary ages of British history.”¹²⁶

But the Hat Act is not the pinnacle of Jefferson’s rhetoric. Of more immediate concern to Jefferson than the Hat Act passed under George II were the acts passed by Parliament under the reign of King George III. Jefferson argued the acts under George III were part of “a deliberate and systematical plan of reducing us to slavery.” Amongst the laws under George III, Jefferson listed “An act for granting certain duties in the English colo-

¹²³ *Id.* at 92, citing Mason to Washington, 5 Apr. 1769, in *The Papers of George Mason*: Vol. I, 1749-78, 100 (Robert A. Rutland ed., Chapel Hill 1970).

¹²⁴ 5 George II c. 22 (1732) in *THE STATUTES AT LARGE*, Volume 6, *supra* note 60, at 89-91.

¹²⁵ *Id.* at Section VII.

¹²⁶ Thomas Jefferson, *A Summary View of the Rights of British America: Set Forth in Some Resolutions Intended for the Inspection of the Present Delegates of the People of Virginia, Now in Convention / by a Native, and Member of the House of Burgesses* (1774) available at Yale Law School, The Avalon Project, Documents in Law, History, and Diplomacy, http://avalon.law.yale.edu/18th_century/jeffsumm.asp.

Beyond Sumptuary

nies and plantations in America, &c.”¹²⁷ While Jefferson did not expand on the law, contemporary readers would have been well aware of the law more commonly known as The Sugar Act passed in 1764. It placed duties not only on sugar, but also:

For every pound weight avoirdupois of wrought silks, bengals, and stuffs, mixed silk or herbs, of the manufacture of Persia, China, or East India, imported from Great Britain, two shillings.

For every piece of callico painted, dyed, printed, or stained, in Persia, China, or East India, imported from Great Britain, two shillings and six pence.

For every piece of foreign linen cloth, called Cambrick, imported from Great Britain, three shillings.

For every piece of French lawn imported from Great Britain, three shillings.¹²⁸

The imposition of duties on items such as wrought silk and French lawn (a type of fine cloth) might be interpreted as a kind of hierarchical sumptuary legislation. The Sugar Act targeted luxury items and created status hierarchies between those who are able to afford to pay the extra tax in opposition to those who were not. Unlike more direct sumptuary regulations, however, the imposition of duties preserved a zone of consumer autonomy. A segment of the population could choose whether or not to purchase Cambrick and pay the extra three shillings or buy a less lavish textile that was untaxed. However, democratic impulses would successfully contravene the consumer choice construction of the import duty.

The role of apparel in revolutionary rhetoric was disproportionate to its direct regulation. For example, appearing before Parliament’s House of Commons in 1766 to speak about the hated Stamp Act that required purchase of a stamp for legal documents and other parchments, Benjamin Franklin talked about clothes.¹²⁹ Answering a query, Franklin stated that if the Stamp Act was not repealed, there would be a “total loss of the respect and affection the people of America bear to this country, and of all the commerce that depends on that respect and affection.” Regarding the effect on commerce, Franklin stated that the Americans would take “very little of your manufactures in a short time” and indeed had the ability to do without them: “The goods they take from Britain are either necessities, mere conveniences, or superfluities. The first, as cloth, etc., with a little industry

¹²⁷ 4 George III c. 15 (1764), in *THE STATUTES AT LARGE, FROM MAGNA CHARTA, TO THE TWENTY-FIFTH YEAR OF THE REIGN OF KING GEORGE THE THIRD, inclusive*. Vol. 7: 457-65 (Owen Ruffhead & Charles Runnington eds., London, Charles Eyre & Andrew Strahan, 1786).

¹²⁸ *Id.*

¹²⁹ *The Examination of Dr. Benjamin Franklin, in A THIRD VOLUME OF INTERESTING TRACTS, ON THE SUBJECT OF TAXING THE BRITISH COLONIES IN AMERICA* (London: printed for J. Almon, opposite Burlington-House, in Piccadilly, 1767), available at Eighteenth Century Collection Online.

they can make at home; the second they can do without till they are able to provide them among themselves; and the last, which are mere articles of fashion, purchased and consumed because the fashion in a respected country; but will now be detested and rejected. The people have already struck off, by general agreement, the use of all goods fashionable in mourning. . . .” Franklin added that the Americans would replace their pride in English fashions with wearing “their old cloathes over again, till they can make new ones.”¹³⁰

While Parliament did repeal the Stamp Act, the colonists pursued their “general agreement” to forgo English fashions and imports. As T.H. Breen has persuasively demonstrated, the non-importation and non-consumption compacts amongst colonists forged an American identity in resistance to unconstitutional taxes on consumer goods.¹³¹ Wearing “homespun” apparel became a mark of American patriotism. While the compacts were unenforceable - - - they were, after all, extra-legal documents under colonial law - - - strategies such as local associations and committees, signatory and subscription lists, newspaper letters, social shaming, and other pressures within and across the colonies were effective in equating “liberty” with eschewing a silk ribbon. This politicization had a distinctively democratic tone, often highlighting the role of women as decision-makers for households, although generally neglecting those unable to make consumer choices, such as slaves and non-adults.¹³²

The anti-importation rhetoric also possessed a pronounced sumptuary inflection. The Articles of Association of the First Continental Congress in 1774, essentially an agreement to boycott English goods, included a provision that:

We will, in our several stations, encourage frugality, economy, and industry, and promote agriculture, arts and the manufactures of this country, especially that of wool; and will discountenance and discourage every species of extravagance and dissipation, especially all horse-racing, and all kinds of games, cock fighting, exhibitions of shews, plays, and other expensive diversions and entertainments; and on the death of any relation or friend, none of us, or any of our families will go into any further mourning-dress, than a black crepe or ribbon on the arm or hat, for gentlemen, and a black ribbon and necklace for ladies, and we will discontinue the giving of gloves and scarves at funerals.¹³³

¹³⁰ *Id.* Breen discusses Franklin’s testimony, BREEN, *supra* note 115 at 195-200.

¹³¹ *Id.* at 227. Breen notes that the “pleasures of possession” began to be equated with “broader, more public issues of constitutional misrule,” and that this “accelerated a symbolic process that would in time allow discontented Americans to conflate a perceived loss of freedom with their own participation in the consumer marketplace.”

¹³² *Id.* at 280-289.

¹³³ Journals of the Continental Congress, The Articles of Association, *available at* Yale Law School, The Avalon Project, Documents in Law, History, and Diplomacy, http://avalon.law.yale.edu/18th_century/contcong_10-20-74.asp.

Beyond Sumptuary

This echoed earlier discourse arguing that it was the “folly and extravagance of the people in imitating the customs and dress of foreigners” and the “extravagant dress and luxury” that had the “fatal effect” of inducing the British to believe that Americans were more prosperous than they were and therefore capable of paying more taxes.¹³⁴ Similarly, it was argued that the colonists had grown “more Luxurious every Year” causing them to “run deeper and deeper in Debt to our Mother Country,” so that it was time to revive the virtues of “industry and Frugality.”¹³⁵ According to T.H. Breen, this virtue was a new sort of consumer virtue – a “bourgeois virtue” - - - distinct from the other religious or political types of virtue.¹³⁶ Nevertheless, the emphasis on virtue was certainly linked to the Puritan and Christian virtue that had animated the sumptuary laws of the Massachusetts Bay Colony. And it was also linked to the notion of virtue in civic republicanism that prized independence from the corrupting influence of commerce.¹³⁷

Perhaps it was this notion of civic republicanism that best explains the effort to include sumptuary laws as among the enumerated powers of the federal government in the United States Constitution, drafted in 1787. The Constitutional Convention occurred because the Articles of Confederation, a document entered into during the Revolutionary War and consolidating a league of sovereign states, came to be perceived as unsatisfactory, at least by those who supported a more unitary government. But even those who supported more unification did not necessarily support the Constitution as drafted, including George Mason, a delegate from Virginia who ultimately did not sign the Constitution. The same Mason who had written George Washington a decade earlier concerning the commercial reciprocation of interest between the colonies and Great Britain, was advocating for a federal power to make sumptuary regulations. According to the Records of the Federal Convention, Mason argued for a Sumptuary Clause to enable Congress to enact sumptuary laws: “The love of distinction it is true is natural; but the object of sumptuary laws is not to extinguish this principle but to give it proper direction.”¹³⁸ The motion failed by a vote of 8-3, with only the delegates from Delaware, Maryland, and Georgia voting in the affirmative. A few weeks later, Mason “had not yet lost sight of his object,” according to the Records, and he was “descanting on the extravagance of our manners, the excessive consumption of foreign superfluities, and the necessary of restricting it.”¹³⁹ Mason this time moved for a committee to be appointed, which did occur, although the committee apparent-

¹³⁴ BREEN, *supra* note 115, at 14.

¹³⁵ *Id.* at 206.

¹³⁶ *Id.* at 264.

¹³⁷ *Id.* at 263-64.

¹³⁸ The Records of the Federal Convention of 1787, 4 vols., (Max Farrand, ed. 1937 rev. ed, 1966). Vol. 2: 344 (Aug. 20, 1787).

¹³⁹ *Id.* at 606 (Sept. 13, 1787).

ly never made a report.¹⁴⁰ The Constitution as drafted and ratified did not include among the enumerated powers of Congress a mention of sumptuary laws, or any references to the power to direct individuals' "love of distinction."

Yet popular rhetoric continued to include judgments about individuals' "love of distinction." As scholar Linzy Brekke has noted, post-Revolutionary War America was beset by an economic malaise and imported textiles were an easy scapegoat.¹⁴¹ Brekke argues that George Washington was a "particularly contradictory figure" during this period, seen as both a person with "homespun" clothes and politics, as well as someone less genuine. One report criticized him as someone who was not nearly as patriotic as his rhetoric: he "dressed in manufactures of foreign nations" and thus almost "every article he wears is repugnant to his words."¹⁴²

In addition to declamatory judgments, there were genuine issues regarding the advisability of government legislating on aspects of dress in a constitutional democracy. John Adams, who would become the nation's second president, wrote in his pamphlet "Thoughts on Government" that

The very mention of sumptuary laws will excite a smile. Whether our countrymen have wisdom and virtue enough to submit to them, I know not; but the happiness of the people might be greatly promoted by them, and a revenue saved sufficient to carry on this war forever. Frugality is a great revenue, besides curing us of vanities, levities, and fopperies, which are real antidotes to all great, manly, and warlike virtues.¹⁴³

Adams thus links support for sumptuary laws with the revolutionary war effort. He also valorizes frugality as a masculine virtue, decidedly superior to the effeminacy of "fopperies." The invocation of rights is implicit and negative: the countrymen may not be sufficiently "wise" to submit. Yet there is also a latent claim of equality (or at least male equality), especially because Adams' passage on sumptuary laws follows one on universal education: "Laws for liberal education of youth, especially of the lower class of people, are so extremely wise and useful, that, to a humane and generous mind, no expense for this purpose would be thought extravagant."¹⁴⁴

Similarly, Mason's support for sumptuary laws may be linked to republican virtue. Jeff Broadwater, a Mason biographer, argues that Mason's concept of republican virtue was not necessarily in conflict with liberal rights, but a "delicate balance" in which individual freedoms rested upon

¹⁴⁰ *Id.* at 607.

¹⁴¹ Linzy Brekke, *The "Scourge of Fashion": Political Economy and the Politics of Consumption in the Early Republic*, 3(1) EARLY AMERICAN STUDIES 111, 123 (2005).

¹⁴² *Id.* at 123, quoting *Pennsylvania Gazette*, Apr. 15, 1789.

¹⁴³ John Adams, *Thoughts on Government*, in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS, BY HIS GRANDSON CHARLES FRANCIS ADAMS, 193, 199 (Little, Brown & Co. 1856).

¹⁴⁴ *Id.*

Beyond Sumptuary

the “virtue of the citizenry.” Moreover, Broadwater notes that the conflicts of Mason’s time were not between “the public good and individual rights but those between majority rights and an undemocratic government.”¹⁴⁵

From a federalism perspective, Mason’s advocacy of federal power to enact sumptuary laws is less explicable. While John Adams remains in reputation a staunch federalist, George Mason continues to be celebrated as a champion of states’ rights. If adopted, Mason’s proposal would have arrogated to the federal government the power to adopt mandatory dress codes for everyone in the United States.

VII. CONCLUSION

From the Magna Carta to the United States Constitution, textiles, clothes, and bodily appearances have been intertwined with the effort to develop democracy. Sumptuary laws, understood in their traditional sense as limitations on luxury, are part of this effort, but only part. At times, regulations mixed sumptuary and other motives, such as the prohibition of excessive hose to certain knights or of fine cloth to certain slaves. At other times, such as the prohibitions of particular patterned plaids or hairstyles, the laws had nothing to do with luxury and everything to do with an incipient nationalism. Additionally, textiles and clothes as consumer items had both economic and symbolic value that governments and social groups sought to deploy in their quests for domination or to resist being dominated.

Government regulations of appearance and clothes -- and attempts to resist them -- have served hierarchies not only of class and social status, but also gender, sexuality, national identity, and servitude. Both the regulation and the resistance are rooted in Anglo-American history since the Magna Carta. The United States Constitution lacks the proposed Sumptuary Clause, but the “delicate balance” between governmental proscriptions and prohibitions of appearance has been -- and remains -- a constitutional concern.¹⁴⁶

¹⁴⁵ JEFF BROADWATER, *GEORGE MASON: FORGOTTEN FOUNDER* 44-45 (2006).

¹⁴⁶ For current controversies, *see* RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* (2013).

MANIPULATING PUBLIC LAW FAVORABILITY: IS IT REALLY THIS EASY?

Brian Christopher Jones*

Institutum Iurisprudentiae, Academia Sinica

ABSTRACT

Can favorability for public laws be manipulated merely by changing the short title of the bill or act? Based on an exploratory survey of undergraduate students from the University of Stirling, the results suggest that naming may indeed play a small but significant part of the assessment. Employing five different types of short titles, it was found that “evocative” titles attracted higher favorability ratings than the “descriptive/technical” titles. Additionally, the survey found that most participants were satisfied with a short vignette of information on the bill or law rather than further explanation, and a notable number of participants supported legislation because they liked the “sound of it.” While also describing the structural context in which short titles are used and providing some political and psychological evidence that naming could be of significance to public law favorability, I ultimately advocate deliberative caution when drafting the short titles of bills and acts in order to ensure accuracy.

CONTENTS

I. INTRODUCTION.....	512
II. THE STRUCTURAL CONTEXT OF SHORT TITLES.....	513
A. <i>Practical concerns</i>	516
B. <i>Evidence of naming effects</i>	517
III. PSYCHOLOGICAL INSIGHTS.....	517
IV. METHODS.....	521
A. <i>Five Classifications of Short Titles</i>	521
i. Personalized titles.....	522
ii. Desirable characteristic titles.....	522
iii. Overt action titles.....	522

iv. Combination titles	523
v. Descriptive/technical titles	524
B. <i>Further methodological details</i>	524
V. RESULTS	525
VI. DISCUSSION	529
VII. CONCLUSIONS	530

I. INTRODUCTION

*It is not society that lives, it is people, and it is to people the law must be communicated.*¹

In our increasingly complex world it is difficult to discern why some laws resonate well with the public and others acquire a cloud of insignificance or even contempt. Ideally, the most influential factor in regard to favorability arises from the substance of the law itself; especially in regard to whether it benefits those who are assessing it. Perhaps some support is also due to particular incidents surrounding a law, such as: news coverage, governmental support, lobbying efforts, and laws passed after highly publicized events, among other things. Yet other subtle factors may be at work as well when assessing law, which have largely been neglected in the literature. In light of some exploratory evidence, this article proposes that even presentational aspects of laws, such as short titles, can influence reactions to a law's favorability.

The short titles of laws are first and foremost a legal phenomenon, in that they are formally used to label and refer to statutes and proposed bills. However, the examination of how they operate in society and their effects on public law favorability involves thinking beyond the legal pragmatics and into the sociological and psychological; and doing this makes the analysis significantly more insightful. As Cotterrell states, “[d]isciplinary boundaries should be viewed pragmatically; indeed, with healthy suspicion. They should not be prisons of understanding.”² Furthermore, he notes that the “sociology of law is otherwise *inclusive* rather than exclusive,” and is “found in many disciplinary fields of knowledge and practice.”³ It is no secret that interdisciplinary legal research is still

*Ph.D. Postdoctoral Research Fellow, Institutum Iurisprudentiae, Academia Sinica. The author wishes to thank Kay Goodall for her comments on an earlier version of this article.

¹ C. THORNTON, LEGISLATIVE DRAFTING (4th ed. 1996).

² Roger Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25(2) J.L. SOC'Y 177 (1998).

³ *Id.* at 187.

regarded as a highly contentious endeavor.⁴ In an attempt to find common ground through an ‘intermediate’ interdisciplinary approach, this piece “appl[ies] the method or theoretical constructs of a different discipline to legal materials or aspects of a legal system in order to study social phenomena related to or affected by the law.”⁵ For, as Vick and other scholars have expressed, “current interdisciplinary legal research too rarely involves meaningful encounters with other disciplines.”⁶ This is an attempt to help remedy that.

The article is composed of three main parts. First, I provide a descriptive juxtaposition of where short titles fit in regard to their legal and political significance. Then, I discuss the survey methods and how they were performed, including the different types of short titles and further survey details. Next, the results are presented, followed by a discussion of the major findings. The article ends with concluding thoughts.

II. THE STRUCTURAL CONTEXT OF SHORT TITLES

Short titles for bills and laws are used in legislatures throughout the world. Though many law-making bodies now use them in differing ways, the main historical function of such titles has been their use as referential points for legislation.⁷ In essence they serve as the face of bills or laws, because such titles are often the first words that individuals may encounter in regard to such legislation. While this article focuses primarily on Westminster, the Scottish Parliament, and Congress, the substance and findings located within the piece may contain value for any legislature that employs short titles, and also have implications for individuals that frequently encounter legislation through their work or other means. In order to demonstrate how short titles fit into the larger theoretical picture regarding the interaction of law and politics, discussion of symbolic politics, agenda setting, framing and problem definition is provided below.

Murray Edelman penned his classic text, *The Symbolic Uses of Politics*, in the mid-1960s, and regarded language as paramount to his theory.⁸

⁴ D.W. Vick, *Interdisciplinarity and the Discipline of Law*, 31(2) J.L. SOC’Y 163, 193 (2004).

⁵ *Id.* at 184-185.

⁶ *Id.* at 192 (quoting Chris Tomlins, *Framing the Field of Law’s Disciplinary Encounters: A Historical Narrative*, 34 LAW & SOC’Y REV. 911, at 964 (2000)).

⁷ See SIR MALCOLM JACK, *ERSKINE MAY’S PARLIAMENTARY PRACTICE: THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT* (24th ed. 2011); DANIEL GREENBERG, *CRAIES ON LEGISLATION* (9th ed. 2008); Brian Christopher Jones, *Drafting Proper Short Titles: Do States Have the Answer?*, 23(2) STAN. L. & POL’Y REV. 455 (2012) (hereinafter Jones, *Drafting Proper Short Titles*); Brian Christopher Jones, *Do Short Titles Matter? Surprising Insights from Westminster and Holyrood*, 65(2) PARLIAMENTARY AFFAIRS 448 (2012) (hereinafter Jones, *Do Short Titles Matter?*); Brian Christopher Jones, *Westminster’s Impending Short Title Quandary: And How to Fix it*, PUBLIC LAW, April 2013, at 223 (hereinafter Jones, *Westminster’s Impending Short Title Quandary*).

⁸ MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (2d ed. 1985).

Writing later in 2001, Edelman declared that “language is a tool that creates worlds and versions of worlds,”⁹ and this statement is no more true than in legislatures, where competing ideas about proposals battle for supremacy. Others have noted this importance on a more general scale, maintaining that “language as symbol is the instrument and tool for human action and expression and the means of sharing social, political, and cultural values,”¹⁰ and that it “acts as the agent for social integration, the means of cultural socialization, the vehicle for social interaction, the channel for the transmission of values, and the glue that bonds people, ideas, and society.”¹¹ When examining subjects closely related to Edelman’s theory of symbolic politics, such as agenda setting, framing and problem definition, his research could not have been more prescient.

Recognizing the importance of language as symbol is essential to understanding the potential implications of short titles for bills and laws. Such names assist in setting the agenda for a government or legislature, and on a broader scale, they apprise the general public of the laws being proposed and enacted in their respective countries. In his seminal work on agenda-setting, Kingdon defines agenda as “the list of subjects or problems to which government officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time.”¹² Inherently, almost all legislation aims to alleviate particular problems. Language itself is “an important component of the social construction of public problems ... [as it] analyzes the interaction among the media, the public, and policymakers as different political issues compete for the limited resource of attention.”¹³ Indeed, Lukes suggests that the power of agenda setting in politics may be the most influential aspect of such power.¹⁴

Problem definition, on the other hand, occurs within agenda setting, and applies to how the government, legislators and the media succeed in defining a particular issue or policy. Rochefort and Cobb refer to it as the “process of characterizing problems,”¹⁵ while others note that “in more

⁹ MURRAY EDELMAN, *THE POLITICS OF MISINFORMATION*, 82 (2001).

¹⁰ CHARLES J. STEWART, CRAIG ALLEN SMITH, & ROBERT E. DENTON JR., *PERSUASION AND SOCIAL MOVEMENTS*, 155 (5th ed. 2006).

¹¹ *Id.* at 155.

¹² JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES*, 3 (2d ed. 2003).

¹³ Regina Lawrence, *Defining Events: Problem Definition in the Media Arena*, in *POLITICS, DISCOURSE, AND AMERICAN SOCIETY*, 92-93 (Roderick P. Hart & Bartholomew H. Sparrow, eds., 2001).

¹⁴ STEVEN LUKES, *POWER: A RADICAL VIEW*, 24 (1974) (“[I]s it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial?”).

¹⁵ DAVID A. ROCHEFORT & ROGER W. COBB, *THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA*, 3-4 (1994).

Manipulating Public Law Favorability

formal political arenas such as legislatures and bureaucracies, particular problem definitions are enshrined in the very act of policymaking.”¹⁶ Baumgartner and Jones believe that problem definitions contribute to an overall policy image, which is ultimately “how a policy is understood and discussed.”¹⁷

Central to problem definition is the act of “framing,” based partly on the insight that problems exist in perception as much as they do in reality,¹⁸ and that the selective focus of chosen language, or “framing,” is the vehicle that fuels this perception. It is acknowledged that other elements (i.e. auditory and/or graphic cues) also contribute to these perceptions. Nevertheless, it is language which is critical to defining such concepts and problems.¹⁹ Lawrence notes that the “fundamental premise of framing is that people generally cannot process information without (consciously or unconsciously) using conceptual lenses that bring certain aspects of reality into sharper focus while relegating others to the background. Frames are the basic building blocks through which public problems are socially constructed.”²⁰ Thus, frames are not specific informational devices but competing perspectives that use conceptual lenses to construct (or deconstruct) problems. It is not uncommon for there to be two competing images for a particular policy, as “every public policy problem is usually understood, even by the politically sophisticated, in simplified and symbolic terms.”²¹ It has been observed by researchers that these frames, especially ones provided by elites, “may have a significant effect on interpretation and public opinion.”²² The short titles of bills are part of these building blocks when considering legislative proposals and also established law.

Therefore located in the arena of agenda setting and problem definition lies the short titles of bills and laws, because these names are essential in constructing and defining the problems that pieces of legislation are attempting to alleviate. This language contributes to the frame in which individuals encounter legislation, and could affect the way they understand or view the proposal. These few words often may be the only aspects of a bill or law that the public ever sees, and choosing words that convey the proper meaning or symbolic meaning of a bill or law is an important part of this process.²³

¹⁶ Lawrence, *supra* note 13, at 105.

¹⁷ FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (2d ed. 2009).

¹⁸ Lawrence, *supra* note 14.

¹⁹ STEWART ET AL., *supra* note 10.

²⁰ Lawrence, *supra* note 13, at 93.

²¹ BAUMGARTNER & JONES, *supra* note 17, at 26.

²² PAUL A. CHILTON & CHRISTINA SCHAFFNER, *POLITICS AS TALK AND TEXT: ANALYTIC APPROACHES TO POLITICAL DISCOURSE*, 229 (2002).

²³ Of course, there are different constraints on legislators in each of the jurisdictions studied. In Congress, the contents of short titles are in the privy of legislators and they are given wide latitude as to the wording, while in the Scottish Parliament short titles are regulated by standing orders that outlaw ‘promotional’ language in short or long titles. In

While evidence exists that frames have certain effects, there remains very little empirical evidence in the way of research on short titles, something this article attempts to address. Some anecdotal evidence from other works seem to suggest that policy names can be important in particular instances,²⁴ but none of these materials are specifically about short titles, and therefore do not elaborate on their significance or potential effects.

A. *Practical concerns*

A common technique for naming legislative proposals is to provide titles that lack definition about what the particular policy has set out to accomplish.²⁵ These are often applied to omnibus bills that are given very “amorphous sounding” names. The vagueness of the name appears to give the bill legitimacy, as individuals would actually have to read the text of the bill, or at least sort through relevant summaries, to ascertain how it will accomplish its goals, something which inattentive publics rarely do.²⁶ Thus, those who encounter such legislation may be left with a positive notion of the supposed achievements.

Schneier and Gross acknowledge that many Congressional titles attempt to conceal information rather than provide it, and point to an act titled “An Act to Reduce Taxation,” which ultimately raised taxes on every item in the bill.²⁷ Schram also touches on the subject in an article about the Family Support Act of 1988 in Congress, stating that the title was inherently misleading, because the Act was “almost exclusively about welfare rather than families.”²⁸ Westminster is not immune to such difficulties. Willett has noted how adding the word “safety” to the Food Safety Act of 1990’s title leads “us to believe that these new proposals have in some substantive sense given ‘safety’ a higher priority.”²⁹ Further he states that “the legislative process—from White Paper to statute book—manifests a

Westminster such titles are subject to informal constraints by House Authorities, and especially the Speaker of the House. Also, in the Scottish Parliament and in Westminster short titles are mandatory, while in Congress short titles are optional, but used frequently. See Brian Christopher Jones, *Processes, Standards and Politics: Drafting Short Titles in the Westminster Parliament, Scottish Parliament and U.S. Congress*, 25(1) *FLA. J. INT’L L.* 57 (2013) (hereinafter Jones, *Processes, Standards, and Politics*).

²⁴ Rochefort & Cobb, *supra* note 15; ERIC REDMAN, *THE DANCE OF LEGISLATION* (2001); WILLIAM SAFIRE, *THE RIGHT WORD IN THE RIGHT PLACE AT THE RIGHT TIME: WIT AND WISDOM FROM THE POPULAR LANGUAGE COLUMN IN THE NEW YORK TIMES MAGAZINE* (2004); FRANK LUNTZ, *WORDS THAT WORK: IT’S NOT WHAT YOU SAY, IT’S WHAT PEOPLE HEAR* (2008).

²⁵ R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION*, 102 (1990).

²⁶ *Id.* at 68-71.

²⁷ EDWARD V. SCHNEIER & BERTRAM GROSS, *CONGRESS TODAY*, 370 (1993).

²⁸ Sanford F. Schram, *Post-Positivistic Policy Analysis and the Family Support Act of 1988: Symbols at the Expense of Substance*, 24(4) *POLITY* 633, 645 (1992).

²⁹ Chris Willett, *The Food Safety Act of 1990: Substance or Symbolism*, 12 *STATUTE L. REV.* 146 (1991).

Manipulating Public Law Favorability

significant degree of symbolism.”³⁰ Additionally, I previously noted that the Protection of Freedoms Act was curiously named, as it could have easily been labeled under “rights” or “freedoms” or even under “Statute Law Repeals” legislation, which is quite common.³¹

Arnold states that many constituents may support a proposal simply because they “like the sound of it.”³² Lawmakers are likely aware of this assertion, and may be already taking advantage of it in particular legislatures (i.e. Congress). Given that voting on these measures could affect their future political careers, legislators could also be susceptible to the pull of evocative short titles.³³ Ministers or other lawmakers may believe that because of the time constraints on their colleagues, providing such titles may be one way to enhance the favorability of particular bills, making them more likeable and therefore more enactable.

B. Evidence of naming effects

I have previously documented that legislators and other insiders in Westminster, the Scottish Parliament and Congress believe that short titles affect the legislative process, and also potentially affect enactment.³⁴ However, while the interviews in those jurisdictions provided credible evidence that short titles do indeed matter to those interacting with legislation, they did not empirically demonstrate that such titles can affect the favorability of bills or acts.

Although researchers in law and politics have touched on naming and how various policies have been framed, no systematic academic research seems to have been conducted into how short titles for bills and laws may affect members of the general public. It seems clear from the research presented above that framing issues can present certain advantages and that researchers and practitioners could be aware of the benefits of an evocative short title. Yet overall these findings remain unsubstantiated, something that this article seeks to remedy.

III. PSYCHOLOGICAL INSIGHTS

From the perspective of social and cognitive psychology, naming is highly valued in various situations. Research into semantic language pro-

³⁰ *Id.* at 155.

³¹ Jones, *Westminster’s Impending Short Title Quandary*, *supra* note 7, at 223.

³² Arnold, *supra* note 25, at 119.

³³ Jones, *Drafting Proper Short Titles*, *supra* note 7; Jones, *Do Short Titles Matter*, *supra* note 7; Jones, *Processes, Standards and Politics*, *supra* note 23. The explanation of what makes a short title ‘evocative’ is supplied below. However, in order to provide the reader with a sense of what this means, such titles usually include unnecessary proper nouns, adjectives and/or verbs in the short titles of the bill or act; such unnecessary use is classified in this article as ‘evocative’.

³⁴ Jones, *Drafting Proper Short Titles*, *supra* note 7; Jones, *Do Short Titles Matter*, *supra* note 7; Jones, *Processes, Standards, and Politics*, *supra* note 23; Jones, *Westminster’s Impending Short Title Quandary*, *supra* note 7.

cessing and the effects of language on the human brain is critical to understanding the potential implications of short titles. Though expanding rapidly, relatively little is known in the field of neuroscience about the neural systems that support communication in regard to morality, valuation and emotion.³⁵ While some believe that individuals may read a statement and then decide how they feel about the text,³⁶ others have demonstrated that the initial valuation of a statement is processed as the reading of a sentence unfolds, and such processes are computed in a matter of a few hundred milliseconds.³⁷ Researchers have evidence that individuals making value judgments on a statement tend to do this on a word-by-word basis, as any word that clashes with a person's value-system triggers an immediate negative neural response.³⁸ This may be why some short titles are often cloaked in words with positive connotations: because our neural pathways respond better to positive language. Short titles provide positive and at times emotionally arousing descriptions of bills and laws that implicitly subjects individuals to make value judgments. Therefore, the more positive words located in the short title the more likely a positive value judgment will occur.

Such findings could also have implications for short titles that incorporate "negative" or "unmoral" sounding words, such as the Westminster Parliament's Corporate Manslaughter and Corporate Homicide Act 2007³⁹ or the Female Genital Mutilation Act 2003.⁴⁰ This could be why the Scottish Parliament instead passed the Prohibition of Female Genital Mutilation (Scotland) Act 2005,⁴¹ as the title is seen as doing something positive; both Acts pursued a similar outcome, but the Scottish Parliament acknowledged the prohibition aspect in the title of the Act.

The rationalist conception that moral judgment is based on thoughtful calculation has also been discredited. Evidence has demonstrated that such judgments are based on "quick, automatic feelings of approval or disapproval," and this is true for both complex and simple stimuli.⁴² Therefore merely because something is more complicated (i.e. larger societal problems) and could be solved through legislative means, we cannot infer that individuals who encounter these problems are necessarily giving their judgments more than cursory thought. This has significant implications for short titles, as a perfunctory glance at many such titles may invoke positive feelings. Van Berkum, *et al.* surmise that "the evolutionary signif-

³⁵ Jos J.A. Van Berkum et al., *Right or Wrong: The Brain's Fast Response to Morally Objectionable Statements*, 20(9) *PSYCHOL. SCI.* 1092 (2009).

³⁶ *Id.* at 1093.

³⁷ *Id.*

³⁸ *Id.* at 1095.

³⁹ Corporate Manslaughter and Corporate Homicide Act, 2007, c.19.

⁴⁰ Female Genital Mutilation Act, 2003, c.31.

⁴¹ Prohibition of Female Genital Mutilation (Scotland) Act, 2005, A.S.P. 8.

⁴² Van Berkum et al., *supra* note 35, at 1093.

Manipulating Public Law Favorability

icance of being able to rapidly tell good from bad suggests that valuations might be among the first bits of information to be computed.”⁴³

Nonetheless, responses to evocative names will vary, especially in terms of which short title classification (see classifications below) is proffered. Some researchers note that proper names can be richly suggestive, and can invoke strong emotional empathy at times, even if one does not know the person.⁴⁴ Other findings are relevant to “overt action” titles, which employ the use of action verbs. Speer et al. note that

neuroimaging studies of single-word reading have also provided initial support for the hypothesis that readers’ representations of word meaning are grounded in visual and motor representations. These studies have demonstrated that brain regions involved in reading action words are some of the same regions involved in performing analogous actions in the real world.⁴⁵

The authors go on to state that “readers dynamically activate specific visual, motor, and conceptual features of activities while reading about analogous changes in activities in the context of a narrative.”⁴⁶ A useful example the authors employ to demonstrate this is when somebody watches a goal kick or performs the act of kicking a football; the same brain regions are activated when reading about such an activity. Therefore people who encounter legislation that discusses “taking back our streets,” “helping families save their homes,” or “protecting children” may activate the same neural pathways that they would be if they were actually engaged in performing the action. This article proposes that by supporting such legislation individuals may be predisposed to develop a narrative in which government, lawmakers, law-making bodies, or even themselves are assisting in the action represented in the title of the Act.

Most persuasion researchers believe that for a message to be effective it must be attended to at some level.⁴⁷ Individuals must therefore be willing to be persuaded by messages in order for them to be effective. Employing the use of evocative naming produces likely advantages to those who desire the bill’s success, but these advantages are probably limited. Those who are not willing or are unlikely to be persuaded on a bill or law probably will not respond positively or negatively to evocatively-named legislation, as they will not attend to the message. Thus, the positive image of the proposal will likely have no effect on those who have already made up

⁴³ *Id.*

⁴⁴ G. English, *On the Psychological Response to Unknown Proper Names*, 27(3) AM. J. PSYCHOL., 430 (1916).

⁴⁵ Nicole K. Speer et al., *Reading Stories Activates Neural Representations of Visual and Motor Experiences*, 20(8) PSYCHOL. SCI. 989 (2009).

⁴⁶ *Id.* at 995-96.

⁴⁷ David R. Roskos-Ewoldson et al., *Attitude Accessibility and Persuasion: The Quick and the Strong*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 39, 40-42 (James Dillard & Michael W. Pfau eds., 2002).

their minds on an issue. The individuals that such methods may affect are those who are willing to be persuaded in some respect, and are attentive to the message being delivered.

Conversely, it has also been demonstrated that when people are more accessible in their attitudes towards an issue, they tend to expend more cognitive effort when interpreting that issue.⁴⁸ These accessible attitudes may bias and also motivate the critical processing of information towards these messages.⁴⁹ These findings are directly relevant to short titles: expanding cognitive effort while interpreting persuasive messages could increase or decrease a person's favorability reaction to evocatively-named legislation. Expending more cognitive energy and effort interpreting these messages may only enhance the favorability of an evocative short title. However, the reverse may be true as well; findings suggest that individuals become more critical of messages when their attitudes are more accessible.⁵⁰

Expectation must also be taken into consideration when evaluating response to various messages. When individuals know that they need to evaluate something in the future, they usually develop an attitude towards the stimulus in question beforehand.⁵¹ This suggests individuals may already have certain attitudes towards various bills or types of laws before they ever encounter them. Experienced political figures and followers may have highly developed attitudes towards bills proposed by certain members, parties, issues, etc., and could react favorably or unfavorably based on these initial qualities. It is unclear whether or not peripheral issues, such as short titles, would affect those predetermined attitudes.

Fear appeals have long been used as persuasion techniques,⁵² and also appear in short titles. Such names often employ overly positive language that endears the measure to those who encounter it, which appears harmless until one considers how an opponent of the bill or law will be perceived. A vote against certain bills implies the opposite of what is being inscribed in its title, (i.e. if a bill is deemed "responsible," those who oppose such measures appear irresponsible; if a bill is mentions "protection," those in opposition appear against protecting whatever it is the bill is in reference to (i.e. children, consumers, etc.)).

Therefore, psychological insights have many implications for how short titles may affect favorability of bills and laws.

⁴⁸ Leandre R. Fabrigar et al., *The Impact of Attitude Accessibility on Elaboration of Persuasive Messages*, 24 *PERSONALITY & SOC. PSYCHOL. BULL.* 339, 342 (1998).

⁴⁹ Roskos-Ewoldson, *supra* note 47, at 49.

⁵⁰ *Id.*

⁵¹ *Id.* at 47.

⁵² *Id.* at 49.

IV. METHODS

As noted above, there is presently little quantitative research available in the academic community related to short titles for bills and acts.⁵³ Because of this dearth of evidence and lack of established methods towards the issue, the focus of this study was largely exploratory.

This article incorporates a quantitative study participated in by university students from Scotland. This study was not a traditional survey, but adopted a technique more familiar in social psychology, in which participants were required to read and compare several texts and then provide answers to closed questions.

The surveys were five-condition randomized experiments.⁵⁴ The five conditions represented the types of bills: humanized, overt action, desirable characteristic, combination and descriptive/technical.⁵⁵ The main dependent construct the survey attempted to establish was the participant's attitude toward the bill or law – that is, how favorably the participant felt about the measure. I wanted to determine if people looked more favorably on bills or laws with evocative (personalized, overt action, combination or desirable characteristic) names, compared to non-evocative names. Two other dependent constructs were present within the surveys as well: why the participants favored or opposed the measure, and whether or not the participants desired more information on the bill. Thus, every survey included four vignettes of bills containing four questions about each bill, and then a page of descriptive characteristic questions.

Before a more precise description of the quantitative sample populations and procedures are provided, an explanation of the bill naming classifications found in this article must be specified.

A. Five Classifications of Short Titles

After researching legislation from Westminster, the Scottish Parliament and Congress, I have identified five particular styles of naming: personalized, desirable characteristic, overt action, combination and bland

⁵³ Much of my qualitative research on the topic is cited above.

⁵⁴ Samples of the survey are available upon request. Twenty different versions of the surveys were composed based on a modified Latin Square Design. (Though this was based on such a design, a true Latin square design must have equal parts, such as 4X4 or 5X5, and my study was a 4X5 design (5 types of names for 4 bills)). It was determined that adding another bill would have made the surveys too protracted. Using this method counterbalances the order of media stories and the order of titles. This technique allows the researcher to have each story appear in each position an equal number of times, and also have each title condition appear an equal number of times. The bland titles were considered the control measures in the experiment. Randomizing the survey versions and the names in the questionnaires using this method increases the reliability and validity of the experiment.

⁵⁵ These are described in more detail below.

naming.⁵⁶ In this study, the first four naming types are classified as “evocative,” while the descriptive/technical naming style is classified as “un-evocative.” It may seem tautological to acknowledge, but the “evocative” naming types all use nouns, proper nouns, verbs, adjectives, or a combination of such terms to present legislation in the most favorable light possible.

i. Personalized titles

These are most commonly used in Congress (e.g. Megan’s Law,⁵⁷ Laci and Connor’s Law⁵⁸) and usually present public bills and laws in a personalized context;⁵⁹ however they are sometimes seen in other legislatures (e.g. The Scottish Parliament) in regard to private law (e.g. the William Simpson’s Home (Transfer of Property etc.) (Scotland) Act 2010⁶⁰ or the Ure Elder Fund Transfer and Dissolution Act 2010⁶¹). Personalized titles can incorporate anybody’s name in the title, but often the sponsors of the legislation or whom the legislation is being passed in honor of are the individuals who adorn such titles.

ii. *Desirable characteristic titles.*

These titles employ language in which particular characteristics may be applied to parties who propose such legislation and/or legislators who vote for or against the measure, such as: responsibility, accountability, etc. Most of the additions to desirable characteristic naming are adjectival. Examples from this genre are: Fair Sentencing Act of 2010,⁶² and, in acronym form, the USA PATRIOT Act of 2001.⁶³

iii. *Overt action titles.*

These names include language that explicitly states an action will take place, and are perhaps the most tendentious of the different styles. Frequent words used inside are “prevention” and “protection,” and this is the most common form of “evocative” naming employed by Westminster

⁵⁶ Acronyms are encompassed in this list. The fact that acronyms spell certain words or phrases makes them a part of the above lists. Usually the word or phrase spelled is how the title is classified.

⁵⁷ Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

⁵⁸ Laci and Conner’s Law, Pub. L. No. 108-212, 118 Stat. 568 (2004).

⁵⁹ See generally, Brian Christopher Jones, *Transatlantic Perspectives on Humanised Public Law Campaigns: Personalising and Depersonalising the Legislative Process*, 6 LEGISPRUDENCE 57 (2012).

⁶⁰ William Simpson’s Home (Transfer of Property etc.) (Scotland) Act, 2010, (A.S.P. 12).

⁶¹ Ure Elder Fund Transfer and Dissolution Act, 2010, (A.S.P. 7).

⁶² Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

⁶³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

Manipulating Public Law Favorability

and the Scottish Parliament. The title of the Violent Crime Reduction Act,⁶⁴ for example, implies that this particular Act will reduce violent crime. Opponents of such measures can be portrayed as aloof or unsympathetic to the reduction of such crime. Conversely, proponents may be deemed more assertive or effective, and willing to take action on various matters. More examples from Westminster are: the Protection of Freedoms Act 2012;⁶⁵ the Counter-Terrorism Act 2008;⁶⁶ the Safeguarding Vulnerable Groups Act 2006;⁶⁷ and the Prevention of Terrorism Act 2005.⁶⁸ Examples from the Scottish Parliament are: the Protection from Abuse (Scotland) Act 2001;⁶⁹ the Protection of Children (Scotland) Act 2003;⁷⁰ the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005;⁷¹ and the Protection of Vulnerable Groups (Scotland) Act 2007.⁷²

iv. Combination titles.

Many Congressional names employ a combination of the tactics mentioned above, seemingly designed to garner as much support as possible through the use of multiple tactics. Therefore, bills or laws may employ both personalized and desirable characteristic qualities (i.e. the Daniel Pearl Freedom of the Press Act of 2009),⁷³ personalized and overt action qualities (i.e. the Adam Walsh Child Protection and Safety Act of 2006),⁷⁴ or overt action and desirable characteristic qualities (i.e. Patient Protection and Affordable Care Act).⁷⁵ This type of naming could heighten the political consequences of voting against the measure: the more tactics used, the more positive policy statements that reside in the title. However it could also raise the stakes for politicians who vote for the law, as should the statute not fulfill its intended aspiration(s), the increase in tendentious language located in the title could potentially be an accountability problem.

⁶⁴ Violent Crime Reduction Act, 2006, c. 38 (U.K.).

⁶⁵ Protection of Freedoms Act, 2012, c. 9 (U.K.).

⁶⁶ Counter-Terrorism Act, 2008, c. 28 (U.K.).

⁶⁷ Safeguarding Vulnerable Groups Act, 2006, c. 47 (U.K.).

⁶⁸ Prevention of Terrorism Act, 2005, c. 2 (U.K.).

⁶⁹ Protection from Abuse (Scotland) Act, 2001, (A.S.P. 14).

⁷⁰ Protection of Children (Scotland) Act, 2003, (A.S.P. 5).

⁷¹ Protection of Children and Prevention of Sexual Offences (Scotland) Act, 2005 (A.S.P. 9).

⁷² Protection of Vulnerable Groups (Scotland) Act, 2007 (A.S.P. 14).

⁷³ Daniel Pearl Freedom of the Press Act of 2009, Pub. L. No. 111-166, 124 Stat. 1186, (2010).

⁷⁴ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, (2006).

⁷⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, (2010).

v. Descriptive/technical titles.

These do not employ any of the naming methods mentioned above. Westminster and the Scottish Parliament employ this type of style more than any other (i.e. the Energy Act 2010;⁷⁶ the Banking Act 2009;⁷⁷ and the Policing and Crime Act 2009).⁷⁸ Given the literature mentioned above it is hypothesized that these particular bills and acts, which do not come accompanied with evocative language, would get lower ratings on favorability scales.

B. Further methodological details

In total 258 undergraduate students from the University of Stirling were recruited for the survey. Each survey consisted of four different bill vignettes (the real-life bills used in the study are in bold below).⁷⁹ All of the bills or acts used were from Westminster or the Scottish Parliament. For every original bill name, four other types of names were contrived. For example, the Standards in Scotland's Schools Act,⁸⁰ since its original name is classified as desirable characteristic, had a personalized, overt action, combination, and bland name contrived for use in additional surveys. Every survey had an almost identical vignette of each real-life bill or law. Only the bill proposal names varied, drawing on the following five types of names in the survey:

UK Bills/Acts:

- *Personalized Titles* – Kim Rogers Violent Crime Act, Tim Hopkins Bill, Ron Jones Torture Damages Bill, Lindsay Newsome Scotland's Schools Bill
- *Desirable Characteristic Titles* – Ethical Standards in Public Life Bill, Standard's in Scotland's School's Bill etc., Common Sense Violent Crime Act, Rational Torture Damages Bill
- *Overt Action Titles* – Violent Crime Reduction Act of 2006, Improving Public Life Bill, Restoring Scotland's Schools Bill, Providing Torture Damages Bill
- *Combination Evocative Titles* – Enhancing Ethical Standards in Public Life Bill, Restoring Standard's in Scotland's Schools Bill, Common Sense Violent Crime Reduction Act, Rational Providing of Torture Damages Bill
- *Control/Bland Titles* – Torture Damages Bill, Violent Crime Act, Public Life Bill, Scotland's Schools Bill

⁷⁶ Energy Act, 2010, c. 27 (UK).

⁷⁷ Banking Act, 2009, c. 1 (UK).

⁷⁸ Policing and Crime Act, 2009, c. 26 (UK).

⁷⁹ Thus, since there were 258 participants in the study, a total of 1,032 bill vignettes were responded to in the study.

⁸⁰ Standards in Scotland's Schools etc. (Scotland) Act, 2000, (A.S.P. 3).

Manipulating Public Law Favorability

The articles used were all actual news stories on the bills and acts, and contained (by substitution when necessary) the contrived bill name, a brief synopsis of what the bill entails, and other relevant information regarding the bill. The articles were taken from the *Guardian*, the *Times*, and the *Scotsman*. The vignettes used in the study were only altered slightly for research purposes.⁸¹ Participants were asked to read the article and then asked how familiar they were with the issues presented in the articles. Next, they were asked whether or not they would support the bill given the information provided, or be unsure, or have no opinion. This question was the main dependent variable for the questionnaire, as the participant's support for each naming type was compared with the others.

If the participant favored or opposed the measure, they were instructed to go to question three (3). If they chose the unsure/have no opinion option, they were instructed to go to question four (4). Question three (3) asked why the participant favored or opposed the measure, and had three options: (1) they liked/disliked the sound of it; (2) they favored/opposed the description or policies of the legislation; or (3) Other. This question attempted to ascertain the separation between actual bill policies and short titles, and was another major dependent variable present in the questionnaire. The fourth and final question on the survey asked the participants whether or not, if offered, they would like more information on the bill. Here the participants were merely given a yes – no option. This question attempted to explore whether or not people desire more information about bills, other than the small vignette that is provided with the questionnaire.

V. Results

The results of survey are included below, and the data is presented according to hypotheses.

Hypothesis 1: Bills with evocative titles (personalized, desirable characteristic, combination, and overt action) will receive higher favorability rates than bills with non-evocative (technical/descriptive) titles. This will be true at the aggregate-level.

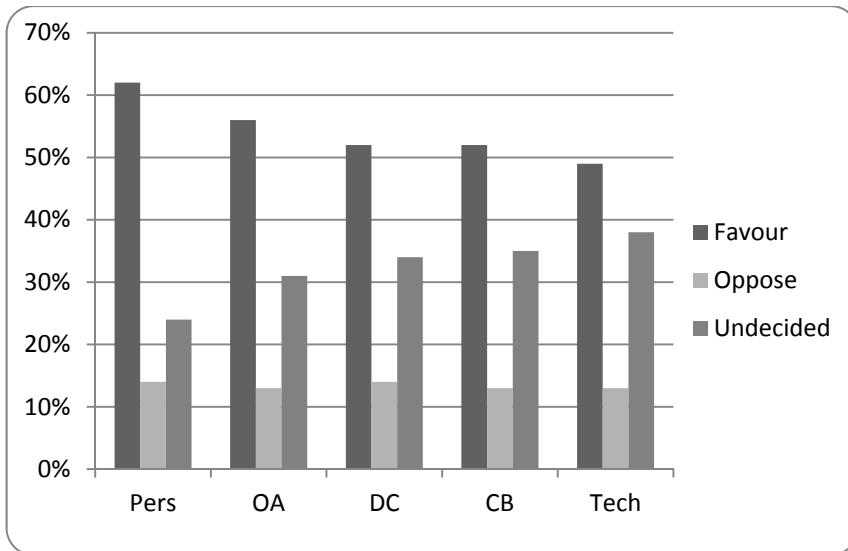
In terms of overall favorability, the hypothesis was confirmed; all evocative titles produced higher favorability ratings than the descriptive names at the aggregate-level. The results were as follows:

⁸¹ The only articles that were altered were the “personalized” vignettes. Since personalized names needed to be contrived for all of the bills and acts used, there was a line added to the vignettes that explained why the Act was named as such. Also, as regards to the personalized names used in these bills, most of them were contrived completely at random, and the names used are fictional. However, there are instances, such as in the U.K. Torture Damages Bill, where the name of the personalized bill is drawn from the actual article, and thus the name is an actual person involved in the issue.

Table 1. Overall favorability for naming types⁸²

	<u>Favor</u>	<u>Oppose</u>	<u>Undecided</u>
Personalized	62%	14%	24%
Overt Action	56%	13%	31%
Desirable Ch.	52%	14%	34%
Combination	52%	13%	35%
Technical	49%	13%	38%

Figure 1. Favorability for Naming Types



This is the most significant finding. As the above figure shows, personalized titles were the most popular overall (62%), followed in succession by overt action (56%), desirable characteristic (52%), combination (52%), and technical (49%). The results of note for this outcome are the ‘Favor’ and ‘Undecided’ bars, since opposition stood quite firm at 13-14% for all naming types. Thus, the undecided category was the main differ-

⁸² The 258 respondents each had four bills included in their surveys. A total of 1,026 bills had valid responses. When compared to bland naming in a multinomial logistic regression, personalised naming was significant on both the favour (.002) and oppose (.083) sides, at the .01 level and .1 level, respectively. However, the aggregate results were not significant in a chi-square test for significance (.207), and naming itself was not significant in a logistic regression (.174).

Manipulating Public Law Favorability

ence among title types. In Figure 1, notice how the favor bar decreases across the graph as it approaches technical titles, while the undecided bar increases as it approaches technical titles. Additionally, for disclosure sake,⁸³ below is a breakdown of the favorability rates by type of legislation and type of short title:

Table 2. Type of Legislation and Type of Title – Favorability

<u>Public Life</u>	<u>Favor</u>	<u>Oppose</u>	<u>Undecided</u>
Pers	51%	19%	30%
OA	58%	8%	35%
DC	54%	12%	35%
CB	57%	14%	29%
Tech	49%	13%	38%
<u>Schools</u>	<u>Favor</u>	<u>Oppose</u>	<u>Undecided</u>
Pers	67%	5%	28%
OA	57%	5%	38%
DC	47%	8%	45%
CB	41%	2%	57%
Tech	47%	6%	48%
<u>Torture</u>	<u>Favor</u>	<u>Oppose</u>	<u>Undecided</u>
Pers	65%	15%	21%
OA	61%	24%	15%
DC	52%	23%	25%
CB	50%	22%	28%
Tech	45%	10%	45%
<u>Violent Crime</u>	<u>Favor</u>	<u>Oppose</u>	<u>Undecided</u>
Pers	68%	14%	19%
OA	48%	18%	35%
DC	59%	14%	27%
CB	58%	16%	25%
Tech	57%	22%	21%

⁸³ Any other data that is not present in the article is available upon request.

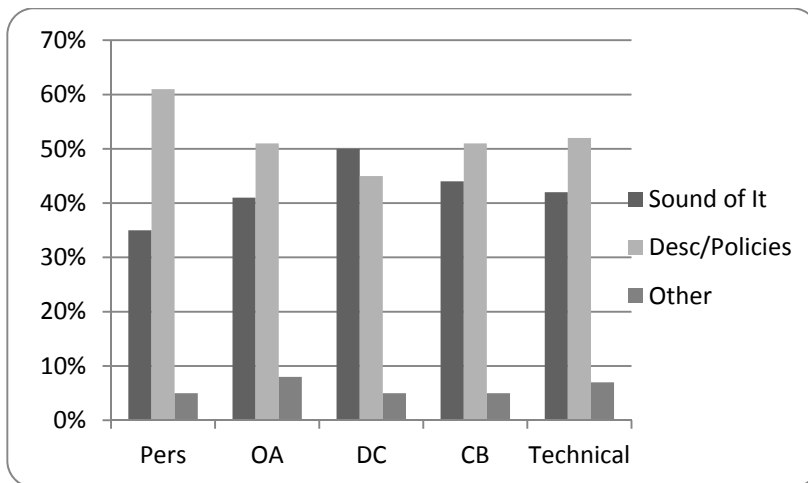
Hypothesis 2: For those participants that favored or opposed the measure, a majority of them will have done so because they favored or opposed the description or policies of the legislation.

This hypothesis was supported for all title types except for one, desirable characteristic, where 50% of the participants said that they supported the legislation because they liked the “sound of it,” while only 45% supported it because of the description/policies of the legislation. Personalized titles produced interesting results in terms of why the measures were supported; they had the highest measure on the description or policies of the legislation with 61%, and the lowest in terms of participants liking the “sound of it” (35%). The “Other” category remained within a similar range for all naming types (5-8%).

Table 3. Why the Measure Was Supported, by Short Title⁸⁴

	<u>Sound of It</u>	<u>Desc./Policies</u>	<u>Other</u>
Personalized	35%	61%	5%
Overt Action	41%	51%	8%
Desirable Ch.	50%	45%	5%
Combination	44%	51%	5%
Technical	42%	52%	7%

Figure 2. Why the Measure Was Supported, by Short Title



⁸⁴ These results were not significant in a chi-squared test for significance (.329), and they were not significant in a multinomial logistic regression either (.419); title types were not significant in the regression (.323).

Manipulating Public Law Favorability

Hypothesis 3: After they have read the short vignette of the bill, participants will not desire more information on the legislation in question.

Surprisingly, this hypothesis was largely supported; three title types (personalized, overt action, and technical) did not desire more information regarding the bills/laws in question.⁸⁵ Additionally, short title style did not seem to play a factor in whether people desired more information on the legislation. The style that garnered the largest percentage wanting more information was Combination (53%), while Desirable Characteristic followed closely behind at 50%. Most of the reactions, however, clustered around 50%.

Table 4. Percentage that Wanted More Information, by Short Title

	<u>Yes</u>	<u>No</u>
Personalized	48%	52%
Overt Action	46%	54%
Desirable Ch.	50%	50%
Combination	53%	47%
Technical	46%	54%

VI. DISCUSSION

The survey data produced three notable findings in regard to: (1) the results for overall favorability; (2) that many people just like the “sound of it”; and (3) that many are satisfied with a small vignette of information.

The most fascinating result from the survey was the distribution of the aggregate favorability results, which supports the proposition that short titles may affect the favorability of bills and laws. The continuous drop in favorability and the increase in undecided outcomes were readily transparent, and correlated almost perfectly. Opposition averages for all short title types held constant at 13-14%. This is an important finding, which indicates that technical titles could produce more indecision, while more evocative titles could produce a more decisive response. In fact the results were statistically significant when analyzing Personalized v. Technical names, which is a noteworthy finding in regard to potential short title effects, especially in regard to Congress. Future studies should incorporate these methods on a much larger scale, and test whether the effects of different short title types influence favorability to the same extent.

⁸⁵ The results, however, were not statistically significant either in a chi-square test for significance (.706) or a multinomial regression (.764).

The second noteworthy finding was that a significant amount of individuals supported policies because they liked the sound of them, as opposed to supporting the description or policies of the legislation. While this result cannot be directly linked to the short titles of the legislation, it is consistent with Arnold's assertion that many people support legislation simply because they like the "sound of it."⁸⁶ In fact, the lowest total for this category was personalized titles at 35%, while the highest was desirable characteristic titles at 50%. These numbers suggest that, for this population, a cursory examination of bills when determining favorability is quite common (and, it should be noted that the participants in this study were highly educated, as most were in years 1-3 of university).

In regard to participants desiring more information about bills, title type did not make a difference to any statistically significant degree. This result runs contrary to individuals who argue that evocative short titles could potentially be effective attention-getting devices for legislation.⁸⁷ There could be multiple explanations for these findings (i.e. because respondents had previously made up their minds on the proposal or because the vignettes supplied an adequate amount of information, etc.); whatever the explanation, many participants were content with the small vignette of information about the legislation.

VII. CONCLUSIONS

The article asks if it is easy to manipulate public law favorability based on the presentational aspects of statutes. Policymakers may be disappointed to learn that such a proposition remains inherently complicated. However, these exploratory survey results suggest that at some level the short titles of bills and laws do matter in terms of public law favorability. Such evidence may have political or procedural implications, as it could provide lawmakers more incentive to employ evocative short titles, especially for contentious legislation that may be difficult to get through a chamber. And the fact that many participants claimed to favor legislation because they liked the "sound of it" and felt adequately supplied with an explanatory vignette of legislation, rather than acquiring more information on it, are certainly distressing findings for public law. Ultimately, the results suggest that the sometimes subtle language located within a few words can produce very real outcomes. Yet this phenomenon should be studied much more in order to ascertain just how short titles affect the favorability of bills and laws.

Using evocative or promotional language in bills and laws, however, should be done with caution. When Orr wrote about the sloganeering efforts of Australian legislative bills, he noted that using such titles for formal, government sponsored legislation may indeed be hastening "a decline

⁸⁶ Arnold, *supra* note 25, at 119.

⁸⁷ WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS, 93 (8th ed., 2011); Jones, *Processes, Standards, and Politics*, *supra* note 24, at 88-91.

Manipulating Public Law Favorability

in respect for democratic governance.”⁸⁸ Others have expressed similar notions. Samuels concludes that evocative political imagery not only misleads, but “promotes conflict, engenders emotion and infects institutions,”⁸⁹ and Perloff maintains that “the fact that citizens of the United States hold their elected representatives and the institution that houses them in low esteem is a serious problem for representative democracy.”⁹⁰

While lawmakers and other legal and political insiders may feel that they are immune to the effects of such language, they should probably heed many of these warnings. Brader has carried out extensive research on emotive political advertising, and found that those more familiar with politics, issues and politicians are *more* affected by these types of advertisements than those less familiar.⁹¹ Therefore many tactics aimed at uninformed or inattentive individuals may affect those that are more involved or knowledgeable about such issues (i.e. lawmakers and other legislative insiders). This is especially relevant in regard to evocative short titles, because sometimes “an occasional memorable or quotable phrase seems to be more persuasive than an argument that is empirically and logically impeccable and thorough.”⁹² Taken on their face many short titles sound like panaceas for some of the most important and highly sophisticated problems and issues of our times, but in reality: “[i]t can rarely be known what concrete future effects public laws and acts will bring.”⁹³ Lawmakers in all jurisdictions should take note of such wise statements when providing short titles to legislation.

⁸⁸ Graeme D. Orr, *Names without Frontiers: Legislative Titles and Sloganeering*, 21(3) STAT. L. REV. 188, 189 (2000).

⁸⁹ Andrew Samuels, THE POLITICAL PSYCHE 61 (1993).

⁹⁰ Richard Perloff, POLITICAL COMMUNICATION: POLITICS, PRESS AND PUBLIC IN AMERICA, 140 (1998).

⁹¹ Ted Brader, CAMPAIGNING FOR HEARTS AND MINDS: HOW EMOTIONAL APPEALS IN POLITICAL ADS WORK, 147-176 (2006).

⁹² Edelman, *supra* note 9, at 97.

⁹³ Edelman, *supra* note 8, at 193.

HOLDING CORPORATIONS TO ACCOUNT: CRAFTING ATS SUITS IN THE UK?

Simon Baughen *

Swansea University

ABSTRACT

*The traditional province of international law is in the regulation of relations between States. However, with the tribunals at Nuremberg and Tokyo established at the end of the Second World War, for the first time it became possible for individuals to incur criminal liability in respect of violation of a core of norms of customary international law, such as the prohibitions on war crimes and crimes against humanity. This process has continued with the UN's establishment in 1993 and 1994 of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively, culminating with the establishment of the International Criminal Court in 2002. Although there have been no comparable institutions with power to award civil compensation for violations of the norms covered by the international criminal tribunals, the U.S. courts have developed a jurisprudence on civil liability of individuals for violating norms of customary international law, either directly, or as aiders and abettors. The gateway for this development has been the Alien Tort Statute (ATS) 1789. The contours of this nascent international civil law have been developed in the U.S. federal courts by transplanting the principles under which international law imposes criminal liability on individuals into the field of civil liability in tort. Until recently, it was assumed that corporations could incur civil liability under the ATS. In September 2010 in *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit decided that this is not the case. Civil liability under customary international law is evidenced by the sources which established criminal liability and none of the international criminal tribunals has ever been given jurisdiction over legal persons. However, subsequent decisions in other Circuits have affirmed that corporations can incur liability under the ATS. The question was referred to the U.S. Supreme Court which gave judgment on 17 April 2013. However, the Supreme Court said nothing about this issue, and, instead, decided the claim on the basis of the territorial limits of the cause of action that could be created under federal common law pursuant to the grant of jurisdiction under the ATS. This article will analyze the development of law in ATS suits on the civil liability of corporations under customary international law and will then consider whether international law can ground a civil cause of action before the courts of the United Kingdom so as to provide a means of holding multinational corporations to account for their involvement in human rights abuses.*

CONTENTS

I. INTRODUCTION 534

II. CORPORATE LIABILITY UNDER THE ATS..... 536

III. THE ATS AFTER *KIOBEL*?.....553

IV. INTERNATIONAL LAW AS A CAUSE OF ACTION BEFORE
THE COURTS OF THE UNITED KINGDOM..... 558

V. HOW MIGHT CORPORATE LIABILITY FOR AIDING
AND ABETTING VIOLATIONS OF INTERNATIONAL LAW
DEVELOP UNDER ENGLISH LAW?..... 566

VI. CONCLUSION..... 573

I. INTRODUCTION

Foreign Investment and resource development in the developing world is often a focus for human rights abuses by States. Two notorious examples from the 1990s are the abuses committed by the Burmese military while providing security for the Yadana pipeline and the suppression of the protests against Shell's activities in Ogoniland culminating in the execution of Ken Saro-Wiwa. Such abuses frequently go hand in hand with allegations of complicity on the part of multinational corporations that are involved in resource extraction in the State in question. In July 2005 Professor John Ruggie was appointed as the Special Representative of the Secretary-General of the UN on the issue of human rights and transnational corporations and other business enterprises. His 2008 report concluded that

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.¹

*Professor of Shipping Law, Swansea University.

¹ U.N. Doc. A/HRC/8/5 (Apr. 7 2008). Professor Ruggie's work concluded in 2011 with the endorsement by the U.N. Human Rights Council on 16 June of his "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" which sets out the 'Protect, Respect, Remedy' framework to address these governance gaps.

Holding Corporations to Account

This article considers the role of civil suits against corporations in closing this governance gap. Any norm of civil liability under customary international law will have to be developed in national courts, in the absence of any international tribunals with power to award compensation. The primary development in this area has been the voluminous litigation under the Alien Tort Statute of 1789 since the revival of this dormant statute with the 1980 decision of the Second Circuit in *Filartiga v. Pena-Irala*.² Since then, the federal courts of the United States have been engaged on a judicial experiment in defining the contours of civil liability for violations of international law, although claims based on violations of customary international law have also been brought before the courts of Canada³ and of England.⁴ All ATS claims will have a foreign element – the plaintiff must be an alien. However, many ATS claims involve allegations of violations of international law occurring outside the United States. Where the defendant is also an alien the result is that claims are being heard in U.S. federal courts which have no connection with the United States at all. These are so-called ‘foreign cubed’ suits which involve claims by a foreign plaintiff against a foreign defendant in respect of events that took place in a foreign jurisdiction. Concerns have been expressed by foreign States that the ATS has seen an exorbitant exercise of jurisdiction by U.S. federal courts that violates the permissible limits on national jurisdiction under international law.⁵

Before considering the nature of U.S. jurisprudence under the ATS that has emerged over the last thirty years, one should pause to consider why such suits are being brought. Violations of international law will involve tortious conduct. Torture, for example, will constitute trespass to the person. Why, then, do victims of such violations chose to base their suits in the United States on violations of customary international law? First, there is the jurisdictional gateway to the federal courts that is given under the ATS where there is a civil action by an alien for a tort committed in violation of the law of nations. For example, in the landmark decision of

² See generally, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

³ *Bouzari v. Iran* [2002] OJ No. 1624; [2004] OJ No. 2800 Docket No. C38295 (dismissed on grounds of sovereign immunity); *Bil’in (Village Council) v. Green Park Int’l Ltd.*, 2009 QCCS 4151 (a claim alleging corporate complicity in war crimes in the occupied territories in Israel, dismissed on grounds of *forum non conveniens*).

⁴ Claims based on torture were brought in *Al-Adsani v. Kuwait*, 103 I.L.R. 420 (Q.B. 1995), aff’d *Al-Adsani v. Kuwait*, 107 I.L.R. 536 (C.A. 1996) and *Jones v. Saudi Arabia*, [2006] UKHL 26 [2007] 1 A.C. 270 but were dismissed on grounds of sovereign immunity.

⁵ See 2012 WL 405480 (Appellate Brief) Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents (Feb. 3, 2012); 2012 WL 2312825 (Appellate Brief) Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party (Jun. 13, 2012). *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659 (2013).

Filartiga,⁶ the plaintiff and the defendant were both Paraguayan and therefore the plaintiff would have been unable to sue under the diversity jurisdiction created under 28 U.S.C. §1332. Indeed, many claims against corporations under the ATS have no connection with the United States, other than the fact that the corporation conducts some form of business activity there, enabling the foreign corporation to be served with proceedings. This was the case in *Kiobel* which involved Dutch and English corporations being sued by Nigerian plaintiffs in respect of events which took place in Nigeria. Second, it may be easier to resist an application to stay proceedings on grounds of *forum non conveniens* if the claim is brought under the ATS rather than as an ordinary tort claim.⁷ Third, the substantive law of liability is determined by international law, as developed through the jurisprudence of the international criminal tribunals, rather than by reference to the law of the State in which the violations occurred. Fourth, the courts are free to develop limitation periods other than those applicable in tort actions. For example, in ATS suits, a ten year period of limitation has been applied, by analogy with the limitation period contained in the Torture Victims Protection Act 1991.⁸ Finally, there is the greater adverse publicity for a corporation in being held liable for complicity in a breach of customary international law as opposed to incurring liability for a ‘garden variety tort.’

II. CORPORATE LIABILITY UNDER THE ATS.

The Alien Tort Statute 1789 provides that “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁹ This Act lay dormant for nearly two centuries until 1980 when it was successfully invoked in a claim for damages in *Filartiga v. Pena-Irala*.¹⁰ The plaintiff, the sister of a Peruvian who had been tortured in Peru, obtained an award of damages against her brother’s torturer, who was then living in Brooklyn. The decision in *Filartiga* has generated a flood of cases by aliens before the federal courts of the United States, in which claims for compensation against individuals have been based on alleged violations of international law. Two landmark decisions opened up the scope of ATS as a means of proceeding against corporations in respect of their involvement with violations of the customary international law. The first was the Second Circuit’s decision in 1995 in *Kadic v.*

⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

⁷ This seems to have been the view expressed in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), although in *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, (S.D.N.Y. 2001) it was held that ATS claims are to be treated in the same way as any other claims when applying a *forum non conveniens* analysis.

⁸ *Papa v. United States*, 281 F.3d 1004, (9th Cir. 2002). The ATS itself contains no express limitation period.

⁹ 28 U.S.C. §1350.

¹⁰ See generally, *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

Holding Corporations to Account

Karadzic that the ATS could grant jurisdiction over claims against non-state actors, individuals who were not acting in an official capacity.¹¹ Most established norms of customary international law only proscribe the conduct of States rather than that of private actors. However, there exists a core of *jus cogens* norms in respect of which non-state actors may incur liability. These are the prohibitions against piracy, slave trading (extending to slavery and use of forced labour), war crimes, and genocide.¹² The Second Circuit held that individual participants in the civil war in the former Yugoslavia, who were not acting in a State capacity, could be held directly liable under ATS in respect of violations of such norms. Where other norms were involved, such as torture, a non-state actor could incur liability only if it had acted under ‘color of law’ under §1983.¹³ The jurisprudence under §1983 has been used to invest the actions of private actors with a State characteristic so as to bring their actions within the jurisdiction created by the ATS or to link private actors to the actions of State actors, referred to as ‘reverse state action’.¹⁴

The second was the Ninth Circuit's majority decision in *Doe I v. Unocal Corp*¹⁵ which extended the finding in *Kadic* to the secondary liability of non-state actors, including corporations,¹⁶ applying international

¹¹ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

¹² *Id.* at 239-41; *Doe v. Unocal*, 395 F.3d 932, 945-7 (2002).

¹³ §1983 derives from the Civil Rights Act 1871, and provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...

¹⁴ This may be done in two ways, through a finding of joint action, or a finding of proximate cause. In *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1307 (C.D. Cal. 2000), Judge Lew distinguished between the two tests, as follows: “The joint action cases address situations in which a private individual, acting in concert with the government, commits the challenged acts. In this case, the government committed the challenged acts. In order for a private individual to be liable for a section 1983 violation when the state actor commits the challenged conduct, the plaintiff must establish that the private individual was the proximate cause of the violation.” In *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887, 7-9 (S.D.N.Y. Feb. 28, 2002) the District Court held that a substantial degree of cooperative action was needed to establish state action and that this had been present between the corporate defendants and the government of Nigeria.

¹⁵ *Doe v. Unocal*, 395 F.3d 932 (2002).

¹⁶ In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, (S.D.N.Y. 2003) Judge Schwarz rejected the defendant’s argument that corporations could not be the subjects of customary international law. In 1997 in *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal.1997) Judge Paez had held that the ATS granted jurisdiction for a claim against a corporation in respect of its alleged complicity in forced labor practiced by the security forces of the Burmese state. The defendants in the *Unocal* litigation did not challenge the reach of the ATS to corporations. Claims had previously been brought against a corporation under the ATS in *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp.

criminal law¹⁷ on aiding and abetting in respect of those handful of norms to which the law of nations attributes individual liability.¹⁸ The claim arose out of Unocal's participation as a joint venturer in the Yadana pipeline project in Burma in the 1990s. The Burmese military provided security for the project and it was alleged that during the course of the project they forced the plaintiffs to work on the project, forcibly relocated various villages, and committed numerous acts of violence, torture and rape in connection with the forced labor and forced relocations. Applying *Kadic* the majority decided that a non-state actor could be held directly liable in civil proceedings under the ATS if it committed a breach of a norm of customary international law which governed the conduct of non-state actors – such as the prohibitions on piracy, slave trading/slavery/forced labor, genocide, crimes against humanity, and war crimes. It could also incur a secondary liability for aiding and abetting breaches of such core norms by state actors.¹⁹ The applicable norm of customary international law was to be found in *Prosecutor v. Furundzija*²⁰ in which the International Tribunal for the former Yugoslavia had held that “the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”²¹ The Tribunal had then gone on to define the *mens rea* for aiding and abetting as actual or constructive (i.e., “reasonabl[e]”) “knowledge that [the accomplice’s] actions will assist the perpetrator in the commission of the crime.”²² This requirement was satisfied through evidence of the knowledge of various senior Unocal executives who were involved in the pipeline project. Judge Reinhardt, however, concluded that the issue of secondary liability in an ATS claim fell to be determined under principles of domestic federal tort law. The Ninth Circuit’s decision was vacated in February 2003 and an *en banc* rehearing reordered, primarily to clarify whether international law or federal tort law was the applicable law for an ATS claim.²³ However, before the case could be reheard the parties agreed a settlement.

668, (S.D.N.Y. 1991) but had been dismissed on the ground that the plaintiffs had failed to state a violation of the law of nations.

¹⁷ Doe v. Unocal, 395 F.3d 932, 948-9 (2002).

¹⁸ *Id.* at 945.

¹⁹ This was an alternative method of linking the corporation to the violations committed by Burmese state actors to the reliance on the U.S. domestic law of ‘color of law’ to be found in §1983. The District Court had held that Unocal had not acted under ‘color of law’ and also that they had not acted as aiders and abettors.

²⁰ *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998).

²¹ *Id.* at 235. The Tribunal based its *actus reus* standard for aiding and abetting chiefly on decisions by American and British military courts and tribunals dealing with Nazi war crimes, as well as German courts in the British and French occupied zones dealing with such crimes in the aftermath of the Second World War. *Id.* at 195-97.

²² *Id.* at 245.

²³ Doe I v. Unocal Corp., 403 F.3d 708 (2005). The effect of vacating the decision is that it has no precedential effect and may not be cited on the Ninth Circuit.

Holding Corporations to Account

In 2004 the Supreme Court considered the scope of the ATS for the first time in *Sosa v. Alvarez-Machain*.²⁴ The plaintiff's claim was based on an allegation that he had been unlawfully abducted from Mexico for 24 hours to bring him back to the United States to face trial. Justice Souter, giving the principal majority opinion, held that the Act was jurisdictional and created no new causes of action.²⁵ However, the drafters of the Act understood that the common law would provide a cause of action for the three violations of international law thought to carry personal liability at the time - offences against ambassadors, violation of safe conducts, and piracy.²⁶ "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."²⁷ A significant rethinking of the role of the federal courts in making common law came in *Erie R. Co. v. Tompkins*, in which the Supreme Court denied the existence of any federal "general" common law.²⁸ Judicial creation of federal common law then largely withdrew to specialized areas, some of them defined by express congressional authorization to devise a body of law directly, or in interstitial areas of particular federal interest, with the general practice being to look for legislative guidance before exercising innovative authority over substantive law.²⁹ Justice Souter went on to outline the type of claims that might be created in this manner:

Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.³⁰

²⁴ *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004).

²⁵ *Id.* at 714, 725.

²⁶ *Id.* at 715:

There was, finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 4 Commentaries 68. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war....[internal citation omitted]. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs that was probably on minds of the men who drafted the ATS with its reference to tort.

²⁷ *Sosa v. Alvarez Machain*, 542 U.S. 692, 724 (2004).

²⁸ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁹ *Sosa*, 542 U.S. 692, 726.

³⁰ *Id.* at 732.

The determination of whether a norm was sufficiently definite to support a cause of action “should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”³¹ Other factors that might limit the availability of relief in the federal courts for violations of customary international law could be a requirement of prior exhaustion of domestic remedies, as well as a policy of case-specific deference to the political branches.³² A related consideration was whether international law extended the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant was a private actor such as a corporation or individual.³³

Justice Breyer substantially agreed with Justice Souter but pointed out that substantive uniformity on a norm of international law would not automatically lead to universal jurisdiction. There also had to be a procedural consensus whereby there was universal jurisdiction by which, as was the case with piracy, any nation could prosecute a subset of universally condemned behavior - such as torture, genocide, crimes against humanity, war crimes. Criminal jurisdiction necessarily contemplated a significant degree of civil tort recovery as well.³⁴

The upshot of *Sosa* is that although the ATS is a jurisdictional grant, that grant determines the substantive claims that could be heard in the district courts pursuant to the grant. In *Sarei v. Rio Tinto* Justice Schroeder analysed the nature of the cause of action under the ATS as follows:

Thus, it is by now widely recognized that the norms *Sosa* recognizes as actionable under the ATS *begin* as part of international law—which, without more, would not be considered federal law for Article III purposes—but they *become* federal common law once recognized to have the particular characteristics required to be enforceable under the ATS.³⁵

Therefore, it is the jurisdictional grant under the ATS that enables the federal courts to develop federal common law to recognise an action for damages for violations of those norms of customary international law that have the characteristics specified in *Sosa*.

The call for judicial restraint in *Sosa* as to the recognition of new causes of action based on violations of customary international law might have indicated that such norms be limited to those for which universal criminal jurisdiction exists. This is particularly so in the light of Justice Breyer’s view that there must be both substantive and procedural consensus on how breaches of specific norms of customary international law should be prosecuted, both criminally and civilly. Notwithstanding the

³¹ *Id.* at 733.

³² *Id.* at 724 n. 21.

³³ *Id.* at n. 20.

³⁴ *Id.* at 762-63 (2004).

³⁵ *Sarei v. Rio Tinto PLC*, 671 F.3d 736 (9th Cir. 2011).

Holding Corporations to Account

Supreme Court's exhortations, it has been very much 'business as usual' in the federal courts where most of the norms of customary international law recognized before *Sosa* have continued to be recognized as grounding claims under ATS. There has been no limitation of ATS claims to those *jus cogens* norms of customary international law which impose universal criminal jurisdiction on non-state actors.³⁶ The federal courts have recognized causes of action in suits brought under the ATS in respect of a range of norms of customary international law under which criminal liability could not be incurred by a non-state actor, such as those prohibiting: torture; extra-judicial killing; apartheid; cruel and inhuman treatment;³⁷ non-consensual medical experimentation.³⁸ However, the federal courts have not taken up the suggestion in *Sosa* that ATS suits might be subject to a requirement of prior exhaustion of remedies.³⁹

The federal courts have adopted three approaches to link corporations to primary violations committed by state actors. First, there is the 'color of law' jurisprudence under §1983 in linking non-state actors with violations of customary international law which is still routinely accepted in ATS suits. However, there is much force in the findings of Judge Illston in *Bowoto v. Chevron Corporation* that, as the Supreme Court in *Sosa* had clearly stated that the scope of liability had to be decided by international law, there was no room for the application of domestic law to determine the liability of non-state actors in respect of violations of customary international law.⁴⁰ Secondly, secondary liability may be determined

³⁶ Only a few ATS claims against corporations allege a direct violation of a *jus cogens* norm. For example, in *Adhikari v. Daoud*, 697 F. Supp. 2d 674 (S.D. Tex., 2009) and *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007) claims were made against corporations for trafficking in forced labor.

³⁷ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

³⁸ *Abdullahi v. Pfizer Inc.*, 562 F.3d 163 (2d Cir. 2009).

³⁹ In *Sarei v. Rio Tinto PLC*, 550 F.3d 822 (9th Cir. 2008) an en banc panel of the Ninth Circuit Court of Appeals remanded the action for the limited purpose of ascertaining whether, as an initial, prudential matter, exhaustion of domestic remedies should be required. Judge Morrow held it inappropriate to impose a prudential exhaustion requirement with respect to plaintiffs' claims for crimes against humanity, war crimes, and racial discrimination (*Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004 (C.D. Cal 2009)). As a prudential matter the traditional two-step exhaustion analysis would be applied to the other ATS claims for violation of the rights to health, life, and security of the person; cruel, inhuman, and degrading treatment; international environmental violations; and a consistent pattern of gross human rights violations. The plaintiffs decided to abandon these claims and Judge Morrow's decisions as regards the claims for crimes against humanity, war crimes, and racial discrimination was upheld by the Ninth Circuit, 671 F.3d 736 (9th Cir. 2011).

⁴⁰ *Bowoto v. Chevron Corp.*, No. C-99-02506 SI, [*25], 2006 U.S. Dist. LEXIS 63209 (N.D. Cal. Aug. 21, 2006):

A related consideration is *whether international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. *Id.* (citing *Sosa*, 542 U.S. at 732 n. 20).

by reference to domestic U.S. law.⁴¹ This is the position that has been taken in the Eleventh Circuit.⁴² Thirdly, the corporate defendant may be held liable under customary international law for aiding and abetting a violation of international law. The existence of a norm of customary international law imposing civil liability for aiding was challenged by Judge Sprizzo in *In re South African Apartheid Litigation*⁴³ in which he held that sources relating to criminal responsibility for aiding and abetting under international criminal law could not establish a norm of international law imposing civil liability on aiders and abettors.⁴⁴ His finding was reversed in the Second Circuit in 2007⁴⁵ all three judges holding that liability for aiding and abetting could be alleged in an ATS claim, although there was disagreement as to whether this was to be determined in accordance with principles of U.S. tort law or by reference to the principles of international criminal law. The matter was remitted to the District Court and in 2009 Judge Schiendlin held that the question of accomplice liability was to be determined by reference to customary international law, reasoning that:

[a]lthough cases in this Circuit have only required consultation of the law of nations concerning the existence of substantive offenses; the language and logic of *Sosa* require that this Court turn to customary international law to ascertain the contours of secondary liability as well.⁴⁶

Aiding and abetting claims created liability for a distinct form of conduct. Judge Schiendlin then went on to state:

As the ATS is merely a jurisdictional vehicle for the enforcement of universal norms, the contours of secondary liability must stem from international sources. Ideally, the outcome of an ATS case should not differ from the result that would be reached under analogous jurisdictional provisions in nations such as Belgium, Canada or Spain ... The imposition of liability based on a cause of action derived after the conduct in question from an amalgamation of the law of nations and federal common law would raise fundamental fairness concerns.⁴⁷

⁴¹ Plaintiffs have been keen to argue for this position for two reasons. First, to avoid a finding that corporations are not capable of incurring civil liability under customary international law as they cannot be subject to criminal liability thereunder. Second, to take advantage of a knowledge-based *mens rea* requirement under federal common law, the position uncertain being under customary international law.

⁴² *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005).

⁴³ 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

⁴⁴ *See also Doe v. Exxon*, 393 F. Supp. 2d 20 (D.D.C. 2005) (where Judge Oberdorfer held that there was no civil liability for aiding and abetting under customary international law).

⁴⁵ *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

⁴⁶ *Ntsebeza v. Daimler AG (In re S. African Apartheid Litig.)*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

⁴⁷ *Id.* at 256.

Holding Corporations to Account

This approach has since been confirmed on two occasions by the Second Circuit, first, in 2009 in *Presbyterian Church of Sudan v. Talisman Energy*⁴⁸ and secondly, in 2010 in *Kiobel v. Royal Dutch Petroleum Co.*⁴⁹ It is also the position in the Ninth Circuit.⁵⁰

The existence of a norm prohibiting aiding and abetting is, therefore, well established in federal courts and furthermore the general consensus is that it extends beyond those norms for which a non-state actor could be held *directly* liable. A contrary position was taken by Judge Illston in *Bowoto v. Chevron Corp.* in 2006, holding that the international law norms invoked by the plaintiff (the prohibition of torture, and of extrajudicial killing) placed no direct liability on a private party so it would be inappropriate to allow liability to be imposed on a private party for aiding and abetting a breach of such a norm.⁵¹ However, in 2007 she reversed this finding, accepting that it had been based on the faulty premise that if a party could not be liable as a principal it could not be liable as aider and abetter.⁵² Consequently, civil liability for aiding and abetting could arise under the ATS in respect of any norm of customary international law that was sufficiently established under the criteria set out by the Supreme Court in *Sosa*. Thus, in *In re South African Apartheid Litigation*, Judge Schiendlin held that corporate defendants could be liable in respect of aiding and abetting the norms prohibiting apartheid and arbitrary denationalization by State actors.⁵³

We now turn to the substance of the aiding and abetting norms that have been derived from international criminal law. As regards the elements of the *actus reus* of criminal liability for aiding and abetting under international law, the federal courts have turned to two sources of customary international law: the Nuremberg trials, and the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The *actus reus* for aiding and abetting under international criminal law was defined by the ICTY Tribunal in *Prosecutor v. Furundzija*, as “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”⁵⁴ The assistance must be substantial but need not be the *sine qua non* of the offence, and liability may be incurred even if the crimes could have been carried out through different means or with

⁴⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

⁴⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

⁵⁰ *Bowoto v. Chevron Corp.*, No. C-99-02506 SI, 2006 U.S. Dist. LEXIS 63209 (N.D. Cal. Aug. 21, 2006); *Sarei v. Rio Tinto PLC*, 671 F.3d 736 (9th Cir. 2011). It is also the position adopted by the District Court in the Southern District of Texas in *Abecassis v. Wyatt*, 704 F. Supp. 2d 623 (S.D. Tex. 2010).

⁵¹ *Bowoto*, 2006 U.S. Dist. LEXIS 63209.

⁵² *Bowoto v. Chevron Corp.*, No C-99-02506 SI, 2007 U.S. Dist. LEXIS 59374 (N.D. Cal. Aug. 13, 2007).

⁵³ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (2009).

⁵⁴ Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 235 (Dec. 10, 1998).

the assistance of another. This definition has been adopted in ATS cases, although in *Doe I v. Unocal* the majority in the Ninth Circuit expressed doubts as to the reference to “encouragement or moral support.”⁵⁵ In *In re South African Apartheid Litigation*, Judge Schiendlin, adopting the *Furundzija* standard, started her analysis by noting that merely doing business in a state which was committing violations of customary international law would not be sufficient to constitute the *actus reus* of aiding and abetting.⁵⁶ In determining whether or not the alleged assistance had had a “substantial effect” on the commission of the crime, guidance could be obtained from a comparison of two Nuremberg decisions. In *The Ministries Case*,⁵⁷ the defendant, Rasche, had supplied loans to the SS and was found not guilty, while the defendant in the *Zyklon B* case, Tesch, had supplied poison gas to death camps and was found guilty.⁵⁸ The two cases could be distinguished by reference to the quality of the assistance provided to the primary violator.⁵⁹

Accordingly, some specific link was required between the state’s violation of customary international law and the corporation’s assistance of that violation. The facts alleged by the plaintiffs against the automotive defendants disclosed just such a direct link through the sale of specialized military vehicles to the South African Government, as well as the provision of components of vehicles allegedly used by the internal security forces to patrol the townships.⁶⁰ Similarly a very direct link with violations of the norms against arbitrary denationalization and apartheid by a state actor would be established by the sale of computers to the governments of South Africa and of the Bantustans for use in the process of registering individuals, prior to the removal of their South African citizenship, and their segregation in particular areas of South Africa. In contrast, the *actus reus* of aiding and abetting was not made out against Barclays Bank whose race-based employment practices followed the geographic segregation already established by the South African Government and involved acquiescence in, rather than the provision of essential support for, apartheid. Nor would the *actus reus* of aiding and abetting be made out by the provision of loans and purchase of South African defense forces bonds. Supplying a violator of the law of nations with funds - even funds that

⁵⁵ However, the full *Furundzija* definition of the *actus reus* requirement has been applied in *Bowoto v. Chevron Corp.*, No. C-99-02506 SI, 2006 U.S. Dist. LEXIS 63209 (N.D. Cal. 21 Aug. 21, 2006) and *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (2009).

⁵⁶ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 258.

⁵⁷ See also *United States v. Von Weizsacker* (“The Ministries Case”), in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, 622, 851-2(1950).

⁵⁸ 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS, 93-103 (1947).

⁵⁹ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 258 (2009).

⁶⁰ This would also satisfy the *actus reus* requirement as regards aiding and abetting extrajudicial killing, but not as regards cruel inhuman and degrading treatment, unlawful detention, and torture.

Holding Corporations to Account

could not have been obtained but for those loans - was not sufficiently connected to the primary violation.⁶¹

As regards the *mens rea* requirement of aiding and abetting, the federal courts have considered a third source, the Rome Statute establishing the International Criminal Court.⁶² This contains a definition of *mens rea* for international criminal liability of accessories, but is silent as regards *actus reus*. The three sources of international law relied on by the federal courts have given conflicting indications as to whether the *mens rea* of aiding and abetting under international law requires intentional assistance or whether knowing assistance will suffice. The first source, the Nuremberg jurisprudence, contains decisions in which either knowledge or intent has been required to establish the culpability of the party providing assistance to the violation of a norm of customary international law. In the *Zyklon B* case, the owner of Tesch and Stabenow and a senior official, Weinbacher, were hanged on the basis that they accepted and processed orders for Zyklon B which were shipped directly to the SS concentration camps and used to exterminate allied nationals.⁶³ Their knowledge of the intended use of the product coupled with its substantial assistance in the violation of international law made them liable as aiders and abettors. In contrast in *United States v. von Weizsaecker (the Ministries case)* Rasche, Chairman of Dresdner Bank, was charged with lending money to SS enterprises which he knew were making use of forced labor, but acquitted.⁶⁴ However, another banker, Puhl, was found guilty as an accessory to crimes against humanity in that he knowingly participated in the disposal of gold, including gold teeth and crowns, and valuables taken from Holocaust victims.⁶⁵ The second source, the decisions of the ICTY and ICTR, leans towards a knowledge standard.⁶⁶ However, the waters are muddied by the Appeal Chamber's statement in *Prosecutor v. Vasiljevic* that the *actus reus* of aiding and abetting required that the accused had carried out "acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime."⁶⁷

The third source is the 1998 Rome Statute establishing the International Criminal Court.⁶⁸ Article 25(3)(c) provides that a person "shall be criminally responsible and liable for punishment for a crime" if that person "[f]or the purpose of facilitating the commission of such a crime, aids,

⁶¹ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 269 (2009).

⁶² *E.g. In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 260-62, 299-300 (2009).

⁶³ 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra* note 58 at 93-103.

⁶⁴ 14 TRIALS OF WAR CRIMINALS, *supra* note 57 at 854.

⁶⁵ *Id.* at 621-2, 868.

⁶⁶ In *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998) knowledge was held to be the basis of the *mens rea* of aiding and abetting.

⁶⁷ Case No. IT-98-32-A, Judgment, 102(i) (App. Chamber, Feb. 25, 2004) (emphasis added).

⁶⁸ The Rome Statute of the International Criminal Court, July 17, 1998 (U.N. Doc. A/CONF.183/9*).

abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.⁶⁹ However, Article 25(3) does not exist in isolation, and has to be read in conjunction with Article 30. Paragraph 1 provides:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

Paragraph 2 then provides that a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence *or is aware* that it will occur in the ordinary course of events.⁷⁰

In *Khulumani v. Barclay Nat. Bank Ltd* the Second Circuit split on this key issue whether it is necessary that the accomplice intended to further the primary violation of the law of nations or whether mere knowledge would suffice.⁷¹ Judge Hall applied federal law which applied a knowledge test in civil claims against aiders and abettors.⁷² Judge Katzman and Judge Korman both held that intention was required under customary international law⁷³, although Judge Korman held that aiding and abetting claims could not be brought against corporations.⁷⁴

The matter was remitted to the district court for reconsideration by Judge Schiendlin. She adopted a knowledge test for the *mens rea* of the international criminal law offence of aiding and abetting, noting that the vast majority of international legal materials specified knowledge and, after examining the Nuremberg decisions, concluded that the *Rasche* case was not authority for requiring intent as the basis of the decision was that there was no *actus reus*.⁷⁵ She then turned to the Rome Statute and concluded that this was not intended to eliminate rights existing under the law of nations: “Nevertheless, where the Rome Statute explicitly deviates from the law of nations, it could fairly be assumed that those rules are unique to the ICC, rather than a rejection of customary international law.”⁷⁶ In the absence of an explicit deviation in the Rome Statute with regard to aiding and abetting liability, Article 25(3)(c) could reasonably be interpreted to conform to pre-Rome Statute customary international law.⁷⁷ Article 30(2) of the Rome Statute also had to be taken into ac-

⁶⁹ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 261 (2009) (emphasis added).

⁷⁰ *Id.* at 262 (emphasis added).

⁷¹ *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

⁷² *Id.* at 286-87.

⁷³ *Id.* at 275-77, 333.

⁷⁴ *Id.* at 321-26

⁷⁵ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 258-59 (2009).

⁷⁶ *Id.* at 261.

⁷⁷ Article 10 of the Rome Statute which provides: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law

Holding Corporations to Account

count.⁷⁸ Judge Schiendlin reasoned that even assuming that Article 25(3)(c) carried an intent requirement, the context of the Rome Statute did not require that an aider or abettor share the primary actor's purpose. Rather it meant that the *actions* must be taken intentionally, and not under duress. However, Article 30(2) provided for a knowledge requirement for the *mens rea* requirement relating to the outcome - rather than the act:

Under the Rome Statute-and under customary international law - there was no difference between amorality and immorality. One who substantially assisted a violator of the law of nations was equally liable if he or she desires the crime to occur or if he or she knows it will occur and simply does not care.⁷⁹

Subsequently, in October 2009, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,⁸⁰ the Second Circuit decided that the *mens rea* of aiding and abetting under customary international law required intention rather than knowledge, adopting Judge Katzman's analysis put forward in *Khulumani v. Barclay National Bank Ltd.*⁸¹ He had held that Article 25 (3)(c) of the Rome Statute constituted authoritative guidance on the international law standard for *mens rea* in criminal proceedings against aiders

for purposes other than this Statute" would appear to support this view. However, this Article appears in Part Two of the Statute: "Jurisdiction, Admissibility and Applicable Law," whereas Article 25 appears in Part Three: "General Principles of Criminal Law."

⁷⁸ This provides that a person has intent where: "(a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence *or is aware* that it will occur in the ordinary course of events" (emphasis added).

⁷⁹ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 262 (2009). This analysis is supported by the pre-trial decision in *Prosecutor v. Lubanga, Situation in the Democratic Rep. of Congo*, ICC-01/04-01/06 Pre-Trial Chamber Decision on the Confirmation of Charges para 352-3 (Jan. 29, 2007). The ICC stated that the volitional element in Article 30(2) also encompasses other forms of the concept of *dolus* which have already been resorted to by the jurisprudence of the *ad hoc* tribunals, that is:

i. situations in which the suspect, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions (also known as *dolus directus* of the second degree); and ii. situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).

In the second situation, where the risk of bringing about the objective elements of the crime is substantial, the suspect's acceptance can be inferred from: "(i) the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realization of the objective elements of the crime; and (ii) the decision by the suspect to carry out his or her actions or omissions despite such awareness." If, however, the risk of bringing about the objective elements of the crime is low, the suspect must have "clearly or expressly accepted the idea that such objective elements may result from his or her actions." *Id.* at ¶ 354.

⁸⁰ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

⁸¹ 504 F.3d 254 (2d Cir. 2007).

and abettors, “because, unlike other sources of international legislation, it articulates the *mens rea* required for aiding and abetting liability.”⁸² He recognized that the Rome Statute had yet to be considered by the International Criminal Court and that its precise contours and the extent to which it may differ from customary international law thus remained somewhat uncertain. The Rome Statute’s *mens rea* standard was consistent with the application of accomplice liability under other sources of customary international law, in particular the *Ministries* case at Nuremberg in which the tribunal declined to impose criminal liability on the banker, Rasche, in respect of making a loan to the SS.⁸³

The Second Circuit’s analysis of this issue is somewhat brief and, unlike that engaged in by Judge Schiendlin, fails to take account of Article 30(2) of the Rome Statute, or of the fact that the decision in *U.S. v. Von Weizsaecker* was based on the absence of the *actus reus* of aiding and abetting. The decision also fails to address the question of whether the Rome Statute was intended to change customary international law. This is disputed by Professor Scheffer, the lead US negotiator for the Rome Statute, who states that he does not

recall hearing directly or being advised by his Justice Department team of negotiators of a single discussion prior to or during the Rome negotiations where the text of what laboriously became Article 25(3)(c) on aiding and abetting as a mode of participation was being settled as a matter of customary international law⁸⁴

and that “the wording of Article 25(3)(c) was uniquely crafted for the International Criminal Court.”⁸⁵ There is also the fact that Article 25(3)(d) provides liability for an individual who “contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose” where such contribution is “intentional” and either “made with the aim of furthering the criminal activity or criminal purpose of the group” or “made in the *knowledge* of the intention of the group to commit the crime.”

The position of other circuits on this question is mixed. In *Sarei v Rio Tinto* the Ninth Circuit was prepared to assume that the *mens rea* for aiding and abetting under international criminal law was purposive assistance, without deciding the issue.⁸⁶ In contrast in *Doe v. Exxon Corporation* the majority of the Court of Appeals for District Columbia held that

⁸² *Id.* at 275. This view was also confirmed in Judge Leval’s dissent in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 11, 188-93 (2d Cir. 2010). The issue was not considered by the majority given their dismissal of the case for lack of subject matter jurisdiction on the grounds that customary international law provided no norms affecting corporations.

⁸³ *Id.* at 276.

⁸⁴ David Scheffer, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT. LAW, 334 (2011).

⁸⁵ *Id.*

⁸⁶ *Sarei v. Rio Tinto PLC*, 671 F.3d 736 (9th Cir. 2011).

Holding Corporations to Account

customary international law on aiding and abetting was to be found in the decisions of the ICTY and ICTR and that, in any event, the Rome Statute contemplated *mens rea* requirement based on knowledge rather than intention.⁸⁷

The next issue as to the substance of customary international law is whether its prohibitions on the conduct of non-state actors affect corporations. Until 2010 the only judicial support for the view that there is no basis for imposing liability on corporations under customary international law was to be found in the minority opinion of Judge Korman in the Second Circuit decision in *Khulumani v. Barclay National Bank Ltd.* to the effect that the criminal law sources cited only encompassed natural persons and therefore did not establish a norm of customary international law that imposed civil liability on corporations.⁸⁸ When the case was remitted to the District Court, in *In re South African Apartheid Litigation*, Judge Schiendlin dealt briefly with the point by stating that the ATS liability of corporations was a long-settled question in the Second Circuit.⁸⁹

This is no longer the case for the Second Circuit's position on this issue changed drastically with its majority decision in *Kiobel v. Royal Dutch Petroleum Co.*, on 21 September 2010.⁹⁰ The case involved claims that a Dutch and an English corporation had aided and abetted, or were otherwise complicit in, violations of the law of nations by the Nigerian government during the unrest in Ogoniland in the early 1990s. In 2006 the District Court dismissed the plaintiffs' claims for aiding and abetting property destruction, forced exile, extrajudicial killing, and violations of the rights to life, liberty, security, and association, but denied defendants' motion to dismiss with respect to the remaining claims of aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture or cruel, inhuman, and degrading treatment.⁹¹

The same court as had decided *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, in 2009 now considered the issue of whether the ATS reached corporate defendants.⁹² The majority, whose opinion was given by Judge Cabranes, held that it did not. Judge Cabranes reviewed the development of international law as it applied to individuals from the starting point of the Nuremberg trials which made explicit what had previous-

⁸⁷ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

⁸⁸ *Barclay Nat'l Bank Ltd.*, 504 F.3d 254. Previously, in *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289, Schwarz J had rejected the defendant's argument that corporations could not be the subjects of customary international law.

⁸⁹ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 254-55 (2009).

⁹⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). Shortly before the decision, the district court in California in *Doe v. Nestle S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) had held that ATS claims could not be pursued against corporations.

⁹¹ *Kiobel v. Royal Dutch Petroleum Co.* 456 F. Supp. 2d 457 (S.D.N.Y. 2006).

⁹² *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). The Second Circuit treated this issue as a jurisdictional issue. Therefore, although it had not been raised by the defendant, they were able to consider the issue *sua sponte*.

ly been implicit the proposition that individuals could incur liability for committing international crimes. However, at Nuremberg this principle had been expressly confined to natural persons. Although the tribunals had the authority to declare an organization to be criminal, this was with a view towards facilitating the imposition of liability on the individual members of the organization. The tribunals had no jurisdiction to impose criminal liability on the organization itself. All subsequent international criminal tribunals from the ICTY and ICTR to the ICC had possessed jurisdiction over natural persons, but not over legal persons.⁹³ The Rome Statute which created the International Criminal Court provided for jurisdiction over 'natural persons' and French proposals for bringing in corporations and other juridical person had been rejected.⁹⁴ The ATS tort jurisdiction extended to those individuals who had committed international crimes and it, therefore, followed, that it could not extend to corporations, although individual perpetrators in a corporation could still incur liability. International law and not domestic law determined the reach of the ATS. International law determined both the 'what' - the norm that was broken - and the 'who' - the persons liable for breach of that norm. For this reason, the norm for aiding and abetting was to be found in international law, rather than in domestic law. Footnote 20 of Justice Souter's opinion in *Sosa* also mandated that the courts use international law to determine the subjects of international law.⁹⁵

In contrast, Judge Leval, dissenting, looked to customary international law to determine the norms imposing liability, including those relating to aiding and abetting, and then to domestic law to supply the remedy for breach. The second stage determined who could be liable and as corporations were subject to civil liability under U.S. domestic law, they could also be liable under the ATS.⁹⁶ Judge Leval pointed to two opinions of U.S. Attorney Generals, in 1795 and 1907, in which the view had been expressed that corporations could incur liability for breaches of customary international law, and could also advance claims for wrongs done to them under customary international law.⁹⁷ Judge Leval was of the view that the majority had misunderstood how the law of nations functions:

Civil liability *under the ATS* for violation of the law of nations is not awarded because of a perception that international law commands civil liability throughout the world. It is awarded in U.S. courts because the law of nations has outlawed certain conduct, leaving it to each State to resolve questions of civil liability, and the United States has chosen through the

⁹³ Unlike the Nuremberg tribunals, these subsequent tribunals had not been given jurisdiction to declare organisations to be criminal.

⁹⁴ A similar proposal, advanced by Australia, had been rejected when the Committee on International Legal Jurisdiction, under the auspices of the ILC, released its report on this issue in 1953. U.N. GAOR, 9th Sess., Supp. No. 12, U.N. Doc. A/2645 (1954).

⁹⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117-23, 127-41 (2d Cir. 2010).

⁹⁶ *Id.* at 173-76.

⁹⁷ 1 Op. Att'y Gen. 57 (1795); 26 Op. Att'y Gen. 252, 253 (1907).

Holding Corporations to Account

ATS to impose civil liability. The majority's ruling defeats the objective of international law to allow each nation to formulate its own approach to the enforcement of international law.⁹⁸

However, Judge Leval agreed that the case should be dismissed, because the plaintiffs had failed to show evidence that the corporation had acted with the purpose of assisting the state actors' violations of customary international law.⁹⁹ Additionally, on the facts alleged, the plaintiffs had failed to plead a basis for a claim of agency or *alter ego* liability so as to make the parent corporation liable for the defaults of its subsidiary. On 4 February 2011, the Second Circuit denied the plaintiff's petition for a panel rehearing.¹⁰⁰

A circuit split on this issue has recently opened up with contrary decisions in three other Circuits. In *Doe v. Exxon* the majority of the Court of Appeals for District Columbia held that the norms of conduct in an ATS suit were derived from customary international law, including those relating to aiding and abetting, but not the norms of attribution, which fell under domestic law.¹⁰¹ Customary international law identified the

⁹⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 11, 175 (2d Cir. 2010).

⁹⁹ *Id.* at 188-93.

¹⁰⁰ *Kiobel*, 642 F.3d 268, 271 (noting that although the 2009 decision in *Talisman* would mean that most aiding and abetting suits against corporations would fail, the issue of corporate liability still mattered:

... because, without it, plaintiffs would be able to plead around *Talisman* in a way that ... would delay dismissal of ATS suits against corporations; and the invasive discovery that ensues could coerce settlements that have no relation to the prospect of success on the ultimate merits. American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. I cannot think that other nations rely with confidence on the tender mercies of American courts and the American tort bar. These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion. If there is a threshold ground for dismissal—and *Kiobel* is it—it should be considered and used.

Id. (Jacobs J.)).

¹⁰¹ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011):

Our analysis begins by recognizing that corporate liability differs fundamentally from the conduct-governing norms at issue in *Sosa*, and consequently customary international law does not provide the rule of decision. Then we establish that corporate liability is consistent with the purpose of the ATS, with the understanding of agency law in 1789 and the present, and with sources of international law. Our conclusion differs from that of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.* ... because its analysis conflates the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law at issue here; even on its own terms, its analysis misinterprets the import of footnote 20 in *Sosa* and is unduly circumscribed in examining the sources of customary international law.

Id. (Rogers J.).

prohibitions on conduct whereas the “technical accoutrements” to the ATS cause of action, such as corporate liability and agency law, derived from federal common law. In *Flomo v. Firestone Natural Rubber Co.*, the Seventh Circuit held that there was a norm of customary international law by which corporations could be held civilly liable in respect of their primary or secondary involvement in violations of *ius cogens* norms of customary international law.¹⁰² Judge Posner held that the factual premise underlying the majority’s decision in *Kiobel* was incorrect and that at Nuremberg two measures had specifically provided sanctions against organizations: Council Law No. 2, “Providing for the Termination and Liquidation of the Nazi Organizations;”¹⁰³ and Control Council Law No. 9, “Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof,” under which the seizure of all IG Farben’s assets was ordered with a direction that some of them be made “available for reparations.”¹⁰⁴ Judge Posner noted, “[a]nd suppose no corporation *had* ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. There were no multinational prosecutions for aggression and crimes against humanity before the Nuremberg Tribunal was created.”¹⁰⁵ Thirdly, there is the decision of the Ninth Circuit in *Sarei v. Rio Tinto Plc*, in which it was held that corporations could incur liability as aiders and abettors of violations of customary international law.¹⁰⁶ Judge Schroeder noted:

We, however, believe the proper inquiry is not whether there is a specific precedent so holding, but whether international law extends its prohibitions to the perpetrators in question. After *Sosa* we must look to congressional intent when the ATS was enacted. Congress then could hardly have fathomed the array of international institutions that impose liability on states and non-state actors alike in modern times. That an international tribunal has not yet held a corporation criminally liable does not mean that an international tribunal could not or would not hold a corporation criminally liable under customary international law.¹⁰⁷

In 2011 two critical developments occurred that were to determine the future scope of the ATS. First, the Supreme Court granted a writ of certiorari in *Kiobel* to determine the issue of “whether corporations are immune from tort liability for violations of the law of nations such as tor-

¹⁰² *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

¹⁰³ Oct. 10, 1945, reprinted in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 131 (1945) available at www.loc.gov/rr/frd/Military_Law/enactments-home.html.

¹⁰⁴ Nov. 30, 1945, *id.* at 225.

¹⁰⁵ *Flomo*, 643 F.3d at 1017.

¹⁰⁶ 671 F.3d 736 (9th Cir. 2011).

¹⁰⁷ *Id.* at 760-61. On 22 April 2013, the U.S. Supreme Court granted the defendant’s petition for a writ of certiorari and the Ninth Circuit’s judgment was vacated, and the case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Kiobel*, 133 S. Ct. 1995 (2013).

ture, extrajudicial executions or genocide [or] may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations.”¹⁰⁸ Secondly, the Supreme Court in *Morrison v. National Australia Bank Ltd.* reconfirmed a canon of construction whereby U.S. statutes are presumed not to have extra-territorial effect.¹⁰⁹ For more than forty years, the US courts had applied the antifraud provisions of federal securities law to actors and transactions operating outside the United States. The Supreme Court held that although this may be permitted under international law, it was necessary for Congress to give a clear indication that it wanted U.S. law to apply to securities transactions in foreign markets.¹¹⁰ On 17 April 2013, these two developments were to come together in the Supreme Court’s decision in *Kiobel*.¹¹¹

III. THE ATS AFTER *KIOBEL*?

In 2011, the Supreme Court granted certiorari to consider the corporate liability question. After oral argument in February 2012, the Supreme Court directed the parties to file supplemental briefs addressing an additional question: “Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” The Supreme Court heard oral argument on this issue in October 2012 and on 17 April 2013 unanimously upheld the Second Circuit’s dismissal of the complaint.¹¹² Its judgment was based entirely on its answer to the second question. The decision is likely to call a halt to the elucidation of civil liability of non state actors under customary international law through ATS suits in the US federal courts.

The majority opinion was based on the application of a canon of statutory interpretation known as the presumption against extraterritorial application which provides that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”¹¹³ The presumption was typically applied to discern whether an Act of Congress regulating conduct applies abroad. Chief Justice Roberts held that the question was not whether a proper claim had been stated under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sover-

¹⁰⁸ 132 S. Ct. 472 (2011) (granting petition for writ of certiorari).

¹⁰⁹ *Morrison v. Nat’l Australia Bank Ltd.*, 130 S.Ct. 2869 (2010).

¹¹⁰ *Id.* at 287-88.

¹¹¹ Prior to the Supreme Court’s decision in *Kiobel*, the Ninth Circuit in *Sarei*, 671 F.3d at 736 (9th Cir. 2011), had held that the ATS was not constrained by this presumption.

¹¹² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ, joined. Kennedy, J., filed a concurring opinion. Alito, J., filed a concurring opinion, in which Thomas, J., joined. Breyer, J., filed an opinion concurring in the judgment, in which Ginsburg, Sotomayor, and Kagan, JJ, joined.

¹¹³ *Id.* at 1664 (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)).

eign.¹¹⁴ In *Morrison*, the Supreme Court had noted that the question of extraterritorial application was a “merits question,” not a question of subject matter jurisdiction. The ATS, on the other hand, was “strictly jurisdictional.”¹¹⁵ Chief Justice Roberts then went on to say “It does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law. But we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.”¹¹⁶

Thus, the majority opinion in *Kiobel* seems to be a merits dismissal, rather than a dismissal for lack of subject matter jurisdiction, as seen by Chief Justice Roberts’ statement that: “The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U. S. law to enforce a norm of international law.”¹¹⁷ The answer to that merits question is determined by the initial Congressional intent behind the enactment of the ATS in 1789. To rebut the presumption the ATS would need to evince a “clear indication of extraterritoriality”¹¹⁸, which it did not. Although the ATS covered actions by aliens for violations of the law of nations, that did not imply extraterritorial reach, for violations affecting aliens could occur either within or outside the United States. At the time of its enactment there were “three principal offenses against the law of nations” that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. The first two offenses had no necessary extraterritorial application. The third, piracy, typically occurred on the high seas, beyond the territorial jurisdiction of the United States or any other country. Although the Supreme Court had generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application, applying U. S. law to pirates did not involve the imposition of the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign. “Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction.”¹¹⁹ As regards Attorney-General Bradford’s 1795 opinion, that was said to defy a definitive meaning:

Whatever its precise meaning, it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain. The

¹¹⁴ *Id.* at 1664.

¹¹⁵ *Id.* at 1664 (quoting *Sosa v. Alvarez Machain*, 542 U.S. 692, 713 (2004)).

¹¹⁶ *Id.* at 1664.

¹¹⁷ *Id.* at 1666.

¹¹⁸ *Id.* at 1665 (quoting *Morrison*, 130 S. Ct. at 2883).

¹¹⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1667 (2013).

Holding Corporations to Account

opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.¹²⁰

Chief Justice Roberts concluded by stating that on the facts all the relevant conduct took place outside the United States. Even where the claims did touch and concern the territory of the United States, they had to do so with sufficient force to displace the presumption against extraterritorial application.¹²¹ Mere corporate presence would not suffice. Justice Kennedy concurred but noted that it was proper for the Court “to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute [...] Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA¹²² nor by the reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”¹²³ Justice Alito in his concurrence stated “[a]s a result, a putative ATS cause of action will fall within the scope of the presumption against extra territoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.”¹²⁴ His is the most stringent approach to the presumption against extra-territorial application. Not only would it mean that there would be no cause of action under the ATS in cases like *Filartiga* where the violation of the international law norm prohibiting torture took place in Peru, but it would deny an action against pirates where the violation of the international law norm takes place on the High Seas.

Justice Breyer agreed with the result but did not invoke the presumption against extra-territoriality. He framed the question in *Sosa* as follows:

Sosa essentially leads today’s judges to ask: Who are today’s pirates? ... We provided a framework for answering that question by setting down principles drawn from international norms and designed to limit ATS claims to those that are similar in character and specificity to piracy. ... In this case we must decide the extent to which this jurisdictional statute opens a federal court’s doors to those harmed by activities belonging to

¹²⁰ *Id.* at 1668. Bradford was proposing an ATS action for incidents that arose out of American participation in a French raid on the British Sierra Leone colony. His opinion concludes that the United States had a duty to provide a remedy because “committing, aiding, or abetting hostilities” like those in Sierra Leone “render[ed the perpetrators] liable to punishment under the law of nations.” Bradford expressed “no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations.”

¹²¹ *Morrison*, 130 S. Ct. at 2883-88.

¹²² Torture Victims Protection Act 1991.

¹²³ *Id.* at 1669.

¹²⁴ *Id.* at 1670.

the limited class that *Sosa* set forth *when those activities take place abroad*.¹²⁵

The ATS was enacted with “foreign matters” in mind, given the explicit reference in its text to “alien[s],” “treat[ies],” and “the law of nations.” The ATS was intended to cover violations of three norms of international law for which a cause of action would be provided by common law. Piracy was one of these and necessarily involved conduct occurring abroad. Justice Breyer stated:

The majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas... That is because the robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies.¹²⁶

Justice Breyer then continued:

In applying the ATS to acts “occurring within the territory of a[nother] sovereign,” I would assume that Congress intended the statute’s jurisdictional reach to match the statute’s underlying substantive grasp. That grasp, defined by the statute’s purposes set forth in *Sosa*, includes compensation for those injured by piracy and its modern day equivalents, at least where allowing such compensation avoids “serious” negative international “consequences” for the United States.¹²⁷

Justice Breyer concluded that there would be jurisdiction under the ATS where:

(1) the alleged tort occurs on American soil, and (2) the defendant is an American national; or (3) the defendant’s conduct substantially and adversely affects an important American national interest, including a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.¹²⁸

The third element would cover cases such as *Filartiga* and *In re Estate of Marcos, Human Rights Litigation*.¹²⁹ This jurisdictional approach was analogous to, and consistent with, the approaches of a number of other nations as well as being consistent with the substantive view of the statute taken in *Sosa*.

¹²⁵ *Id.* at 1671 (internal citations omitted) (emphasis in the original).

¹²⁶ *Id.* at 1672.

¹²⁷ *Id.* at 1673

¹²⁸ *Id.* at 1674. In doing so Justice Breyer referred to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402, 403 & 404 (1986). The latter is particularly significant in that it explains that a “state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade,” and analogous behavior. *Id.* at 1673.

¹²⁹ 25 F. 3d 1467 (9th Cir. 1994).

Holding Corporations to Account

The Supreme Court's decision in *Kiobel* has sounded the death knell for 'foreign cubed' suits proceeding in the federal courts under the Alien Tort Statute. What is less clear is whether the decision will close off 'foreign squared' suits under the ATS. These involve an alien plaintiff suing a U.S. defendant in respect of a violation of international law that took place in a foreign jurisdiction, as was the case in *Unocal*.¹³⁰ Under Justice Breyer's analysis in *Kiobel*, the most favorable to the continued viability of ATS suits, a case like *Unocal* would involve his second element, the defendant being an American national, but not the first, the alleged tort occurring on American soil.¹³¹ That leaves the third element of Justice Breyer's analysis, the distinct national interest in preventing the United States from becoming a safe haven for a torturer or other common enemy of mankind. It is arguable that this would be satisfied where a U.S. corporation is charged with aiding and abetting an international crime and that Justice Breyer would have found jurisdiction under the ATS had the *Kiobel* defendants been American corporations. The majority opinion and in particular Justice Alito's statement that a putative ATS action would be barred "unless the *domestic conduct* is sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations" is less conducive to such a view.¹³² In most ATS cases involving U.S. corporations, the aiding and abetting has taken place outside the U.S. – in *Unocal* it was in Burma – and such cases would therefore not give rise to a cause of action under the ATS, given the presumption against extra territorial application of the statute. Chief Justice Roberts' opinion leaves this question open. The claims must "touch and concern" the territory of the United States, and do so with sufficient force to displace the presumption against extra territorial application. No indication is given as to what force is necessary to displace the presumption other than that mere geographical presence in the U.S. will not be enough.¹³³

One possible alternative outlet for claims based on violations of customary international law is 28 USC §1331 which gives federal courts juris-

¹³⁰ *Doe v. Unocal*, 395 F.3d 932 (2002).

¹³¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659,1671(2013).

¹³² *Kiobel*, 133 S. Ct. 1659,1671.

¹³³ A further development which will limit the scope of extra-territorial litigation in the federal courts, and not just under the ATS, is the tightening up of the rules regarding personal jurisdiction following the Supreme Court's 2011 decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011). Following this decision it is doubtful that Shell would have been subject to general jurisdiction by reason of its "Investor Relations Office" in New York as was held in an earlier companion case *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). On 22 April 2013, just five days after its judgment in *Kiobel*, the Supreme Court in *Daimler Chrysler AG v. Bauman* granted the defendant's petition for a writ of certiorari to determine "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." 133 S.Ct. 1995 (Mem) (2013), case below 644 F.3d 909 (9th Cir. 2011).

diction over matters arising under the Constitution and federal laws. In *Bodner v. Banque Paribas*¹³⁴ it was held that U.S. citizens could sue a French bank in respect of the looting of their possessions in World War Two, which constituted a war crime. In contrast in *Xuncax v. Gramajo*¹³⁵ it was held that federal law gave rise to no autonomous right to sue for breaches of customary international law. However, in *Sosa* Justice Souter observed:

Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as §1350) ... Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after *Erie*, ... as a more expansive common law power related to 28 U.S.C. §1331 might not be.¹³⁶

This analysis makes it unlikely that a cause of action for violations under customary international law could arise under any other grant of jurisdiction to the federal courts. Another avenue would be for plaintiffs to bring their claims in tort in the federal courts under diversity jurisdiction, or in tort, or under customary international law, in the state courts.¹³⁷ Alternatively, plaintiffs in ‘foreign cubed’ suits could forget about proceeding in the U.S. and bring suit in the defendant’s jurisdiction. In *Kiobel* this would have been the Netherlands in respect of Royal Dutch Petroleum Company and the United Kingdom in respect of Shell Transport and Trading Co. In the next part of this article, I shall consider the question of whether the courts of the United Kingdom would entertain a cause of action against a corporate defendant based on a violation of a norm of customary international law.

IV. INTERNATIONAL LAW AS A CAUSE OF ACTION BEFORE THE COURTS OF THE UNITED KINGDOM

The United Kingdom has no statute such as the ATS 1789. This, however, is not a significant obstacle to the development of civil accountability of corporations before the U.K. courts in respect of direct and secondary violations of customary international law. The ATS is jurisdictional and

¹³⁴ *Bodner v. Banque Paribas*, 114 F. Supp 2d 117, 127 (E.D.N.Y. 2000). As U.S. citizens, they could not have recourse to ATCA. Neither, given the nature of the violation of customary international law, could they have recourse to the TVPA.

¹³⁵ *Xuncax v. Gramajo*, 886 F. Supp. 162, 182-84 (D. Mass. 1995).

¹³⁶ *Sosa v. Alvarez Machain*, 542 U.S. 692, 731 n.19 (2004) (internal citations omitted).

¹³⁷ See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012).

does not itself create a cause of action for violations of the law of nations. The cause of action must be generated by federal common law.

In the U.K. jurisdiction is based on the Brussels Regulation (EC) no.44/2001 and on the common law rules. Article 2 of the Brussels Regulation requires the court to exercise jurisdiction over a defendant domiciled within the jurisdiction.¹³⁸ Where the defendant is a corporation, Article 60.1 provides that a company “or other legal person or association of natural or legal persons” is domiciled “at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business.” Where an action is brought against a company domiciled in the U.K. the courts of the United Kingdom must accept jurisdiction, even if the claim relates to events outside the jurisdiction.¹³⁹ Unlike the position in the United States, U.K. courts will be unable to stay such proceedings on grounds of *forum non conveniens*.¹⁴⁰

Where the company is incorporated in a foreign country which is not an EU or Lugano Member State and has a place of business in England that is not its central administration/statutory seat/principal place of business the High Court would have jurisdiction over the company based on its traditional rules only. In the United Kingdom, the common law basis for asserting jurisdiction is through service of proceedings. Service could be through CPR 6.9 which provides that service of proceedings on a foreign company may be made at “any place in the jurisdiction where the corporation carries on its activities, or at any place of business of the company within the jurisdiction” or, as regards a company registered as an overseas company, pursuant to §1139 Companies Act 2006. In addition, with the leave of the court, a claim form may be served on a party outside the jurisdiction under CPR 6.36.¹⁴¹ It is, therefore, quite possible for jurisdiction to

¹³⁸ Article 5(3) provides an alternative place of suit for tort claims, namely, “the courts for the place where the harmful event occurred or may occur.” Where there are multiple defendants domiciled in different Member States, Article 6(1) provides that each defendant may be sued in the courts of the State in which any one of them is domiciled. Thus, in *Motto & Ors v. Trafigura*, [2011] EWHC 90206, a claim in negligence for damages from exposure to toxic waste dumped in Africa was brought in the English court against Trafigura Ltd., the U.K.-domiciled charterer, and also against its parent company Trafigura Beheer BV, domiciled in the Netherlands.

¹³⁹ As in *Guerrero v. Monterrico Metals PLC*, [2009] EWHC 2475 (QB) where a U.K. parent company was sued in tort in respect of the alleged complicity of its Peruvian subsidiary in violent police suppression in Peru of environmental protests against the activities of the subsidiary. A freezing order was obtained over the parent corporation’s assets. The trial was scheduled to start in October 2011 but the case settled in July 2011.

¹⁴⁰ *Owusu v. Jackson*, [2005] 2WLR 942 (ECJ).

¹⁴¹ Practice Direction 6(b) paragraph 3(1) contains two provisions relevant to tort claims. First, under heading 3 where “A claim is made against a person (‘the defendant’) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.” Second, under heading 9

be established in a 'foreign cubed' case, although the proceedings are liable to be stayed on the basis of *forum non conveniens*. This will not always be the case for a stay will be denied where the claimant can establish that there would be substantial injustice in being required to proceed in the alternative forum.¹⁴² This contradicts the assertions in the amici briefs to the Supreme Court in *Kiobel* of the governments of the United Kingdom and the Netherlands¹⁴³ that international law does not permit a State to entertain civil claims involving foreign parties in respect of conduct that took place entirely in the jurisdiction of another State.¹⁴⁴

The critical question is whether violations of customary international law generate a distinct cause of action under English law. The answer to this question depends upon how the English courts have dealt with the relationship between international law and domestic law. There are two doctrines on this issue. The first is the doctrine of incorporation under which the rules of international law are incorporated into U.K. law automatically and considered to be part of U.K. law unless they are in conflict with an Act of Parliament.¹⁴⁵ The second is the doctrine of transformation under which the rules of international law are not to be considered as part of U.K. law except in so far as they have been already adopted and made part

where "A claim is made in tort where (a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction."

¹⁴² An example is provided by *The Vishva Ajay*, [1989] 2 Lloyd's Rep. 558 (QB) which involved a collision in an Indian port and a claim made against the Indian owners of the colliding vessel. Service had been effected by the arrest of a sister-ship and the English proceedings. Although India was the appropriate forum the court refused to stay the English proceedings following evidence that a trial in India would be delayed for many years, making the evidence of witnesses involved less reliable.

¹⁴³ 2012 WL 405480 (Appellate Brief) Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents (Feb. 3, 2012) and 2012 WL 2312825 (Appellate Brief) Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party (Jun. 13, 2012).

¹⁴⁴ See MALCOLM SHAW, INTERNATIONAL LAW 652 (8th ed., 2008) (noting that the rarity of diplomatic protests has led some writers to conclude that customary international law does not prescribe any particular regulations to restrict courts' jurisdiction in civil matters).

¹⁴⁵ The doctrine originates from the following statement of Lord Mansfield C.J. in *Triquet v. Beth*, (1764) 3 Burr. 1478:

Lord Talbot declared a clear opinion - "That the law of nations in its full extent was part of the law of England, ... that the law of nations was to be collected from the practice of different nations and the authority of writers'. Accordingly, he argued and determined from such instances, and the authorities of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc., there being no English writer of eminence on the subject... . *Id.* (citing *Buvot v. Barbut*, (1736) 3 Burr. 1481; 4 Burr. 2016).

of our law by the decisions of the judges, or by Act of Parliament, or long established custom.¹⁴⁶

In criminal proceedings the theory of transformation has been applied. In *Pinochet (3)* the House of Lords was faced with Spain's request to extradite General Pinochet to face criminal charges relating to charges involving torture that had occurred while he was President of Chile.¹⁴⁷ For this to happen, the charges against him in Spain also had to constitute criminal acts in the United Kingdom. Torture committed outside the U.K. became criminal only when §134 Criminal Justice Act 1988 brought into force the provisions of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Punishment (UNCAT) which established universal criminal jurisdiction for torture.¹⁴⁸ This came into force on 29 September 1989, and therefore Pinochet could be extradited only in relation to charges of torture that had taken place between that date and the end of his Presidency in 1990.¹⁴⁹ Subsequently, the House of Lords has held in *R v. Jones (Margaret)* that international law does not create new criminal offences and therefore the defendants could not advance a defense in criminal proceedings that their conduct had been directed at preventing an international crime.¹⁵⁰ Historically, the courts may have recognized breaches of international law, such as piracy, violations of safe conduct and the rights of ambassadors, as creating domestic crimes.¹⁵¹ However, since *R v.*

¹⁴⁶ The doctrine goes back to 1876 in the judgment of Lord Cockburn C.J. in *Reg. v. Keyn*, (1876) 2 Ex. D. 63, 202-03:

For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it... Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature.

Id.

¹⁴⁷ *Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147.

¹⁴⁸ Lord Millett, however, was of the view that the conduct alleged had become criminal before that date when it had become a criminal offense under customary international law. *Id.* at 276.

¹⁴⁹ The 1984 Convention impliedly removed the immunity enjoyed by former heads of state and accordingly Pinochet lost his immunity from criminal proceedings once the U.K. and Chile had ratified the Convention. However, Pinochet retained his immunity as head of state in respect of torture committed before that date, even though it could be said that torture had already become a crime under international law before that date.

¹⁵⁰ *R v. Jones (Margaret)*, [2006] UKHL 16; [2007] 1 AC 136.

¹⁵¹ Previously, in *Hutchinson v. Newbury Magistrates Court*, (2000) ILR 499, the Divisional Court held that, although 'waging aggressive war' was a crime under international law, it could not be relied to provide a defense to domestic criminal proceedings due to uncertainty as to how the incorporation of international law would work in the domestic system.

Knuller the courts had refused to create any new criminal offences.¹⁵² That was entirely for matter for Parliament. The fact that conduct had achieved the level of a crime under international law, in the instant case the crime of aggression, did not mean that the same conduct would be a crime under domestic law.¹⁵³ However, their Lordships stressed that they were making no finding as regards the potential role of customary international law in civil proceedings.¹⁵⁴

In contrast, in civil proceedings since the decision of the Court of Appeal in *Trendtex Trading Corp v. Central Bank of Nigeria* the theory of incorporation has held sway.¹⁵⁵ The issue was whether to recognize the development in international law under which there was no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature. The Court of Appeal held that the defendant bank was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore not entitled to immunity from suit. Lord Denning and Shaw LJ then went on to consider the position in the event that the bank had been regarded as part of the government of Nigeria. What was the effect of the development in international law that had removed sovereign immunity in respect of commercial transactions by government entities?¹⁵⁶ Lord Denning M.R. and Shaw L.J. took the view that the doctrine of incorporation applied, in which case the bank would have been unable to rely on sovereign immunity in relation to commercial transactions.¹⁵⁷

However, to incorporate customary international law into domestic law is not a straightforward matter. In *Maclaine Watson v. Dept of Trade and Industry*, which arose out of the collapse of the Tin Council, one of the issues before the Court of Appeal was whether there was a rule of in-

¹⁵² *R v. Knuller*, [1973] AC 435.

¹⁵³ All the appellants committed acts in February or March 2003 which were, or are alleged to have been, criminal offenses, at the RAF base at Fairford in protest at the preparations for the war against Iraq. By way of defense they argued that they had a defense under §3(1) Criminal Law Act 1967 which provides: "A person may use such force as is reasonable in the circumstances in the prevention of crime unless there was legal justification for what they did or are said to have done." They argued that the crime they were seeking to prevent was the crime of aggression under customary international law and that such crimes are, without the need for any domestic statute or judicial decision, recognized and enforced by the domestic law of England and Wales.

¹⁵⁴ *R v. Jones (Margaret)*, [2006] UKHL 16; [2007] 1 AC 136, ¶ 59 (Lord Hoffmann); ¶ 100 (Lord Mance).

¹⁵⁵ *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] QB 529.

¹⁵⁶ These developments were evidenced by decisions in Belgium, Holland, West Germany, and, most authoritatively, by the U.S. Supreme Court's decision in *Alfred Dunhill of London Inc. v. Cuba*, 425 U.S. 682 (1976).

¹⁵⁷ This issue is analyzed in detail by the International Law Association Human Rights Committee in their *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad* (2001) Eur.H.R.L. Rep. 129. However, the discussion on *forum non conveniens* predates the decision in *Owusu v. Jackson*, [2005] 2 W.L.R. 942 (ECJ).

Holding Corporations to Account

ternational law that member States participating in an international organization, in this case the International Tin Council, could be sued in respect of liabilities incurred by such organizations.¹⁵⁸ Nourse L.J. was of the view that there was a rule of international law to this effect which would simply be transposed into national law. He dealt with the argument that the rule of international law existed only on the international plane as follows:

Above all, there being no clear and definite consensus amongst the sources which we may consult, we ought to welcome an opportunity of supplementing them with reason and justice. Is it not both reasonable and just, and also proper, to impute to the members an intention that they should meet the bill for any amounts outstanding on the I.T.C.'s tin and loan contracts?¹⁵⁹

Nourse L.J. concluded that it was just and proper for the members of the ITC to incur joint and several liability in national courts in respect of undischarged liabilities of the ITC. However, Kerr L.J. was of the view that, even if there were such a rule under international law, the rule did not extend to the municipal plane so as to allow the members of the organization to be sued in national courts:

Thus, it may well be that if an international association were to default upon an obligation to a State or association of States or to another international organization, then the regime of secondary liability on the part of its members would apply as a matter of international law.¹⁶⁰

To transpose this liability to the national sphere “would be tantamount to legislating on the plane of international law; an impossible concept, unfortunately.”¹⁶¹ The issue was not re-considered when the case came before the House of Lords where the decision was based on an analysis of treaty rights rather than the application of customary international law.¹⁶²

There have since been two cases in which the claimants based their claims not only on conventional torts, but also on a violation of the international prohibition against torture. The first was *Al Adsani v. Kuwait*¹⁶³ in which the Court of Appeal held that §1 of the State Immunity Act

¹⁵⁸ *Maclaine Watson v. Dept of Trade & Industry*, [1989] Ch.72 (CA).

¹⁵⁹ *Id.* at 220.

¹⁶⁰ *Id.* at 184.

¹⁶¹ *Id.* at 185. Ralph Gibson L.J. held that:

Where the contract has been made by the organisation as a separate legal personality, then, in my view, international law would not impose such liability upon the members, simply by reason of their membership, unless upon a proper construction of the constituent document, by reference to terms express or implied, that direct secondary liability has been assumed by the members.

Id. at 245.

¹⁶² [1990] 2 A.C. 418.

¹⁶³ *Al-Adsani v. Kuwait*, 103 I.L.R. 420 (Q.B. 1995), *aff'd* *Al-Adsani v. Kuwait*, 107 I.L.R. 536 (C.A. 1996).

1978¹⁶⁴ precluded a civil suit being brought against a foreign State for breach of this norm, notwithstanding the fact that torture is recognized as a *jus cogens* norm of customary international law,¹⁶⁵ and that UNCAT expressly grants universal criminal jurisdiction against torturers. The decision was subsequently upheld by a majority decision of the European Court of Human Rights.¹⁶⁶

The second was *Jones v. Saudi Arabia*. An attempt was made to argue that an exception to the principles set out in the 1978 Act existed when a civil claim in respect of torture was brought both against the Kingdom of Saudi Arabia and against an individual state official, Colonel Aziz. Initially, the claimants had been denied leave to serve proceedings out of the jurisdiction Colonel Aziz because the Kingdom of Saudi Arabia was entitled to claim immunity on his behalf. The Court of Appeal held that a State's immunity was *ratione personae*, and accordingly the claim against the Kingdom of Saudi Arabia should be dismissed under s. 1 of the 1978 Act. However, the immunity of an official was *ratione materiae* only, and torture could not be treated as the exercise of a State function so as to attract immunity *ratione materiae* in either criminal or civil proceedings against individuals. The question of whether a claim for systematic torture should be allowed to proceed required the court to consider and balance all relevant factors, including the considerations underlying State immunity, jurisdiction and the availability of an alternative forum, at one and the same time.¹⁶⁷

However, the House of Lords overruled the decision, on the grounds that UNCAT provides no exception to the principle of sovereign immunity in relation to civil proceedings.¹⁶⁸ Although UNCAT established universal criminal jurisdiction in respect of torture, this did not translate into universal civil jurisdiction and accordingly sovereign immunity could still be invoked in respect of civil claims against individuals who had committed torture.¹⁶⁹ The Convention dealt with civil proceedings in Article 14.1 but this only required a state to grant a civil remedy in respect of torture committed within its jurisdiction. As to the fact that the prohibition on torture was a *jus cogens* norm, Lord Hoffmann approved the following observations:

¹⁶⁴ "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part."

¹⁶⁵ Article 53 of the Vienna Convention on the Law of Treaties 1969 defines a peremptory (*jus cogens*) norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

¹⁶⁶ *Al Adsani v. U.K.*, (2002) 34 E.H.R.R. 11.

¹⁶⁷ *Jones v. Saudi Arabia*, [2004] EWCA Civ 1394; [2005] Q.B. 699.

¹⁶⁸ *Jones v. Saudi Arabia*, [2006] UKHL; 26 [2007] 1 A.C. 270.

¹⁶⁹ Their Lordships noted that the decision in *Pinochet 3* created an exception to sovereign immunity only in relation to criminal proceedings. *Id.* at ¶¶ 19, 68.

Holding Corporations to Account

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a *jus cogens* mandate can bite.¹⁷⁰

His Lordship then went on to state:

To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But, contrary to the assertion of the minority in *Al-Adsani*, it is not *entailed* by the prohibition of torture.¹⁷¹

Their Lordships, though, made no comment on whether a violation of the international prohibition on torture gave rise to a cause of action separate from that arising under domestic tort law. The basis of the decision is that the norm of customary international law relating to sovereign immunity had not been displaced by the 1984 Convention in civil proceedings and gives no guidance as to whether or not the doctrine of incorporation applies in respect of civil proceedings. It would, therefore, seem that there is still some scope for making a claim on the basis of a breach of a violation of a norm of customary international law. The decisions in *Al Adsani* and *Jones v Saudi Arabia* rule out any civil claims against a State or its officials where the State claims immunity, but have no effect on claims against private parties.¹⁷² Corporations who collude in international crimes committed by officials of foreign States are unlikely to be

¹⁷⁰ *Id.* at ¶ 44 (Lord Hoffmann, approving HAZEL FOX, *THE LAW OF STATE IMMUNITY*, 525 (2002)).

¹⁷¹ *Id.* at ¶ 45.

¹⁷² See Francois Larocque, *Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort*, 46 *OSGOODE HALL L.J.* 605, 630-640 (2008):

It may be that, on the basis of their inherent jurisdiction, Canadian and English courts are able to recognize new causes of action for torture on the theory that the "prohibitive rules of customary law" are incorporated into the common law. But looking back at the few Canadian and English transnational human rights proceedings on record, it is striking to note how little judicial discussion this issue has received. One wonders whether the *Bouzari* and *Al-Adsani* courts simply assumed it to be within their purview to enforce international norms through their civil jurisdiction. Reference to the principle of incorporation in the courts' reasons for judgment supports this hypothesis, though it is impossible to draw definitive conclusions in the absence of explicit reasoning on this point. One possible explanation, of course, is that the courts did not feel compelled to say much on the civil actionability of the international crime of torture in light of their decisions that the claims were barred in any event by state immunity.

Id. at 640.

regarded as agents and the foreign State in question will, therefore, be unable to claim sovereign immunity on their behalf. This raises the question of whether norms of customary international law, other than the prohibition on torture, might also create causes of action, and whether liability can be incurred by private parties who aid and abet violations of such norms by state actors.

V. HOW MIGHT CORPORATE LIABILITY FOR AIDING AND ABETTING VIOLATIONS OF INTERNATIONAL LAW DEVELOP UNDER ENGLISH LAW?

The first question is whether the English courts will accept that there is a norm of customary international law under which non state actors can incur civil liability. Such a norm will have to be evidenced by State practice in national courts as there is no international mechanism by which civil liability can be imposed on non-state actors. The voluminous ATS litigation in the United States will provide an important part of evidence of State practice.¹⁷³ There are other instances in other common law jurisdictions of such a norm forming the basis of a cause of action in a national court. In Ireland in 1995 in *The Toledo* the norm in question was the obligation on a State to admit vessels in distress to a place of refuge within its domestic waters.¹⁷⁴ In Canada a torture claim was brought against Iran in 2002 in *Bouzari v. Iran*¹⁷⁵ but foundered on the rocks of sovereign immunity. In 2009 in *Bil'in (Village Council) v. Green Park International Ltd.*,¹⁷⁶ a claim was brought in Canada against a corporation alleging complicity in war crimes in the occupied territories in Israel. The claim was dismissed on grounds of *forum non conveniens*. There is also the fact that no challenge was made to the pleading of a cause of action based on torture before the English courts in *Al Adsani* and *Jones v. Saudi Arabia*. Katherine Gallagher, Senior Staff Attorney at the Center for Constitutional Rights, has pointed out that the recognition of ATS judgments as a source of customary international law has been confirmed by the Appeal Chamber of the

¹⁷³ In *Trendtex Trading Corp v. Central Bank of Nigeria*, [1977] QB 529, the Court of Appeal found that the norm of customary international law on sovereign immunity had been changed by decisions of national courts, particularly that of the U.S. Supreme Court. *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

¹⁷⁴ (1995) 3 I.R.406, 422-27, 431-34. A claim was brought by a shipowner against the Irish State in respect of a violation of the norm of customary international law, being the prima facie right of vessels in distress to have access to a place of refuge in the nearest maritime State in which such facilities were available. On the facts, the claim was unsuccessful because the right of access was not absolute and was modified by countervailing considerations such as the risk of oil pollution or of the vessel's sinking or hindering navigation should it be admitted into Irish waters.

¹⁷⁵ [2002] O.J. No. 1624 (Ontario Superior Court of Justice), aff'd [2004] O.J. No. 2800 Docket No. C38295 (Ontario Court of Appeal).

¹⁷⁶ [2009] Q.C.C.S. 4151 (Quebec Superior Court).

ICTY in allowing an amendment to an appeal,¹⁷⁷ arguing for a ‘purpose’ based test for *mens rea* for aiding and abetting on the grounds that this is what was applied by the Second Circuit in 2009 in *Talisman*.¹⁷⁸

The critical question is what norms of customary international law can affect non-state actors and so open up the possibility of civil recovery from such parties? The two civil claims advanced before the English courts so far have been in respect of torture. The breach of this norm can entail criminal liability for individual officials, but not for non-state actors, as by definition torture must be perpetrated by a State actor.¹⁷⁹ However, as was made clear in *Kadic* there exists a core of *jus cogens* norms which directly affect non-state actors. These norms are those in respect of which individuals can incur criminal liability under customary international law – the prohibitions on piracy, genocide, war crimes, crimes against humanity, slave trade.¹⁸⁰ These prohibitions give rise to universal criminal jurisdiction in that they entitle any State to prosecute an offender irrespective of where the offence was committed.¹⁸¹ In addition, for some of these crimes an offender may face criminal proceedings before an international tribunal, such as the International Criminal Court. Criminal proceedings may also lie against a party that has aided and abetted a party who has committed the primary offence. These are the only norms of customary international law prohibiting conduct by non-state actors and therefore are the only norms that could form the basis for a civil cause of action for damages under customary international law. The basis of civil liability of aiders and abettors would be co-extensive with the international law prohibition on aiding and abetting, namely aiding and abetting primary offences for which a non-state actor could incur criminal

¹⁷⁷ General Ojdanic’s Motion to Amend his Amended Notice of Appeal of 29 July 2009, Sainovic and others (IT-05-87-A), Defense, 15 Oct. 2009.

¹⁷⁸ Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT’L CRIM. JUST. 745, 766 (2010).

¹⁷⁹ Although torture can only be committed by State actors, it would be possible for a non-State actor to incur criminal liability under UNCAT and, thereby, incur civil liability by reason of its complicity in torture. Article 4(1) provides that, “Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.” (emphasis added).

¹⁸⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§404 (1986) states: “A State has jurisdiction to define and prescribe punishment for certain offenses proscribed by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in s.402 is indicated.” Comment (b) then states: “*Universal jurisdiction not limited to criminal law*: In general, jurisdiction on the basis of universal interest has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example by providing a remedy in tort or restitution for victims of piracy.”

¹⁸¹ States may also be obliged to prosecute persons within their jurisdiction who have committed such crimes, as is the case with torture pursuant to Article 4(1) of UNCAT.

liability. This would rule out civil claims for aiding and abetting violations of customary international norms which govern the conduct of States but which do not govern the conduct of individuals. An example of such a claim is provided by Judge Schiendlin's decision in *In re South African Apartheid Litigation* to the effect that a corporation could incur liability for aiding and abetting arbitrary denationalization, even though that prohibition of customary international law did not directly apply to non state actors.¹⁸²

Three important questions would need to be addressed in determining the scope of a civil action based on a violation of a norm of customary international law prohibiting conduct by non-state actors. First, there is the question which the Supreme Court dodged in *Kiobel*. Can a civil claim be made against a corporation in respect of a violation of such a prohibition? If called on to decide this issue, the U.K. courts could go one of two ways. They could determine that customary international law provides the prohibitive norms and it is then left to each State to determine how to apply them within their domestic legal order. Domestic law would then determine the issue of corporate liability. This is the approach taken by Judge Leval in *Kiobel*¹⁸³ and by Judge Posner in *Flomo*.¹⁸⁴ Although it has never been possible to bring criminal proceedings against a corporation before an international tribunal, that does not necessarily mean that the prohibition against conduct is limited to natural persons. Volker Nehrlich has addressed this point as follows:

A norm of criminal law describing a crime may be understood as comprising two sub-norms: the first, most elementary, sub-norm consists of a prohibition of certain conduct, such as the prohibition to kill another person. To make it a norm of criminal law, however, a second sub-norm is required, which provides that the consequence of any contravention of the first sub-norm is criminal punishment. In international criminal law, this structure can best be observed in respect of war crimes, where the prohibition of certain conduct is generally contained in a rule of international humanitarian law, be it customary or conventional in nature; the second sub-norm is often grounded in international custom.¹⁸⁵

Thus, international criminal proceedings against individuals evidences the prohibition of international law that binds all persons, natural or juridical, even though no international tribunals have been established with power to hear criminal cases against non-natural persons. This argument is supported by Judge Schwarz's analysis of the point in *Talisman* in which he noted that the IMT in the *Farben* and *Krupp* cases spoke of the corporations as having violated international law, even though the pro-

¹⁸² *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 252, 264-65 (S.D.N.Y. 2009).

¹⁸³ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 11, 173-36 (2d Cir. 2010).

¹⁸⁴ *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1020-21 (7th Cir. 2011).

¹⁸⁵ Volker Nehrlich, *Core Crimes and Transnational Business Corporations*, 8 J.INT'L CRIM. JUST., 895, 898 (2010).

Holding Corporations to Account

ceedings were against their individual executives.¹⁸⁶ It is also echoed in the observations of Judge Shahabudeen in his separate opinion in *Certain Phosphate Lands in Nauru*:

In international law a right may well exist even in the absence of any juridical method of enforcing it ... Thus, whether there is a right to contribution does not necessarily depend on whether there exists a juridical method of enforcing contribution.¹⁸⁷

Alternatively, they could take the view expressed by the majority of the Second Circuit in *Kiobel* – that corporations cannot incur civil liability for violations of customary international law that constitute international crimes, because only natural persons can be prosecuted for international crimes.¹⁸⁸ Although it is clear that under international law corporations can

¹⁸⁶ *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 315-316 (S.D.N.Y. 2003). At Nuremberg the heads of major German corporations were prosecuted for, *inter alia*, war crimes and crimes against humanity. In each of these cases, individuals, and not corporate entities, were put on trial, but the court consistently spoke in terms of corporate liability. In *United States v. Krauch*, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1081, 1140 (1952), it stated:

With reference to the charges in the present indictment concerning Farben's [a German corporation] activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 *were committed by Farben*, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries. [...]. The *action of Farben* and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. [...] Such *action on the part of Farben* constituted a violation of the Hague Regulations [on the conduct of warfare].

Similarly in *United States v. Krupp*:

[T]he confiscation of the Austin plant [a tractor factory owned by the Rothschilds] [...] and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations [...and] the Krupp firm, through defendants[...] voluntarily and without duress participated in these violations.

9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO., 1327, 1352-53 (1950).

¹⁸⁷ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment (sep. op. of Shahabuddeen J.), ICJR (1992), 240, 290.

¹⁸⁸ This approach would still leave open the possibility that individual corporate officials could incur civil liability for conduct constituting an international crime. In *Kiobel*, Judge Cabranes specifically mentioned that this possible avenue of suit remained possible under the ATS. Doug Cassel has also pointed out that directing ATS suits would be directed at individual executives would result in their corporation ending up having to indemnify them in respect of any liability incurred. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L L. & BUS. 304, 321-22 (2008).

have rights¹⁸⁹ and be subject to obligations, this is achieved indirectly, pursuant to obligations imposed on States.¹⁹⁰ There are also problems of attribution when proceeding against a corporation. Take, for example, a case like *Unocal*.¹⁹¹ That involved a subsidiary corporation accused of aiding and abetting forced labor on the Yadana Pipeline Project by the Burmese security forces, but with suit being brought against the subsidiary corporation's U.S. parent. The initial attribution required is in relation to the *mens rea* requirement for aiding and abetting forced labor by the subsidiary. How is this established? Which corporate officials do we look to when determining issues of whether "knowing assistance" or "purposive assistance" was given by the corporation to the Burmese security forces? International criminal law can give us no answer to this question, as from Nuremberg to the International Criminal Court, corporations have never been the susceptible to proceedings before international criminal tribunals. To answer this question we would either have to look to some domestic law, such as the *lex fori* or the *lex loci delicti* or the *lex loci societatis*.

A further attributional link then needs to be addressed. How is the parent corporation to be held responsible for the aiding and abetting of its subsidiary? Again international law runs out and we have to resort to domestic law. In ATS cases the federal courts have had to decide this issue by reference to domestic law on these issues, in the absence of clear standards under international law. In 2009 in *In re South African Apartheid Litigation*, Judge Schiendlin held that although the ATS requires the application of customary international law whenever possible, it was necessary to rely on federal common law in limited instances in order to fill gaps.¹⁹² Vicarious liability was clearly established under customary international law, obviating any concerns regarding universality. Command responsibility, the military analogue to holding a principal liable for the acts of an agent, was firmly established by the Nuremberg Tribunals.¹⁹³ However, as the international law of agency had not developed precise standards in the civil context,¹⁹⁴ federal common law principles concerning agency would be applied.¹⁹⁵

¹⁸⁹ Corporations may commence arbitration proceedings against foreign states under Bilateral or Multilateral Investment Treaties, such as NAFTA. States may claim compensation from other states in respect of expropriations of the properties of corporations, as in *Chorzow Factory*, (1928) P.C.I.J. (Ser. A) No. 17; *Barcelona Traction*, 1970 I.C.J. 3.

¹⁹⁰ A number of treaties impose liabilities directly on corporations, such as the 1969 International Convention on Civil Liability for Oil Pollution Damage.

¹⁹¹ *Doe v. Unocal*, 395 F.3d 932 (2002).

¹⁹² *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 271, (2009).

¹⁹³ Steve Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 504-06 (2001), has argued that command responsibility provides a plausible way of developing customary international law on this issue

¹⁹⁴ In contrast, in 2006, Judge Cote in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) applying the conflicts of law of the forum, New York, had previously held that this issue fell to be determined under the law of the place of incorporation of the company whose veil is to be pierced. The allegation that the

Holding Corporations to Account

It is likely that the courts of the U.K. would follow this second approach, being swayed by the undesirability of having an action based on a violation of customary international law where domestic laws have to be invoked to determine the rules of attribution to show how a legal person has violated such a norm. This would lead to different outcomes on liability depending on the rules of corporate attribution in the jurisdiction in which the action was brought. This is a point identified by Julian Ku, Professor of Law, Hofstra University School of Law, who, noting that there is almost no international support for the imposition of liability on corporations, states:

The reason for this reluctance is not hard to understand. Corporate structures differ from country to country, as do rules of attributing liability within such structures or piercing through such structures to shareholders, management, or parent corporations. No single rule of attribution has been developed under customary international law or even in many treaty systems.¹⁹⁶

The second question is what constitutes the *mens rea* for international crimes under customary international law. Is it 'knowing assistance' or 'purposive assistance'? On balance the decisions at Nuremberg and under the ICTY and ICTR would point to the former. As against that, Article 25(3) of the Rome Statute clearly points to a standard of 'purposive assistance,' and the preponderance of ATS decisions supports this analysis. However, Article 25(3) has to be read in conjunction with Article 30(2) which provides that a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence *or is aware* that it will occur in the ordinary course of events.¹⁹⁷

Taking the two provisions together it is possible to conclude that Article 25(3)(c) does not require that aiders or abettors share the primary actor's purpose but rather that their actions must be taken intentionally, and not

subsidiaries had acted as agents of the parent would be determined either under the law of Sudan as the *lex loci delicti* and domicile of most plaintiffs, or of the law of Canada, as domicile of Talisman, with a presumption in favor of the former.

¹⁹⁵ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 271 (2009). In *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 191-96 (2d Cir. 2010), although Judge Leval dissented on the corporate liability point, he agreed that the claim should be dismissed. One of his reasons was on the facts alleged, the plaintiffs had failed to plead a basis for a claim of agency or alter ego liability so as to make the parent corporation liable for the defaults of its subsidiary.

¹⁹⁶ Julian Ku, *The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 389 (2010).

¹⁹⁷ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 262, n.181 (2009) (emphasis added).

under duress. Article 30(2) then provides for a knowledge requirement for the *mens rea* requirement relating to the outcome - rather than the act.

Third, how will a claim based on a violation of a norm of customary international law be dealt with under the Rome II Regulation?¹⁹⁸ The basic rule relating to the proper law of torts is to be found in Article 4(1):

The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.¹⁹⁹

On facts like those in *Unocal*²⁰⁰ this would mandate the application of the law of the State in which the forced labor had occurred. A claim based on a violation of international law would raise the question of whether international law was incorporated into the domestic civil law of the country in question. If the answer were 'no,' the Rome II Regulation contains two provisions which permit a derogation from the rule in Article 4. First, Article 16 which provides:

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

For this to apply the court would have to classify the imposition of civil liability for violations of customary international law as a mandatory law of the forum. The objection to this is that customary international law permits but does not require national courts to make available such a remedy. Secondly, Article 26 which provides:

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.²⁰¹

¹⁹⁸ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

¹⁹⁹ Article 15 provides that this basic rule "shall govern ... in particular (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; ... (g) liability for the acts of another person." Accordingly, claims against a parent corporation in tort, whether directly, vicariously through a finding of agency on the part of the subsidiary, or through a piercing of the corporate veil of the subsidiary, would come within the scope of the Regulation.

²⁰⁰ *Doe v. Unocal*, 395 F.3d 932 (2002).

²⁰¹ In Case C-369/96, *Jean-Claude Arblade, Arblade & Fils SARL v. Bernard Leloup, Serge Leloup, Sofrage SARL*, 1999 E.C.R. I-8453, the ECJ defined 'public order' legislation as "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State." Recital 32 of the Regulation cites "the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an exces-

Holding Corporations to Account

It is likely that a U.K. court would conclude that the application of Article 4 would be contrary to the public policy of the U.K. in mandating the application of another country whose domestic legal order had not incorporated the norms of customary international law.²⁰²

VI. CONCLUSION

The past four years have seen varying fortunes for foreign plaintiffs seeking redress from U.S. corporations under the ATS. Spring 2009 saw the high-water mark of ATS suits against corporations. In April there was Judge Schiendlin's ruling in *In Re South African Apartheid Litigation* that that the allegations were sufficient to sustain claims for aiding and abetting apartheid, torture, extrajudicial killing, and cruel, inhuman or degrading treatment as against the automotive manufacturer defendants, and for aiding and abetting apartheid and arbitrary denationalization against as against the technology manufacturer defendants, and that the *mens rea* of aiding and abetting was that of knowing assistance.²⁰³ On 8 June, on the eve of the trial, Shell agreed a \$15.5 million settlement with the plaintiffs in *Wiwa*, a companion suit to *Kiobel*.²⁰⁴ In October 2009, however, the tide turned with the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy* ruling that the *mens rea* for aiding and abetting under customary international law was one of purpose, based on Article 25(3)(c) of the Rome Statute, rather than one of knowledge as had been established by the decisions of the ICTY and ICTR.²⁰⁵ Worse was to come in September 2010 when the Second Circuit in *Kiobel* ruled that ATS claims cannot be brought against corporations, as the norms of customary international law on civil liability reflect those on criminal liability and these only affect natural persons. However, three other circuits have since decided not to follow this lead, with decisions in *Exxon Mobil, Sarei*, and *Flomo* re-affirming that corporations could be held liable under the ATS.²⁰⁶

The Supreme Court was expected to resolve this issue in *Kiobel*. However, this was not to be as the Supreme Court's decision of 17 April 2013 dodged the initial issue referred to it of whether corporations could

sive nature to be awarded" as an example of circumstances that could be regarded as being contrary to the public policy (*ordre public*) of the forum.

²⁰² *Kuwait Airways Corp v. Iraqi Airways* (Nos. 4 & 5) [2002] UKHL 19; [2002] 2 AC 886, is an example of where the English courts have refused to apply a particular foreign law on such a basis under the common law conflicts rules.

²⁰³ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 264-5 (S.D.N.Y. 2009).

²⁰⁴ See CENTER FOR CONSTITUTIONAL RIGHTS, *Settlement Reached in Human Rights Cases against Royal Dutch/Shell* (June 8, 2009), <http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell>.

²⁰⁵ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

²⁰⁶ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Sarei v. Rio Tinto PLC*, 671 F.3d 736 (9th Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

incur liability under the ATS as it affirmed the Second Circuit's dismissal on the ground that the ATS had no extra-territorial application.²⁰⁷ This was a smart move for a court conscious of the criticism made by foreign governments, such as those of the U.K. and the Netherlands, that the United States had taken on itself the role of arbiter of how international law affected private parties in disputes which had no connection with it. A decision either way on the initial issue of corporate liability under the ATS would have inexorably involved the U.S. Supreme Court in making a determination on the extent of civil liability of private parties under customary international law. Instead, *Kiobel* was decided on the application of a U.S. canon of statutory interpretation which restricted the causes of action that could arise in the federal courts under the grant of jurisdiction under the ATS.²⁰⁸

The development of jurisprudence on corporate civil liability for violations of customary international law that has taken place since 2002 under the ATS is now likely to come to a standstill. The Supreme Court's decision in *Kiobel* will have the effect of screening out most ATS claims against corporations in future and the U.S. contribution to the development of international law will diminish. 'Foreign cubed' claims are certainly out and on 22 April 2013 the Supreme Court vacated the Ninth Circuit's judgment in *Sarei* regarding the presumption against extraterritoriality and remanded the case back to the Ninth Circuit "for further consideration in light of *Kiobel*."²⁰⁹ The position is less clear regarding 'foreign squared' claims against U.S. defendants in connection with violations of customary international law occurring outside the United States. Justice Breyer's *Kiobel* concurrence gives the most hope that some of these claims could continue to be brought in the federal courts under the ATS. At the other end of the spectrum there is Justice Alito who would hold that the presumption against extra territorial application would not be rebutted "unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."²¹⁰ If *Kiobel* is to mark the end of civil claims for violations of customary international law being heard in the federal courts under the jurisdiction granted by the ATS, it will not mark the end of human rights claims against corporations. Such claims will continue to be brought instead as ordinary tort claims in either the federal or the state courts. Such claims will lack the publicity value of claims under the ATS where the allegation is of complicity in a violation of customary international law but will be free from any uncertainty as to the capacity of corporations to incur civil liability. Indeed, it is worth recalling that the

²⁰⁷ Accordingly, there remains a circuit split on this issue.

²⁰⁸ Nor was the Supreme Court's decision based on the other international law argument advanced – that international law precluded a State from asserting jurisdiction over 'foreign cubed' civil claims that had no connection with that State.

²⁰⁹ 133 S. Ct. 1995 (2013).

²¹⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013).

Holding Corporations to Account

jury found for the defendant corporation in the two ATS cases against corporations which have gone to trial, those in *Estate of Rodriguez v. Drummond Co.* in 2007²¹¹ and *Bowoto v. Chevron* in 2008.²¹²

The U.K. courts have yet to grapple with the issues of customary international law that have arisen in ATS cases. The only ATS-type case to come before the High Court to date is *Guerrero & Others v. Monterrico Metals Plc*²¹³ which was pleaded as a tort claim. However, the pleading of torture as a distinct cause of action in *Al Adsani* and *Jones v. Saudi Arabia* leaves open the possibility of a future claim being brought in the courts of the United Kingdom against a company based on its alleged complicity in international crimes.²¹⁴ In such circumstances the court would have to consider anew the issue raised in *Kiobel* as to whether international law authorizes States to impose civil liability on corporations that commit international crimes, either as principals or as aiders and abettors.

The first amicus brief of the governments of the U.K. and the Netherlands in *Kiobel* argued that corporations cannot incur civil liability for violations of customary international law. There is a compelling logic in this approach. Civil liability of non-state actors is derivative of criminal liability. If all the sources of international criminal law say that only natural persons can incur criminal liability the same must apply as regards civil liability. Therefore, we may in the future see claims against individual corporate officers in respect of aiding and abetting international crimes such as war crimes, genocide, crimes against humanity, but it is unlikely that we will see such claims against non-legal persons.²¹⁵

This is not to leave the victims of such crimes without a remedy. Such claims can, and have been, advanced in the courts of the U.K. as ordinary tort claims. Since 1990 there have been a string of tort cases that have been brought against U.K. parent corporations in respect of harm suffered in foreign jurisdictions as the result of the activities of their sub-

²¹¹ See BUSINESS & HUMAN RIGHTS RESOURCE CENTER, *Case Profile Drummond Law Suit (re Columbia)*, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/DrummondlawsuitreColumbia> (last visited 24 Sept. 2013).

²¹² See BOWOTO V. CHEVRON TRIAL BLOG, (Dec. 1, 2008, 3:12 PM), *Verdict: Chevron Found Not Guilty*, <http://bowotovchevron.wordpress.com/2008/12/01/chevron-not-liable-on-all-claims/> (last visited 24 Sept 2013).

²¹³ [2009] EWHC 2475 (QB).

²¹⁴ *Al-Adsani v. Kuwait*, 103 I.L.R. 420 (Q.B. 1995), *aff'd* *Al-Adsani v. Kuwait*, 107 I.L.R. 536 (C.A. 1996); *Jones v. Saudi Arabia*, [2006] UKHL 26; [2007] 1 A.C. 270.

²¹⁵ Civil claims against individuals for violations of *jus cogens* norms of customary international law may also be subject to a requirement of exhaustion of remedies, a position argued for by the European Commission and by the governments of the U.K. and the Netherlands in their amicus briefs in *Kiobel*.

sidiaries.²¹⁶ In 2009, an ATS type claim came before the High Court in an application for the continuation of a freezing order in *Guerrero v. Monterrico Metals*.²¹⁷ A claim was made against the U.K. parent company of a subsidiary which operated a Peruvian mine pleading for trespass to the person, conspiracy to cause injury, and negligence (and their equivalents under the Peruvian Civil Code). The claim arose out of the detention and torture of the Peruvian claimants protesting against the operation of the mine, and the claimants alleged that the parent company had incited and aided the commission of violations by the Peruvian police. The claimants obtained the continuation of their freezing order and in 2011 the claim was settled.²¹⁸ In 2012 there was another significant development in the tort liability of multi-national companies when the Court of Appeal in *Chandler v. Cape Plc* held a parent company liable on the basis of its assumption of responsibility for the health and safety of its subsidiary's employees.²¹⁹ Most recently, in June 2013, a settlement was reached with various Kenyan claimants in *Mutua v. Foreign and Commonwealth Office* in respect of their tort claims arising out of their treatment by the British colonial authorities in Kenya during the suppression of Mau-Mau in the 1950s.

Given these developments in ordinary domestic tort law, why should a claimant consider pleading an additional cause of action based on a violation of customary international law? In *Al Adsani* and *Jones v. Saudi Arabia* the reason was to forestall a plea of sovereign immunity being asserted by the impleaded State. In both cases that argument failed. With actions against corporate defendants there is no question of such a plea being asserted. There is one respect in which a cause of action based on reliance on customary international law may yield a substantive advantage over a straightforward tort claim; and that is in respect of aiding and abetting. The relevant law under Article 4 of the Rome II Regulation will be that of

²¹⁶ *Ngcobo v. Thor Chemicals Holdings Ltd & Desmond Cowley*, THE TIMES, Nov. 10, 1995; *Sithole v. Thor Chemicals Holdings Ltd.* [1999] EWCA (Civ) 706; *Connelly v. RTZ Corp.* [1998] 1 A.C. 854; *Lubbe v. Cape PLC* [2000] UKHL 41.

²¹⁷ *Guerrero v. Monterrico Metals*, [2009] EWHC (QB) 2475.

²¹⁸ Tort claims against parent corporations in respect of the activities of their overseas subsidiaries are a speciality of London solicitors, Leigh Day, who acted for the claimants in *Guerrero*. However, the changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act ('LASPO') 2012 on 1 April 2013 restricting the amount recoverable in costs by a successful claimant may make it more difficult for them to take on claims involving small numbers of plaintiffs in the future. Michael D. Goldhaber notes "The three keys to Leigh Day's funding model were the ability to recover from defendants' full legal costs, success fees, and litigation insurance premiums (which protected plaintiffs against the risk of covering a victorious defendant's costs). Sure enough, LASPO generally eliminated the recovery of success fees and insurance premiums while limiting cost recovery to 'proportionate' costs." Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 133 (2013).

²¹⁹ [2012] EWCA Civ 525, [2012] 1 W.L.R. 3111.

the country in which the damage occurs. If this is a Commonwealth country its law on the liability of secondary parties in tort is likely to be the same as English law, under which there is no civil claim against one who aids and abets a tort. A claim against a secondary party has to be on the basis that they are a joint tortfeasor. A party who knowingly facilitates a wrong committed by another will not be jointly liable.²²⁰ However, with aiding and abetting an international crime it is arguable that the *mens rea* is one of knowing assistance rather than intentional assistance. Accordingly an action against a company, or a company official, that knowingly gave assistance to State authorities that committed an international crime would result in damages whereas an action based on domestic tort would succeed only if the company had procured the wrongful act or acted in furtherance of a common design or been party to a conspiracy with the State authorities. It remains to be seen whether this prospect results in a future suit against a U.K. company, or its senior managers, for aiding and abetting State authorities in internationally criminal conduct. However, it is likely that such claims will continue to be advanced as ordinary tort claims and that the courts of the U.K. will not be called on to consider the questions that have preoccupied the U.S. federal courts in ATS cases since *Filartiga* as to the nature of a claim for damages based on a violation of a prohibition of customary international law. The development of such a cause of action may come to be seen as a purely American concern and one which *Kiobel* may well have consigned to history.

²²⁰ “Mere facilitation of the commission of a tort by another does not make the defendant a joint tortfeasor and there is no tort of ‘knowing assistance’ nor any direct counterpart of the criminal law concept of aiding and abetting; the defendant must either procure the wrongful act or act in furtherance of a common design or be party to a conspiracy.” W.V. H. ROGERS, WINFIELD AND JOLOWICZ ON TORT, 21.2 (18th ed.2010). See also, *Fish & Fish Ltd. v. Sea Shepherd U.K. (The Steve Irwin)* [2013] EWCA Civ. 544; [2013] 3 All E.R. 867: “At common law, the fact that a person has facilitated the doing of a tortious act by another is not in itself sufficient to make him liable in tort. This is so even where the facilitation is done knowingly.” (Beatson L.J.). *Id.* at 41.

ENVIRONMENTAL CLAIMS AND INSOLVENT COMPANIES: THE CONTRASTING APPROACHES OF THE UNITED KINGDOM AND THE UNITED STATES

Blanca Mamutse*

University of Surrey

and

Valerie Fogleman**

University of Cardiff

ABSTRACT

The purposes of insolvency law and environmental law are diametrically opposed. Each regime has been developed with little, if any, consideration of the inevitability of a clash with the other law. Through re-organisation and liquidation, insolvency law pursues the objectives of enabling the debtor to make a fresh start, and maximising returns to creditors through the expeditious distribution of the debtor's assets. The objective of environmental law is to apply the polluter pays principle to ensure that a company or other person who pollutes the environment pays to remediate it instead of the costs being met by taxpayers. Remediating contamination tends to take a long time, with the precise costs not known until the contamination has been remediated. Handling claims for remediating contamination in insolvency proceedings thus has the potential to prolong them, and consequently delay the debtor's fresh start or the distribution of its assets.

This article examines clashes between bankruptcy/insolvency law and environmental law in the United States and the United Kingdom, and the very different approaches adopted by courts in those jurisdictions in an effort to resolve the conflicts between these areas of law. Whilst there is much more case law on environmental claims in bankruptcy proceedings in the United States, the number of insolvent companies that own or occupy land that requires remediation due to their operations is increasing quite rapidly in the United Kingdom. The Scottish Coal case, especially, illustrates the critical consequences for debtors, creditors and the public purse when a company with substantial environmental liabilities enters insolvency proceedings.

The article also examines a new type of proceedings involving insolvent companies and companies with limited assets; claims to remediate contam-

ination against their directors and officers. This situation has already arisen in Ireland and Canada – again with very different approaches in each jurisdiction. The article continues the examination of this relatively new clash between claims for remediating contamination in environmental law against persons related to a company that is insolvent or has limited assets by examining the importance of developing other effective courses to follow in response to the problem of corporate environment liability. These courses include direct parent company liability and the development of directors’ duties.

The article concludes that the reach of the polluter pays principle has had remarkably little effect on bankruptcy/insolvency law to date. The fundamental principle of limited liability in company law has prevailed in many, if not most, cases against the fundamental principle of the polluter pays in environmental law. It is, thus, necessary to develop a more collaborative relationship between environmental, company and insolvency law.

CONTENTS

I. INTRODUCTION	581
II. THE POLLUTER PAYS PRINCIPLE AND ITS APPLICATION TO THE REMEDIATION OF CONTAMINATION FROM HISTORIC POLLUTION	583
III. REGIMES TO REMEDIATE CONTAMINATION FROM HISTORIC POLLUTION	587
A. <i>Comprehensive Environmental Response, Compensation, and Liability Act</i>	587
B. <i>Part 2A of the Environmental Protection Act 1990</i>	595
IV. ENVIRONMENTAL CLAIMS IN BANKRUPTCY / INSOLVENCY PROCEEDINGS	600
A. <i>Environmental claims in bankruptcy proceedings in the United States</i>	600
i. Discharging liabilities for clean-up costs in a re-organization	602
ii. Abandonment of burdensome property.....	606
B. <i>Environmental claims in insolvency proceedings in the United Kingdom</i>	608
V. CORPORATE VEIL-PIERCING AND DIRECTORS’ LIABILITY IN RESPONSE TO ENVIRONMENTAL CLAIMS.....	615

VI. CLAIMS AGAINST DIRECTORS AND OFFICERS OF INSOLVENT COMPANIES AND COMPANIES WITH LIMITED ASSETS..	616
A. <i>Environmental Claims against Directors and Officers in Ireland</i>	616
B. <i>Environmental Claims against Directors and Officers in Canada</i>	618
VII. DEVELOPING OTHER AVENUES OF LIABILITY	621
A. <i>Direct Parent Company Liability</i>	621
B. <i>Incorporation of Environmental Concerns into Directors’ Duties in the United Kingdom</i>	625
VIII. MINIMIZING THE IMPACT OF ENVIRONMENTAL INSOLVENCIES IN PRACTICE	630
IX. CONCLUSIONS.....	632

I. INTRODUCTION

Many countries have enacted liability regimes to remediate land contaminated by historic pollution. None of the regimes could be – or is – truly fair because they necessarily impose retroactive liability on some persons, such as current landowners, who cannot be described as “polluters” in any real sense. In some countries, the designation of these so-called polluters has triggered an elaborate process in which the “polluters” have attempted to avoid or transfer liability and enforcing authorities have attempted to ensure that the costs of remediating the contamination are paid by anyone but the taxpayer.¹

Persons that have been targeted have not only challenged their liability but, depending on the jurisdiction, have brought contribution actions against other potential polluters and made claims against their general liability insurance policies – sometimes with great success even though many policies were issued before the legislation was enacted. Other “polluters” have instituted insolvency proceedings, sometimes attempting to

* Blanca Mamutse, Lecturer, University of Surrey School of Law

** Valerie Fogleman, Professor, Cardiff University School of Law

¹ See, e.g., *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990) (applying state law to cut off successor corporation’s liability “would result in great expense to the taxpayer, which is contrary to CERCLA’s purposes”).

leave their environmental liabilities behind in a re-organization rather than liquidating.

Governmental authorities have been equally resourceful. If a person identified by them as a polluter has insufficient, or no, funds to pay the costs of remediating contamination, they have sought to impose secondary liability on persons such as directors and officers, lenders, and affiliated – and sometimes unaffiliated – companies. If a polluter institutes insolvency proceedings, they have argued that re-organization does not discharge obligations to remediate contamination, or that the assets in an insolvency estate in a liquidation should pay remedial costs rather than other creditors. Some authorities have even sought to impose liability on directors and officers of an insolvent company when the insolvent estate has insufficient assets to remediate contamination.

This article examines the elaborate procedures involving environmental claims against insolvent companies and the attitude of courts in deciding claims concerning them. The article focuses on the United Kingdom,² doing so by contrasting systems in other jurisdictions and analyzing them with the legislation and approach taken by courts in the United Kingdom. The article begins by briefly examining the polluter pays principle and problems in its application in regimes to remediate contamination from historic pollution. Next, the article examines the main regime to remediate contamination from historic pollution in the United States, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”), in order to compare it with the main regime in the United Kingdom; Part 2A of the Environmental Protection Act 1990 (“EPA 1990”).³ The purpose is to show how “polluters” have been designated in the regimes to remediate contaminated land from historic pollution and how differences in the liability systems in these regimes have affected approaches to environmental claims in insolvency proceedings, as well as illustrating the different approaches themselves. In the United States, the collision between the regime to remediate contamination from historic incidents and bankruptcy law, neither of which was drafted to accommodate the other, began about 30 years ago and is highly developed. In the United Kingdom, the collision between environmental and insolven-

² Due to the increasing devolution of environmental law in the United Kingdom, this article discusses primarily English law. References to the law of Wales, Scotland and Northern Ireland are made as appropriate.

³ Part 2A is in force in England, Wales and Scotland. It has not been brought into force in Northern Ireland. *See* Waste and Contaminated Land (Northern Ireland) Order 1997, S.R. 1997/2778, part III (not in force). The statutory guidance to Part 2A differs between England, Scotland and Wales. Department for Environment, Food and Rural Affairs, Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance (Apr. 2012) (England); Natural Scotland, Scottish Executive, Environmental Protection Act 1990: Part IIA Contaminated Land; Statutory Guidance: Edition 2 (Paper SE/2006/44, May 2006); Welsh Government, Guidance Document, Contaminated Land Statutory Guidance – 2012 (WG19243).

cy law is much more recent and involves only a handful of cases. The number of cases is, however, steadily increasing.

The article then turns to proceedings under environmental, not insolvency, law to analyze the approaches of courts in Ireland, and to a lesser extent Canada, in applying the polluter pays principle in respect of directors and officers of companies that are insolvent or cannot otherwise pay to remediate contamination caused by them. In considering the potential expansion of liability for environmental harm, the article discusses English law to examine parent company liability and the impact of the incorporation of environmental concerns into directors' statutory duties. The article concludes by suggesting issues to consider in dealing with future environmental claims involving insolvent companies in the United Kingdom in view of the increasing number of such claims.

II. THE POLLUTER PAYS PRINCIPLE AND ITS APPLICATION TO THE REMEDIATION OF CONTAMINATION FROM HISTORIC POLLUTION

In the late 1960s, many governments realized that traditional legislation to protect human health was no longer adequate in the face of increasingly severe pollution incidents such as the *Torrey Canyon* and the Santa Barbara oil spills and the increasingly rapid deterioration of air and water quality. The governments reacted by enacting legislation to protect the environment as well as human health.⁴ Although legislation to protect the environment was focused, not on protection of the environment for its own sake, but on its effect on human health,⁵ it nevertheless resulted in a massive volume of new legislation.

The new environmental legislation introduced regulatory regimes to control air and water pollution and to manage the handling and disposal of waste. The regimes were much more stringent than previous legislation, with associated increased costs to businesses that were required to purchase and operate technologically advanced equipment to reduce emissions of pollutants and to pay increased costs of disposing of waste in landfills

⁴ See *R. v. Carrick Dist. Council, ex parte Shelley*, [1996] ENVTL. L. REV. 273, 279, [1996] J.P.L. 857 (Q.B.D.).

⁵ Such legislation includes the Clean Water Act and the Clean Air Act in the United States. In the United Kingdom, it includes the EPA 1990. See, e.g., Lisa Heinzerling, *Reductionist Regulatory Reform*, 8 FORDHAM ENVTL. L. REV. 459, 490-91 (1997) ("laws regulating the pollution of air, water, and the land – have the dual purpose of protecting human health and the environment. In most cases . . . these laws will take the protection of human health as their first concern . . . natural resource protection will often end up as a kind of tag-along value, icing on the cake of a regulation otherwise justified by the benefits of improving human health"); Adam I. Davis, *Ecosystem Services and the Value of Land*, 20 DUKE ENVTL. L. & POL'Y F. 339, 344-45 (2010) (major federal environmental laws in United States since 1970s include goal of minimising effect of industrial pollution on human health).

that were engineered to be more secure than previous disposal methods, many of which had simply been unlined pits and lagoons.

As governments introduced the new controls, they became concerned that some countries would establish themselves as “pollution havens,” that is, intentionally keeping their environmental legislation lax in order to entice businesses to locate in them due to lower capital and operating costs. In 1972, the Organization for Economic Co-operation and Development (“OECD”), whose members included the most developed countries that were introducing the new legislation, recommended that they adopt the polluter pays principle.⁶ The principle is an economic mechanism designed to adopt a harmonized approach to internalize environmental costs into businesses that cause pollution. The internalized costs include the costs of measures taken by businesses to prevent and control pollution from its activities and related administrative costs of regulatory authorities.⁷ Businesses may then include the costs in the price of their goods in the knowledge that their competitors are subject to the same controls and are, thus, also likely to increase the price of their goods. Governments recognized that some business would be unable to afford the new technologically advanced equipment and would have to close. They, therefore, made exceptions to the polluter pays principle to avoid socio-economic problems from the loss of jobs and other hardship. These exceptions, which included government subsidies, were to be used only in “exceptional circumstances.”⁸

The adoption of the polluter pays principle by OECD countries was rapid.⁹ By the mid-1970s, the principle was being referred to as a reason for enactment of the continuing stream of more stringent and extensive environmental legislation instead of being referred to only as a means to internalize costs resulting from it. The polluter pays principle had become an integral part of environmental legislation and came to be cited almost like a mantra as if its meaning is self-evident.

Meanwhile, a new problem had surfaced; contamination from past pollution that continues to cause risks to human health and the environment. Perhaps the most notorious example is Love Canal in the United States, where a school and houses had been built in the 1950s next to a known hazardous waste dump. The dump, which was about 1,000 meters long, 25 meters wide, and three to five meters deep and located in impermeable clay, contained approximately 25,000 tons of over 200 chemicals.¹⁰

⁶ OECD, Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies (C (72)128, 1972).

⁷ See NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 27 (2002).

⁸ OECD, Recommendation of the Council on the Implementation of the Polluter-Pays Principle (C (74) 223, 1974).

⁹ See OECD, Joint Working Party on Trade and Environment, The Polluter-Pays Principle as It Relates to International Trade, 10 (COM/ENV/TD (2001) 44/final, Dec. 23, 2002).

¹⁰ See VALERIE FOGLEMAN, ENVIRONMENTAL LIABILITIES AND INSURANCE IN ENGLAND AND THE UNITED STATES 745 (2005) (school was built 26 metres north of its planned

Environmental Claims and Insolvent Companies

Heavy rain in the mid to late 1970s caused chemicals in the dump to break through the near surface, spilling over in a bathtub-like effect. Black sludge entered basements in the houses, and drums exploded onto the surface.¹¹ Widespread publicity ensued across the United States about Love Canal and the risks from it and other contaminated sites.¹²

In December 1980, the U.S. Government, motivated by Love Canal and similar sites, enacted CERCLA.¹³ The legislation established the Superfund program, which was to be led by the U.S. Environmental Protection Agency (“EPA”) to remediate abandoned and unregulated sites containing hazardous waste. Legislation already existed to remediate contamination, including the Resource Conservation and Recovery Act (“RCRA”) and the Clean Water Act. RCRA authorized the EPA to require persons responsible for non-hazardous and hazardous waste that “may present an imminent and substantial endangerment to health or the environment” to remediate it.¹⁴ The main purpose of RCRA, however, was to control the handling of waste from its cradle to its grave, including technical and financial measures concerning treatment, storage and disposal facilities; it was not designed to remediate waste that was already in the grave.

Countries, such as the United Kingdom, in which there had not been widespread publicity concerning problems from former waste sites, also began to consider whether “Love Canals” existed in their territory¹⁵ and whether they should enact specific legislation to remediate contamination from historic pollution.¹⁶ Like the United States, the United Kingdom already had legislation to remediate contamination, including the statutory

location, surrounded by subsurface drain, due to concerns that waste would cause odours and damage school’s concrete foundations).

¹¹ *Id.* at 741-48. Love Canal was not the only area affected by past pollution that experienced problems in the 1970s. In 1978, authorities in Lekkerkerk, in the Netherlands, discovered a dump containing about 1,600 leaking drums of hazardous waste under a housing estate built on former marshland in the early 1970s.

¹² The number of television, radio and newspaper accounts was massive. The New York Times, alone, printed 180 reports about Love Canal between 1978 and 1987. Other contaminated sites that received national publicity, and generated concerns by the U.S. Congress, included the Valley of the Drums, a 13-acre dump and drum recycling site in a valley in Bullitt County, Kentucky, that contained between 20,000 and 30,000 leaking unlabelled drums of hazardous waste.

¹³ Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. §§ 9601 *et seq.* (2012).

¹⁴ 42 U.S.C. § 6973(a) (2012).

¹⁵ *See* Select Committee on Science and Technology, Hazardous Waste Disposal, Report, 1980-1, H.L. 273-II, 63, § 6 (memorandum by Department of Environment: “existence of a Love Canal in the UK cannot . . . be denied categorically. However, the UK is a small country and the chances of substantial indiscriminate dumping having occurred seem likely to be small”).

¹⁶ The United Kingdom subsequently introduced a provision in the EPA 1990 to require waste regulation authorities to inspect their areas to detect threats to human health and the environment from closed landfills and to remedy any contamination that caused such a threat. The provision was eventually repealed, never having been brought into force. Environmental Protection Act 1990, c. 43, § 61 (repealed) (U.K.) (hereinafter EPA 1990).

nuisance regime¹⁷ and the Water Resources Act 1991.¹⁸ As in the United States, however, the legislation was not designed to remediate contamination from past pollution, with the result that its effect was “patchy.”¹⁹

Throughout the late 1980s and the 1990s, the role of the polluter pays principle was slowly being extended from its roots as an economics principle in international trade to internalization of costs from the remediation of contamination.²⁰ As it was extended, variations in the principle emerged, with broad differences in its scope²¹ and degree²² in different jurisdictions. Major differences involved the identity of the persons who would be “polluters”. The OECD has not addressed this issue, even in the context of legislative controls on future pollution.²³ The European Union subsequently identified the “polluter” on economic principles by stating that the point at which the fewest economic operators exist should be selected, with the “polluter” to be the person or persons at that point.²⁴ This approach is not, however, especially relevant to liability for the remediation of contamination from historic pollution. The principle adapts badly to legislation that imposes liability because it is too late to pass on costs incurred in remediating contamination in the price of goods when competitors may not have to incur such costs. The persons who pay the cost of remediating pollution in retroactive liability regimes are probably current shareholders of companies named as polluters.²⁵

¹⁷ *Id.*, pt. III.

¹⁸ Water Resources Act 1991, c. 57 (Eng. & Wales).

¹⁹ Environment Committee, *Contaminated Land* (HC 1989-90, 170-I) ¶ 8.

²⁰ See DE SADELEER, *supra* note 7, at 33-34; see also Sanford E. Gaines, *The Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, 26 TEX. INT'L L.J. 463, 484-85 (1991) (principle was moving cautiously “fairly far toward a liability conception of what polluters should pay”).

²¹ See Boris N. Mamlyuk, *Analyzing the Polluter Pays Principle Through Law and Economics*, 18 SE. ENVTL. L.J. 39, 44-46 (2009).

²² See Frank Biermann, Frédéric Böhm, Rainer Brohm, Susanne Dröge & Harald Trabold, *The Polluter Pays Principle under WTO Law: The Case of National Energy Policy Instruments* (Environmental Research of Federal Ministry of the Environment, Nature Conservation and Nuclear Safety, Research Report 201 19 107, UBA-FB 000555/e, Dec. 2003), 5-6 (referring to polluter pays principle in Germany as one of three basic principles for environmental policy and commenting on wide variation in its implementation, with most OECD countries applying “weak” principle whilst only a few countries, such as Germany and Denmark, apply “strong” principle (including environmental taxes); also noting that most developing countries have not adopted the principle due to adverse economic conditions).

²³ See DE SADELEER, *supra* note 7, at 38.

²⁴ Council Recommendation of 3 March 1975 regarding cost allocation matters and action by public authorities on environmental matters, 75/436/Euratom, 1975 O.J. (L 194), 1, 2, Annex, § 3; see also DE SADELEER, *supra* note 7, at 54-55 (channelling liability responds to polluter pays principle’s redistributive and preventive functions).

²⁵ See Don Fullerton & Seng-Su Tsang, *Environmental Costs Paid by the Polluter or the Beneficiary? The Case of CERCLA and Superfund 4* (National Bureau of Economic Research, NBER Working Paper No. 4418, Aug. 1993) (“CERCLA liability is established

Environmental Claims and Insolvent Companies

There is an argument that equity demands that past polluters pay such costs. While this may well be – and probably is – correct for companies that were aware that their activities were causing harm to human health and the environment when they carried them out, it would have been impossible for companies to dispose of waste according to today’s technical standards because the technology did not exist at that time. Further, an argument that the true costs of production were in effect subsidized by the public is simply wrong; the public benefited from the lower prices of the goods being produced.

III. REGIMES TO REMEDIATE CONTAMINATION FROM HISTORIC POLLUTION

The regimes to remediate contamination from historic pollution in the United States and the United Kingdom are vastly different, not only in their purpose, scope, implementation and enforcement, but also in the identity of the persons designated as “polluters.”

A. Comprehensive Environmental Response, Compensation, and Liability Act

The liability system in CERCLA is not specifically based on the polluter pays principle, perhaps due, among other things, to CERCLA being signed into law on 11 December 1980,²⁶ when application of the principle was mostly limited to the internalization of environmental costs in international trade.

CERCLA’s primary purpose is to enable the federal government swiftly to clean up abandoned and uncontrolled hazardous waste sites.²⁷ The U.S. Congress knew that significant funding would be required because, by the time CERCLA was enacted, the EPA had investigated 7,000 sites suspected of, or known to pose, risks to human health and the environment, and had already identified 397 sites that needed remediation, at an average estimated cost between \$3 million and \$5 million each.²⁸ Congress, there-

on the commonly held principles that polluters pay for pollution. However, because this liability is retroactive, it is probably borne by current shareholders”).

²⁶ Pub. L. No. 96-510, 94 Stat. 2767 (1980).

²⁷ See *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989); *Dickerson v. Adm’r, EPA*, 834 F.2d 974, 978 (11th Cir. 1987); *J.V. Peters & Co. v. Adm’r, EPA*, 767 F.2d 263, 264 (6th Cir. 1985).

²⁸ 126 Cong. Rec. H9153, H9155 (1980) (statement of Rep. Florio), *reprinted in* 1980 U.S.C.C.A.N. 26,336, 26,338, *reprinted in* 2 Senate Committee on Environment and Public Works, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)*, Public Law 96-510, 97th Cong., 2d Sess. 686 (committee print 1983, 3 volumes) [hereinafter *CERCLA Legislative History*]. The EPA had estimated, in 1979, that there were 30,000 to 50,000 uncontrolled hazardous waste sites in the US, of which between 1,200 and 2,000 were posing a serious risk to human health. H.R. Rep. No. 96-1016(I), 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120, *reprinted in* 2 *CERCLA Legislative History* at 47, 49.

fore, created a trust fund, commonly known as the Superfund, established at \$1.6 billion for five years,²⁹ to be funded by taxes.³⁰ Levying taxes, primarily from petro-chemical industries, followed the polluter pays principle because, in particular, the levies were on chemicals that would be cleaned up under the Superfund program. In addition, due to the levy applying to all companies that were producing the same petro-chemicals, they could internalize the costs.³¹ In order to ensure that contaminated sites that posed the greatest risks to human health and the environment would be remediated first, Congress established a national priorities list of sites to be remediated.³²

CERCLA's secondary purpose is to make persons who were responsible for the disposal of hazardous waste that needed to be cleaned up bear the responsibility and cost of doing so.³³ In order to facilitate swift clean ups, liability under CERCLA is strict,³⁴ joint and several,³⁵ and retroac-

²⁹ 42 U.S.C. § 9631(a) (repealed).

³⁰ CERCLA established four taxes to fund the Superfund trust fund. Most funding was raised by an excise tax on crude oil. 26 U.S.C. §§ 4611-12. The other taxes were a chemical feedstocks excise tax, *id.* §§ 4661-62, a chemical derivatives excise tax, *id.* §§ 4671-72, and an environmental corporate income tax. *id.* § 59A. The taxes were based on industries associated with the contaminated sites. The taxes raised approximately \$13.5 billion between 1981 and 1998. They lapsed in 1996 and have not been reauthorized. *See EPA Supports Superfund "Polluter Pays" Provision / Agency Submits Administration's Guidance to Congress* (EPA press release, June 21, 2010) ("EPA sent a letter to Congress in support of reinstating the lapsed Superfund 'polluter pays' taxes . . . taxes should be paying for teachers, police officers and infrastructure that is essential for sustainable growth -- not footing the bill for polluters").

³¹ *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 8 (1982) (Senate Committee on Environment and Public Works "concluded that the chemical industry, with its vast earnings, would be able to internalize these costs").

³² *See* 40 C.F.R. § 300.425 (2013).

³³ *See* *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991) (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)).

³⁴ CERCLA does not specifically provide that it imposes strict liability. Instead, it adopted the standard of liability under section 311 of the Clean Water Act, 42 U.S.C. § 9601(32) (2012); *see* 33 U.S.C. § 1321 (2012). It is well settled, however, that the standard of liability under CERCLA is strict liability, as it is under section 311 of the Clean Water Act. *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 394 (9th Cir. 1989); *see* H.R. Rep. No. 253(I), 99th Cong., 1st Sess. 74 ("No change has been made in the standard of liability under CERCLA. As under section 311 of the Federal Water Pollution Control Act, 33 U.S.C. 1321 (2012), liability under CERCLA is strict, that is, without regard to fault or wilfulness"), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856, *reprinted in* 3 Senate Committee on Environment and Public Works, *A Legislative History of the Superfund Amendments and Reauthorization Act of 1986* (Public Law 99-499), 101st Cong., 2d Sess. 1764, 1837 (committee print 1990, 7 volumes).

³⁵ *See* *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-11 (S.D. Ohio 1983) (defendant is jointly and severally liable unless it can show that harm was divisible and that there is reasonable basis to apportion harm). The court noted that Congress deleted a

Environmental Claims and Insolvent Companies

tive.³⁶ Congress also ensured that it would be relatively easy for the EPA to enforce the regime. Liability attaches if:

- a site is a “facility”³⁷
- from which there is a “release or threatened release”³⁸
- of a “hazardous substance”³⁹
- into the “environment.”⁴⁰

requirement for joint and several liability in all cases, and held that Congress intended liability to “be determined from traditional and evolving principles of common law.” *Id.* at 808 (quoting 126 Cong. Rec. 30,932 (1980) (remarks of Sen. Randolph), *reprinted in* 1980 U.S.C.C.A.N., *reprinted in* 1 CERCLA Legislative History, *supra* note 28, at 686; *see also* O’Neil v. Picillo, 883 F.2d 176, 179 n.4 (1st Cir. 1989) (“courts generally . . . have declined to place the burden of showing that defendants are “substantial” contributors on the government, recognizing Congress’ concern that cleanup efforts not be held hostage to the time-consuming and almost impossible task of tracing all of the waste found at a dump site”), *cert. denied*, 493 U.S. 1071 (1990).

³⁶ *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986) (“Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect”).

³⁷ *See United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (“term ‘facility’ should be construed very broadly to include ‘virtually any place at which hazardous wastes have been dumped, or otherwise disposed of’”), *cert. denied*, 484 U.S. 848 (1987); *see also* *New York v. General Elec. Corp.*, 592 F. Supp. 291, 296 (N.D.N.Y. 1984) (“Congress sought to deal with every conceivable area where hazardous substances come to be located”).

³⁸ 42 U.S.C. § 9601(22) (2012) (subject to limited exclusions, term ‘release’ means “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant”); *see, e.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985) (“leaking tanks and pipelines, the continuing leaching and seepage from the earlier spills, and the leaking drums all constitute ‘releases’ . . . Moreover, the corroding and deteriorating tanks, Shore’s lack of expertise in handling hazardous waste, and even the failure to license the facility, amount to a threat of release”).

³⁹ 42 U.S.C. § 9601(14) (2012) (defining “hazardous substance” as any substances designated pursuant to the Clean Water Act, RCRA, Clean Air Act – over 700 substances – but not including “petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance [or] natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas”). Liability for remediating oil, as indicated above, is under the Oil Pollution Act 1990. 33 U.S.C. §§ 2701 *et seq.* (2012).

⁴⁰ 42 U.S.C. § 9601(8) (2012) (defining “environment” as “(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States . . . , and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States”).

All the above terms are defined broadly. The term “persons” is also defined broadly;⁴¹ it includes “all known forms of business and commercial enterprises,”⁴² including successor corporations⁴³ and bankruptcy estates.⁴⁴

There are four categories of liable persons, called potentially responsible parties (“PRPs”), all of whom are primarily liable. They are:

- “the owner and operator of a vessel or a facility”;⁴⁵
- “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of”;⁴⁶
- generators of hazardous substances, that is, persons who “arranged for” the disposal or treatment of waste;⁴⁷ and

⁴¹ 42 U.S.C. § 9601(21) (2012). The term “person” is defined to mean “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” *Id.*

⁴² *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991).

⁴³ *Id.* at 1245 (term “corporation” includes successor corporation); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990) (applying state law to cut off successor corporation’s liability “would result in great expense to the taxpayer, which is contrary to CERCLA’s purposes”); *see also In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1010, 1019 (D. Mass. 1989) (“[i]t would be manifest injustice . . . to permit [successor corporation] to contract away [corporation’s] liability for PCB contamination”).

⁴⁴ *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 284 (Bankr. N.D. Ohio 1985) (“this court has no difficulty in finding that the debtor, and hence the debtor’s estate, is a person as defined by CERCLA”).

⁴⁵ 42 U.S.C. § 9607(a)(1) (2012). The term “facility” includes offshore as well as onshore facilities. *Id.* §§ 9601(20)(A)(17), (18). The term is defined broadly to include anywhere that a hazardous substance is located. *Id.* § 9601(9) (“(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel”). Exceptions to the term “facility” are narrow; they include consumer products in consumer use. *Id.* § 9601(9) (B). The word “and” has been interpreted to mean “or”; it thus includes owners who are not operators and vice versa. *See United States v. Fleet Factors*, 901 F.2d 1550, 1554 n.3 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

⁴⁶ 42 U.S.C. § 9607(a) (2) (2012). CERCLA incorporates the term “disposal” from RCRA, in which it is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.” *Id.* § 9601(2); *see id.* § 6903(3).

⁴⁷ *Id.* § 9607(a) (3) (“any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances”). The term “arranged for” is not defined

Environmental Claims and Insolvent Companies

- transporters, that is, persons who transported a hazardous substance to a treatment or disposal facility selected by them.⁴⁸

Courts have interpreted all four categories of PRPs broadly due to CERCLA's remedial nature. CERCLA's three defenses,⁴⁹ meanwhile, have been construed narrowly.⁵⁰ The defenses are: an act of God; an act of war; an act or omission of an unrelated third party, and any combination of the three defenses.⁵¹

As stated by Justice Brennan, “[t]he remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.”⁵² Further, the EPA is not limited to enforcing CERCLA in respect of sites that are contaminated by historic pollution; it may enforce other regimes such as RCRA.

Classifying the types of PRPs in the four categories does not appear to have been particularly contentious. The Senate Bill, which was introduced on 11 July 1979 and which became CERCLA, broadly identified persons who would be liable. They were to be owners or operators of a facility or

but has been construed broadly. *E.g.*, *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) (“liberal judicial interpretation of the term is required in order that we achieve CERCLA's ‘overwhelmingly remedial’ statutory scheme”); *id.* at 1318 (“In light of the broad remedial nature of CERCLA, we conclude, as other courts have, that even though a manufacturer does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed, the manufacturer may be liable. For liability to be imposed on such a manufacturer, the evidence must indicate that the manufacturer is the party responsible for “otherwise arranging” for the disposal of the hazardous substance”); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (“Courts have also held defendants ‘arranged for’ disposal of wastes at a particular site even when defendants did not know the substances would be deposited at that site or in fact believed they would be deposited elsewhere”).

⁴⁸ 42 U.S.C. § 9607(a) (4) (2012) (“any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person”). Again, this category has been construed broadly to include persons that carried out filling and grading activities during the development of a site fell within the category because it entailed moving contaminants and depositing them at another area of the site. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988) (filling and grading creosote pools).

⁴⁹ 42 U.S.C. § 9607(b) (2012). In order to succeed in a defense, a PRP must prove that the release or threatened release and damages from it were caused “solely” by one of the defenses. *Id.*

⁵⁰ *See, e.g.*, *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (“rains were foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels. Furthermore, the rains were not the sole cause of the release. Therefore . . . rains were not sufficient to establish an act of God defense pursuant to CERCLA”); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1540 & n.2 (W.D. Mich. 1989) (“Defendants have not shown any evidence . . . that a third party was the sole cause of the release and concomitant harm”).

⁵¹ 42 U.S.C. § 9607(b) (2012).

⁵² *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989).

vessel from which there was an unlawful discharge, release or disposal of hazardous substances “and any other person who caused or contributed or is causing or contributing to such discharge, release, or disposal, including but not limited to prior owners, lessees, and generators, transporters, or disposers of such hazardous substances.”⁵³ This loose terminology was subsequently revised to substantially its final form by June 1980.⁵⁴ The congressional debates that followed the establishment of the four categories of PRPs did not tend to focus on the types of persons in the categories or refer to them as “polluters.” Instead, the debates focused on whether strict, and/or joint and several liability would be imposed, and the defenses to such liability.⁵⁵

When it enacted CERCLA, the U.S. Congress considered bankruptcy law tangentially. That is, CERCLA exempts state and local governments from liability as an owner or operator if they “acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign.”⁵⁶ In such a case, the person “who owned, operated, or otherwise controlled activities at such facility immediately beforehand” is deemed to be the owner or operator of the facility.⁵⁷ Congress thus foresaw the potential for bankrupt companies to be PRPs but did not establish any criteria for handling environmental claims in bankruptcy proceedings.

By November 1980, substantive debates on the Senate Bill had virtually ceased as Congress hurriedly enacted CERCLA in the waning days of a lame duck Congress. The Senate Bill that had been drafted by “a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all pending measures [following which f]aced with a complicated bill on a take it -or-leave it basis, the House took it, groaning all the way.”⁵⁸ A detailed understanding of many of CERCLA’s provisions is, therefore, unavailable. The

⁵³ S. 1480, 96th Cong., 1st Sess., § 4(a), *reprinted in* 1 CERCLA Legislative History, *supra* note 28, at 155, 168-69.

⁵⁴ S. 1480, Staff Working Paper No. 2 (June 2, 1980), *reprinted in* 1 CERCLA Legislative History, *supra* note 28, at 245, at 266-67.

⁵⁵ See 126 Cong. Rec. (daily ed. Sept. 19, 1980), *reprinted in* 1980 U.S.C.C.A.N. 26,336, 26,339, *reprinted in* 2 CERCLA Legislative History, *supra* note 28, at 222, 232 (statement of Rep. Staggers) (“issues of liability were perhaps the most difficult . . . in fashioning this legislation. In many instances, it will be difficult to determine precisely what the responsibilities of a generator or a transporter of hazardous waste or the owner or operator of the hazardous waste disposal site should have been and what a particular defendant’s portion of cleanup costs should be”); see also J.P. Sean Maloney, *A Legislative History of Liability under CERCLA*, 16 SETON HALL LEGIS. J. 517, 538 (1992); Grad, *supra* note 31, *passim*.

⁵⁶ 42 U.S.C. § 9601(20) (D) (2012).

⁵⁷ *Id.* § 9601(20) (A) (iii).

⁵⁸ Grad, *supra* note 31, at 1.

Environmental Claims and Insolvent Companies

hurried drafting also inevitably led to ambiguities in CERCLA itself.⁵⁹ What was never an issue, however, was the ease with which the EPA was intended to enforce CERCLA to achieve the swift remediation of contaminated sites. As U.S. Assistant Attorney General Roger Marzulla subsequently stated: “With only slight exaggeration, one government lawyer has described a [CERCLA] trial as requiring only that the Justice Department lawyer stand up and recite: ‘May it please the Court, I represent the government and therefore I win.’”⁶⁰

The EPA,⁶¹ the U.S. Department of Justice,⁶² and commentators⁶³ have referred to CERCLA’s implementation of the polluter pays principle in the liability provisions of CERCLA despite references to the principle in its enactment being largely absent. It is, perhaps, telling that persons that are responsible for remediating contamination from historic pollution are called PRPs, not responsible or liable parties.

During the first five years after CERCLA’s enactment, the EPA’s enforcement of the Superfund program was lax and heavily biased towards

⁵⁹ See, e.g., *Artesian Water Co. v. Gov’t of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) (“CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage”); *Mid Valley Bank v. N. Valley Bank*, 764 F. Supp. 1377, 1387 (E.D. Cal. 1991) (“extraordinarily poorly drafted statute”); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989) (“[I]like many a court before it, this Court cannot forbear remarking on the difficulty of being left compassless on the trackless wastes of CERCLA. This Court has previously noted the statute’s incomprehensive nature”).

⁶⁰ See William D. Evans, Jr., *The Phantom PRP in CERCLA Contribution Litigation: EPA to the Rescue?*, 26(43) ENV’T REP. (BNA) CURR. DEV. 2109, 2110 (Mar. 8, 1996).

⁶¹ E.g., US EPA, Memorandum, Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans, 2 (June 6, 2007) (“Importantly, the Good Samaritan Initiative preserves CERCLA’s ‘polluter pays’ principle”); EPA, *CERCLA/Superfund Orientation Manual* (Office of Solid Waste and Emergency Response, Technology Innovation Office EPA/542/R-92/005, Oct. 1992) II-2 (“Superfund program was founded on the premise that the polluter must pay for problems created by the polluter”); EPA, *The Buck Stops Here; Polluters are Paying for Most Hazardous Waste Cleanups*, Superfund Today 1 (EPA 540-K-96/004, June 1996) (“public’s demand that polluters pay for cleanup also makes it critical that EPA find those who are responsible”).

⁶² Statement of Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice Before the Superfund, Waste Control, and Risk Assessment Subcommittee of the Senate Environment and Public Works Committee (Mar. 21, 2000) (“Congress also decided that the parties that created these environmental hazards should pay for cleaning them up. This ‘polluter pays’ principle is implemented in the liability and enforcement provisions of the statute”). The U.S. Department of Justice brings judicial proceedings on behalf of the EPA and other federal administrative agencies.

⁶³ See, e.g., Thomas A. Rhoads & Jason F. Shogren, *Current Issues in Superfund Amendment and Reauthorization: How is the Clinton Administration Handling Hazardous Waste*, 8 DUKE ENVTL. L. & POL’Y F. 245, 245 (1998) (referring to “reliance on the ‘polluter pays’ principle in CERCLA”).

industry.⁶⁴ Criticism of the EPA and realization by the U.S. Congress that the problem of abandoned and uncontrolled waste sites was much worse than originally foreseen and could eventually cost \$100 billion to clean up,⁶⁵ resulted in major amendments when CERCLA was re-authorized by the Superfund Amendments and Reauthorization Act (“SARA”). Reasons for the amendments were to strengthen the legislation and the Superfund program and to rebuild public confidence.⁶⁶ Thus, CERCLA became even more stringent. A key change made by SARA was a bar against review of a PRP’s liability until the EPA brings a judicial action to enforce an order or brings a cost-recovery action.⁶⁷ That is, a PRP must remediate contamination before it can argue that it is not liable under CERCLA. The bar codified judicial practice. When PRPs had challenged their liability prior to the EPA having brought such proceedings, courts had refused to infer a right to do so,⁶⁸ considering that it would frustrate CERCLA’s primary purpose of swiftly cleaning up hazardous waste sites if challenges were to be allowed before contamination had been remediated.⁶⁹

⁶⁴ See Patricia Sullivan, *Anne Gorsuch Burford Dies; Reagan EPA Adm’r*, WASHINGTON POST, B06 (July 22, 2004) (Ms Gorsuch had “resigned under fire in 1983 during a scandal over mismanagement of a \$1.6 billion program to clean up hazardous waste dumps”).

⁶⁵ See H.R. Rep. No. 253(I), 99th Cong., 1st Sess. 55, reprinted in 1986 U.S.C.C.A.N. 2835, 2837, reprinted in 3 Senate Committee on Environment and Public Works, A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499), 101st Cong., 2d Sess. 1764, 1818 (committee print 1990, 7 volumes).

⁶⁶ Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

⁶⁷ 42 U.S.C. § 9613(h) (2012); see *In re Combustion Equip. Assocs., Inc.*, 838 F.2d 35, 41 (2d Cir. 1988) (declining to exercise jurisdiction under Declaratory Judgment Act to declare CERCLA claim dischargeable in bankruptcy).

⁶⁸ *E.g.*, *United States v. Outboard Marine Corp.*, 789 F.2d 497, 506 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986) (“CERCLA does not give . . . federal Courts jurisdiction to review the EPA’s [actions] prior to enforcement. Rather, these courts have held that the jurisdiction rests with the trial court only after the EPA has enforced [CERCLA] and the Government subsequently sues under CERCLA . . . to recover the cleanup costs incurred”).

⁶⁹ *E.g.*, *Dickerson v. Adm’r, EPA*, 834 F.2d 974, 978 (11th Cir. 1987) (quoting *J.V. Peters & Co., Inc., v. Adm’r, EPA*, 767 F.2d 263, 264 (6th Cir. 1985)) (“purpose of CERCLA provides further evidence that Congress did not intend to provide for pre-enforcement judicial review. The primary purpose of CERCLA is ‘the prompt cleanup of hazardous waste sites’”). *Id.* at 978 (quoting *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985) (“[t]o delay remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate the sources of danger to health and environment”), *cert. denied*, 476 U.S. 1115 (1986)). PRPs may apply for recovery of their costs, 42 U.S.C. § 9606(b) (2) (A) (2012), but succeed only infrequently. SARA also specifically authorized PRPs to bring contribution actions against other PRPs. 42 U.S.C. § 9613(f)(1); see *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 162-63 (2004).

B. Part 2A of the Environmental Protection Act 1990

In contrast to CERCLA, Part 2A is an enforcement-unfriendly regime which, as described below, is not designed to result in the swift remediation of contaminated sites even though the U.K. Government specifically stated that Part 2A is based on the polluter pays principle.⁷⁰ By the time Part 2A received the Royal Assent on 19 July 1995, the principle had been an integral part of environmental law for over 20 years and was part of the E.U. Treaty.⁷¹ Inclusion of the principle in the Treaty, however, is directed at institutions of the European Union; Member States are not bound by it.⁷² Further, Part 2A is national, not E.U., legislation. Still further, the polluter pays principle in Part 2A differs significantly from that of the OECD and the European Union.⁷³

⁷⁰ Department of the Environment and the Welsh Office, *Paying for Our Past* (Mar. 8, 1994), ¶ 4E.1 (“polluter pays principle must be central to any regulatory regime”) [hereinafter *Paying for Our Past*].

⁷¹ Consolidated Treaty of the European Union art. 130r(2). The polluter pays principle is, together with the preventive and precautionary principles, in the Treaty on the Functioning of the EU (“TFEU”), art. 191(2). Article 191(2) provides: “Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”

⁷² See *Envtl. Prot. Agency v. Neiphin Trading Ltd.*, [2011] I.E.H.C. 67 ¶ 6.28 (Ir.) (agreeing with LUDWIG KRÄMER, *FOCUS ON EUROPEAN ENVIRONMENTAL LAW* 246 (1992), that the polluter pays principle “merely set forth principles for action by the European Community, or Union as it is now, but they do not themselves have any significant or even indirect legal effect”); see *R. v. Sec’y of State for Trade and Industry ex parte Duddridge*, [1996] ENVTL. L. REV. 325 (Court of Appeal) (Eng.) (agreeing Sec’y of State did not have duty to apply precautionary principle due to its inclusion in EU Treaty). The EU has applied the principle in the Environmental Liability Directive (“ELD”) in which the principle has retained its economic origins in its application to liability for remediating accidental environmental damage. Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, as amended, 2004, O.J. (L 143), 56; see also Valerie Fogleman, *The Polluter Pays Principle for Accidental Environmental Damage: Its Implementation in the Environmental Liability Directive* 116, 128-47, in *PRINCIPI EUROPEI E ILLECITO AMBIENTALE* (Alessandro D’Adda et al. eds., 2013). The ELD does not, however, apply to environmental damage that occurred before its deadline for transposition into Member State national law on 30 April 2007. ELD, art. 17; see *Joined Cases C-379/08 & C-380/08, Raffinerie Mediterranee SpA (ERG) v. Ministero dello Sviluppo Economico*, 2010 E.C.R. I-01919, ¶ 34.

⁷³ See Blanca Mamutse & Valerie Fogleman, *Improving the Treatment of Environmental Claims in Insolvency*, [2013] J.B.L. 486, 497-99 (discussing differences in application of polluter pays principle). The U.K. Government’s attitude towards the polluter pays principle differed according to whether it was being introduced in E.U. or national legislation. In 1993, a Select Committee of the House of Lords referred to the principle as having been developed in the European Union “on the perceived equity of requiring those whose activities cause damage to pay for rectifying it”. Select Committee on the European Communities, *Remedying Environmental Damage*, Third Report, 1993-94, H.L., Paper 10 (Dec. 14, 1993), 5, ¶ 2. The committee considered that it was “quickly apparent that [it

Unlike CERCLA, Part 2A was not intended to establish a national program to remediate contaminated land.⁷⁴ Its main objective is “to provide an improved system for the identification and remediation of land where contamination is causing unacceptable risks to human health or the wider environment”⁷⁵ The primary authorities that implement and enforce Part 2A are nearly 450 local authorities, not the national environmental authorities for England, Wales, and Scotland.⁷⁶ Unlike CERCLA, an enforcing authority’s discretion is strictly limited.⁷⁷ After the local authority in whose area the contaminated site is located makes a determination that the land meets the criteria for designation as “contaminated land,”⁷⁸ it faces nine prohibitions on the service of a remediation notice⁷⁹ and 23 grounds of appeal against it.⁸⁰

To be liable under Part 2A, a person must be an “appropriate person.”⁸¹ The word “person” is defined broadly, as in CERCLA, to include “a body of persons corporate or unincorporated”⁸² and governmental authorities.⁸³ There are two categories of appropriate persons. Class A persons, who are primarily liable, are persons that “caused or knowingly permitted” a substance to be in, on or under land such that the land is con-

provides] no more than general indications to what might be desirable policy and practice.” *Id.* at 6, ¶ 4.

⁷⁴ See Defra, *Assessing Risks from Land Contamination – A Proportionate Approach, Soil Guideline Values: The Way Forward* (CLAN 6/06, Nov. 2006) 6, ¶ 2.6 (“Part 2A was never intended to establish a national remediation programme”).

⁷⁵ Department of the Environment, Transport and the Regions, DETR Circular 02/2000, Environmental Protection Act 1990: Part IIA, Contaminated Land (Mar. 20, 2000), annex 1, ¶ 25.

⁷⁶ The Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency are the authorities for a sub-set of contaminated land known as special sites. Their authority is, however, severely limited. See Valerie Fogleman, *The Contaminated Land Regime; Time for a Regime that is Fit for Purpose (Part 1)*, INT’L J. L. IN BUILT ENV’T (forthcoming).

⁷⁷ See Valerie Fogleman, *The Contaminated Land Regime; Time for a Regime that is Fit for Purpose (Part 2)*, INT’L J. L. IN BUILT ENV’T (forthcoming).

⁷⁸ EPA 1990, § 78B.

⁷⁹ *Id.* § 78H. A remediation notice is served if the appropriate person does not voluntarily remediate the contamination. If the appropriate person remediates the contamination voluntarily, the appropriate person prepares and publishes a remediation statement. EPA § 78H(7).

⁸⁰ Contaminated Land (England) Regulations 2006, S.I. 2006/1380, reg. 7. Whilst there is an argument that the grounds of appeal could be seen as protecting the enforcing authority from many challenges, this argument is simply wrong. Extensive research into regimes to remediate contamination around the world has not found another regime that is as prescribed as Part 2A.

⁸¹ EPA 1990, § 78A(9).

⁸² Interpretation Act 1978, c. 30, sched. 1.

⁸³ EPA 1990, § 159(1). Governmental authorities includes local authorities themselves. See *id.* § 78H(5) (prohibiting service of a remediation notice on a “person if and so long as . . . it appears to the [enforcing] authority that the person on whom the notice would be served is the authority itself”).

taminated land.⁸⁴ Causing contamination is strict liability.⁸⁵ Liability for knowingly permitting contamination occurs when a person who has the power to remediate it fails to do so after a reasonable opportunity.⁸⁶ Part 2A thus imposes strict liability to a more limited extent than CERCLA. Class A persons are considered to be “polluters.”⁸⁷ If a Class A person cannot be found after a reasonable inquiry, the owner or occupier (called a Class B person) is secondarily liable.⁸⁸ Thus, unlike CERCLA, current owners and occupiers are secondarily, not primarily, liable although, unlike CERCLA, there is no “innocent purchaser defense,”⁸⁹ by which a current owner or occupier can avoid liability. Instead, an enforcing authority may, but is not required to, apply hardship provisions.⁹⁰

Another key difference between the regimes is the scope of liability. Part 2A applies joint and several liability to exclude specified appropriate persons from liability,⁹¹ with the person(s) who remain being liable in re-

⁸⁴ *Id.* § 78F(2).

⁸⁵ *Alphacell v. Woodward* [1972] A.C. 824, 839-41 (H.L.) (Eng.) (overflow from settling tanks into river due to brambles, ferns and long leaves becoming wrapped around impellers is act that subjects its operator to liability); *see Env't Agency (formerly National Rivers Authority) v. Empress Car Company (Abertillery) Ltd.* [1999] 2 A.C. 22, 32, [1998] 2 W.L.R. 350 (H.L.) (Eng.) (maintaining tank is affirmative act that subjects its operator to liability if tank is vandalised and its leaked contents pollute water).

⁸⁶ 7 Mar. 1995, Parl. Deb., H.L. (1995), vol. 562, col. 182 (U.K.) (statement of Viscount Ullswater) (“case law already provides that the test of ‘knowingly permit’ requires both knowledge of the contaminating substances and that it must be within a person’s power to do something to prevent the pollution occurring”); 11 July 1995, Parl. Deb. H.L. (1995), vol. 565, col. 1497 (statement of Earl Ferrers) (“test of ‘knowingly permitting’ would require both knowledge that the substances in question were in, on or under the land and the possession of the power to prevent such a substance being there”). The person does not need to know of the harm that may result from the contamination; only its presence. *See Circular Facilities (London) Ltd v. Sevenoaks Dist. Council*, [2005] EWHC 865, [2005] ENV. L. REV. 755, 765 (Q.B.D. Admin.) (Eng.); *see generally* Valerie Fogleman, *Circular Facilities (London) Ltd v Sevenoaks DC: The Meaning of “Knowingly Permitted” under the Contaminated Land Regime*, [2005] J.P.L. 1269.

⁸⁷ Department of the Environment and Welsh Office, *Framework for Contaminated Land; Outcome of the Government’s Policy Review and Conclusions from the Consultation Paper Paying for our Past*, 4.4.1 (Nov. 1994) (referring to causer or knowing permitter as “polluter”).

⁸⁸ EPA 1990, § 78F(4).

⁸⁹ 42 U.S.C. § 9601(35) (A) (2012). A PRP has a defense if it proves that when it “acquired the facility the [PRP] did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.” *Id.* § 9601(35) (a) (i). This is accomplished by carrying out “all appropriate inquiries.” *See All Appropriate Inquiries*, ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/brownfields/aai/> (last updated Apr. 10, 2011).

⁹⁰ Department for Environment, Food and Rural Affairs, *Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance*, ¶ 8.6(i) (Apr. 2012). CERCLA also includes hardship provisions. *See* 42 U.S.C. § 9622(g)(7) (2012).

⁹¹ Department for Environment, Food and Rural Affairs, *Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance*, ¶¶ 7.38-.61 (Apr. 2012).

spect of contamination caused or knowingly permitted by themselves and the excluded persons. Part 2A then applies proportionate liability to apportion⁹² and attribute⁹³ liability between remaining appropriate persons.⁹⁴ The detailed exclusion tests for Class A persons are designed to transfer liability from the person who actually caused the contamination to the person who most recently knowingly permitted its continued presence.⁹⁵ Thus, in stark contrast to CERCLA, the person who caused contamination can be excluded from liability. The U.K. Government considered that excluding the actual polluter complies with the polluter pays principle,⁹⁶ specifically referring to the potential for the person who caused the contamination to be insolvent or incapable of being identified.⁹⁷

Unlike CERCLA, Part 2A includes provisions to protect insolvency practitioners from personal⁹⁸ and criminal liability,⁹⁹ with an exception if they commit an “unreasonable” act or omission. In enacting Part 2A, however, Parliament did not attempt to reconcile Part 2A with the Insolvency Act 1986 (“IA 1986”) or to minimize potential conflicts if claims involving Part 2A arise in insolvency proceedings.

A further major difference between Part 2A and CERCLA is the absence of a fund in the former. The U.K. Government reasoned that local authorities were merely continuing their previous responsibilities under the

⁹² *Id.* ¶¶ 7.80-.86.

⁹³ *Id.* ¶¶ 7.87-.91.

⁹⁴ *See id.* ¶¶ 7.62-.75 (apportionment for Class A persons); *id.* ¶¶ 8.80-.86 (apportionment for Class B persons); *id.* ¶¶ 8.87-.91 (attribution criteria).

⁹⁵ *See* Fogleman, *supra* note 77.

⁹⁶ *See* Paying for Our Past, *supra* note 70, at ¶ 4E.7 (“It need not be inconsistent with the [polluter pays principle] to provide for the enforcement of regulatory obligations on [persons other than the ‘actual polluter’], especially the owner. The regulator should be able to seek to enforce obligations on the person responsible for the pollution or on anyone to whom the polluter has transferred the burden of meeting the obligations however that transfer took place”); Response to the Communication from the Commission of the European Communities (COM (93) 47 final) Green Paper on remedying environmental damage; Memorandum by the Government of the United Kingdom of Great Britain and Northern Ireland (Oct. 8, 1993) § 3.14 (“The polluter pays principle suggests that the polluter should generally meet the costs of remedying damage which is attributable to its actions. However, in the normal working of markets in property, responsibility for land, and for the effects of that land on others and the surrounding environment, shifts with the transfer of ownership.... Provided that residual liability is properly reflected in price, liability based on current ownership may still be consistent with the polluter pays principle”).

⁹⁷ Paying for Our Past, *supra* note 70, ¶ 4E.4.

⁹⁸ EPA 1990, § 78X(4)(a). The EPA 1990 defines the relevant insolvency practitioners. *Id.* §78X(3)(a).

⁹⁹ *Id.* §78X(4)(b). An “unreasonable” act or omission is one that would be considered unreasonable by a person acting in the same capacity as the insolvency practitioner. *Id.* §78X(4)(a).

statutory nuisance regime.¹⁰⁰ Although funding for capital works was subsequently provided, local authorities must bid for it; it is not automatically available.¹⁰¹ Further, unlike CERCLA, there is no urgency to remediate contamination in Part 2A. Remediation notices may be appealed before any remediation begins and are automatically suspended during its appeal.¹⁰² Unlike other U.K. regimes, the suspension has no exceptions; it is absolute.¹⁰³

Still further, courts in the United Kingdom have not construed the provisions of Part 2A broadly. There are only three reported cases, two of which have been unsympathetic to enforcing authorities. In the first case, the High Court allowed an appeal against a remediation notice on the basis that the Magistrates Court had failed to state, in its judgment, that it had made a finding that the appellant, a developer, had known about the contamination it had purportedly “knowingly permitted.”¹⁰⁴ The case involved a former brick and tile works that had been re-developed for housing. Carbon dioxide and methane from decomposing vegetation in the former clay pits was entering the houses, posing a risk of asphyxiation of the residents and an explosion. Although the developer had not caused the presence of the vegetation, it had failed to remove it during the re-development of the site. The issue was, thus, whether the developer knowingly permitted the contaminants to remain on the site.

In the second case, the then House of Lords concluded that the privatized gas company was not a “polluter” and was not liable for remediating a former gasworks site that had been redeveloped as housing. The contamination was found when a resident of one of the houses “discovered a pit

¹⁰⁰ 11 July 1995, Parl. Deb. (1995) H.L., vol. 565, col. 1501; *see also* Environment Committee, Contaminated Land, Report, H.C. (1996-97), 22-II, Memorandum by Department of the Environment, 2, ¶ 14 (responsibilities under statutory nuisance regime are “broadly equivalent to those under Part IIA to cause their areas to be inspected from time to time, and to require action to deal with various matters including premises or deposits which are prejudicial to health or a nuisance”).

¹⁰¹ *See, e.g.*, Environment Agency, Contaminated Land Program; Approved Projects for 2012/13, 1 (Aug. 2012); Environment Agency, Contaminated Land Capital Projects Outcomes Report 2011-12 (Dec. 2012).

¹⁰² Contaminated Land (England) Regulations 2006, S.I. 2006/1380, reg. 12(1); *see Housing on Chemicals Site Contaminated Land*, 329 ENDS Rep. 3 (2002); *Redland and Crest to Start Site Clean-up*, 422 ENDS Rep. 23 (Mar. 2010) (remediation of contamination began 10 years after discovery of site due to length process in determining land to be contaminated land, serving remediation notices and finalisation of appeal against notices).

¹⁰³ *Cf.* Statutory Nuisance (Appeals) Regulations 1995, S.I. 1995/2644, reg. 3 (Eng.) (exceptions include alleged statutory nuisance being injurious to health); Anti-Pollution Works Regulations 1996, S.I. 1996/1006 (Eng. & Wales) (no provisions for suspension of works notices).

¹⁰⁴ *Circular Facilities (London) Ltd v. Sevenoaks Dist. Council*, [2005] EWHC 865, [2005] ENV. L. REV. 755, 764 (Q.B.D. Admin.) (Eng.).

filled with a tar-like substance in his garden.”¹⁰⁵ The developers of the housing on the former gasworks, which had been in operation before British Gas was nationalized in 1948, had been dissolved many years before the discovery. Lord Scott stated that he had “no doubt that that [Part 2A was enacted on the principle that the polluter should pay] and [had] no quarrel with that principle. But [the privatized gas company] was not a polluter and is no less innocent of having ‘caused or knowingly permitted’ the pollution than the innocent owner or occupiers of the 11 residences.”¹⁰⁶ He was scathing about the Environment Agency’s contention that the privatized company should be liable, stating that he found

it extraordinary and unacceptable that a public authority, a part of government, should seek to impose a liability on a private company, and thereby to reduce the value of the investment held by its shareholders, that falsifies the basis on which the original investors, the subscribers, were invited by government to subscribe for shares.¹⁰⁷

Finally, in contrast to the U.S. Congress strengthening CERCLA six years after its enactment, the U.K. Government weakened Part 2A in 2012 by, among other things, directing enforcing authorities to “seek to use Part 2A only where no appropriate alternative solution exists.”¹⁰⁸

IV. ENVIRONMENTAL CLAIMS IN BANKRUPTCY / INSOLVENCY PROCEEDINGS

The clashes between bankruptcy law and environmental law in the United States began much earlier than in the United Kingdom. As a result, there are many more cases on many more issues in the United States. This section examines two key issues; discharging liability for clean-up costs in a re-organization, and disclaiming property in a bankruptcy/insolvency estate as burdensome/onerous property. The first issue shows the resourcefulness of the EPA in bringing proceedings that survive re-organization, an issue which has not yet arisen in the United Kingdom. The second issue shows major differences in the approaches by courts in the United States and the United Kingdom.

A. Environmental claims in bankruptcy proceedings in the United States

Most environmental claims in bankruptcy proceedings in the United States involve CERCLA, so-called State mini-CERCLAs (that is, similar legislation to CERCLA enacted by State legislatures), and to a lesser extent

¹⁰⁵ R. (National Grid Gas PLC) v. Env’t Agency, [2006] EWHC 1083 (Admin), [2006] 1 W.L.R. 3041, ¶ 33 (Q.B.D.) (Eng.).

¹⁰⁶ R. (National Grid Gas PLC) v. Env’t Agency, [2007] UKHL 30, [2007] 1 W.L.R. 1780, 1786 (H.L.) (Eng.).

¹⁰⁷ *Id.* at 1786-87.

¹⁰⁸ Department for Environment, Food and Rural Affairs, Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance, ¶ 1.5 (Apr. 2012).

Environmental Claims and Insolvent Companies

RCRA. The clashes between environmental and bankruptcy law were inevitable. The U.S. Congress did not consider the interface with bankruptcy law when it enacted CERCLA or RCRA. In particular, the bar against litigation by a PRP under CERCLA until the EPA has brought judicial proceedings is in direct conflict with the purpose of the Bankruptcy Code to administer a debtor's estate swiftly, distribute whatever assets remain fairly among creditors, and provide debtors with a fresh start¹⁰⁹ by discharging debts that arose before the bankruptcy.¹¹⁰ The clash is made even more difficult because, in addition to environmental law (which may be federal or state law) and bankruptcy law (which is federal law), doctrines of corporate/company law (which is state law) are generally involved.¹¹¹ The different approaches of CERCLA and bankruptcy law have, as one judge remarked, led creditors to be "stranded at the increasingly crowded 'intersection' between the discordant legislative approaches embodied in CERCLA and the Bankruptcy Code."¹¹²

¹⁰⁹ See, e.g., *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 779 (7th Cir. 1992) ("CERCLA and the Bankruptcy Act are two sweeping statutes both with very important purposes. The problem is that the goals underlying these statutes do not always coincide. Bankruptcy laws serve an important purpose of equitably distributing an insolvent debtor's funds in hopes of maximizing the creditor's interests in receiving payment and the debtor's interest in a fresh start. . . . Just as important interests underlie the bankruptcy laws, laudable goals also underlie CERCLA — namely, protecting this nation's environment by distributing the costs associated with cleaning up sites containing hazardous materials."); *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991). ("We agree that the Bankruptcy Code and CERCLA point toward competing objectives. The Code aims to provide reorganized debtors with a fresh start, an objective made more feasible by maximizing the scope of a discharge. CERCLA aims to clean up environmental damage, an objective that the enforcement agencies in this litigation contend will be better served if their entitlement to be reimbursed for CERCLA response costs based on pre-petition pollution is not considered to be a "claim" and instead may be asserted at full value against the reorganized corporation."); *In re Hemingway Transport, Inc.*, 993 F.2d 915, 921 (1st Cir.), cert. denied, 510 U.S. 914 (1993) ("CERCLA's settled policy objectives, reemphasized in [SARA], prominently include the expeditious cleanup of sites contaminated or threatened by hazardous substance releases which jeopardize public health and safety, and the equitable allocation of cleanup costs among all [PRPs]. . . . On the other hand, [the] Bankruptcy Code . . . often serves to forestall CERCLA's intended equitable allocation of responsibility.")

¹¹⁰ See Pierre G. Armand, Steven D. Cook, M. Natasha Labovitz & David F. Williams, *Current Hot Topics Involving Litigation of Environmental Issues in Large Corporate Bankruptcies* (ABA Section of Litigation 2011 Environmental, Mass Torts & Products Liability Committees Joint CLE Seminar). (Jan. 27-29, 2011): Environmental Litigation Breakout: Caution at the Intersection of Environmental and Bankruptcy Law 1.

¹¹¹ See Anne M. Lawton & Lynda J. Oswald, *Scary Stories and the Limited Liability Polluter in Chapter 11*, 65 WASH. & LEE L. REV. 451, 459 (2008).

¹¹² *In re Hemingway Transp., Inc.*, 993 F.2d 915, 921 (1st Cir.), cert. denied, 510 U.S. 914 (1993) ("CERCLA's settled policy objectives, reemphasized in the Superfund Amendments and Reauthorization Act of 1986 ('SARA'), prominently include the expeditious clean-up of sites contaminated or threatened by hazardous substance releases

i. Discharging liabilities for clean-up costs in a re-organization

A major clash involves the discharge of liabilities for clean-up costs in a re-organization under chapter 11 of the Bankruptcy Code. With limited exceptions, a debtor in a chapter 11 re-organization discharges pre-petition debts.¹¹³ The Bankruptcy Code defines a “debt” as “liability on a claim,”¹¹⁴ and a “claim” as a “right to payment”¹¹⁵ or “a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.”¹¹⁶

The landmark case as to whether a claim for remediating contamination is a “claim” under the Bankruptcy Code is *Ohio v. Kovacs*.¹¹⁷ In 1976, the State of Ohio had brought an action against Kovacs, the chief executive officer of Chem-Dyne Corporation, as well as Chem-Dyne which operated a hazardous waste disposal site, for breaching environmental laws. In settling the action, Kovacs agreed, on behalf of himself and Chem-Dyne, to an injunction that, among other things, prohibited further pollution, barred further waste being brought onto the site, and required the removal of hazardous waste from the site. When Kovacs failed to remove the waste, the State of Ohio had appointed a receiver, who was directed to take possession of the site and Kovacs’ other assets so as to comply with the injunction. Before the clean up was complete, Kovacs filed a bankruptcy petition.¹¹⁸ The State filed a complaint in the Bankruptcy Court that Kovacs’ obligations were not dischargeable in bankruptcy because they were not a “debt.”¹¹⁹

The U.S. Supreme Court agreed with the Sixth Circuit Court of Appeals that Kovacs’ obligations were dischargeable in bankruptcy because they had been converted into an obligation to pay money and were, therefore, a “claim” under the Bankruptcy Code.¹²⁰ The Court noted that it was not holding that the parts of the injunction prohibiting pollution and barring further waste being brought to the site were dischargeable in bankruptcy. In addition, the Court stated that it was not questioning whether

which jeopardize public health and safety, and the equitable allocation of clean-up costs among all [PRPs]”).

¹¹³ See 11 U.S.C. § 1141(d) (1) (A) (2012) (confirmation of plan of re-organization “discharges the debtor from any debt that arose before the date of such confirmation”).

¹¹⁴ 11 U.S.C. § 101(12) (2012).

¹¹⁵ *Id.* § 101(5)(A) (“right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured”).

¹¹⁶ *Id.* § 101(5)(B) (“right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured”).

¹¹⁷ 469 U.S. 274 (1985).

¹¹⁸ *Id.* at 276.

¹¹⁹ *Id.* at 276-77.

¹²⁰ *Id.* at 285.

Environmental Claims and Insolvent Companies

anyone “in possession of the site – whether it is Kovacs or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee – must comply with the environmental laws.”¹²¹

Due to the issue not being fully resolved, many cases followed as to whether an action to clean up contamination against a PRP under CERCLA or equivalent persons under State mini-CERCLAs is dischargeable in bankruptcy. In *In re Chateaugay Corp.*, the Second Circuit Court of Appeals held that a debtor may discharge a claim for reimbursement of the cost of cleaning up contamination.¹²² The court discussed difficulties in making such a decision, commenting that the intent of the Bankruptcy Code is “to override many provisions of law that would apply in the absence of bankruptcy,”¹²³ and noting that “an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a ‘claim’ if the creditor obtaining the order [usually the EPA] had the option, which CERCLA confers, to do the clean-up work itself and sue for response costs, thereby converting the injunction into a monetary obligation.”¹²⁴ Thus, according to the Second Circuit, most claims under CERCLA are dischargeable in bankruptcy with the exception of an EPA order for cleaning up ongoing contamination that met the “imminent and substantial endangerment” criteria under CERCLA.¹²⁵

It thus seemed that the EPA was bound to failure in bringing many claims for clean ups against PRPs, who could then re-organize minus the claims. The EPA, however, eventually found the solution in a case involving Apex Oil Company. Apex had bought a refinery in Hartford, Illinois, in 1967. In 1987, it filed for re-organization under chapter 11. In 1990, Apex emerged from re-organization, having discharged its obligations. The EPA did not bring a claim in the re-organization proceedings. The re-organized company no longer refined oil due to its predecessor having sold the refinery in 1988. In 2003, the EPA exercised its powers under CERCLA and the Clean Water Act to investigate a plume of hydrocarbons migrating from the refinery. The hydrocarbons had contaminated the shallow groundwater and were emitting fumes into residences, posing a risk to human health and the environment. Apex refused to contribute to the clean

¹²¹ *Id.* at 283.

¹²² 944 F.2d 997, 1009 (2d Cir. 1991).

¹²³ *Id.* at 1002.

¹²⁴ *Id.* at 1008.

¹²⁵ *See, e.g., In re CMC Heartland Partners*, 966 F.2d 1143, 1146-47 (7th Cir. 1992) (“CERCLA postpones all judicial review of administrative orders under § 106(a) until the work has been performed or the EPA itself applies for judicial enforcement”); *see* 42 U.S.C. § 9606(a) (2012) (when EPA “determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat”).

up. Its contribution was estimated at \$150 million, although it may have been able to recover some of this amount by bringing contribution actions against other PRPs. The EPA notified Apex that it would carry out the remediation itself and seek contribution from Apex under CERCLA and the Clean Water Act.

Instead, the EPA brought an action against Apex under RCRA. In contrast to CERCLA, RCRA does not include a provision that authorizes any kind of monetary relief. RCRA entitles a plaintiff, including the EPA, only to demand a cleanup.¹²⁶ The Seventh Circuit Court of Appeals rejected Apex's argument that the claim was monetary because it would have to pay a contractor to remediate the contamination because it no longer had internal capacity to carry out the works itself. The court stated that "[t]he root arbitrariness of Apex's position is that whether a polluter can clean up his pollution himself or has to hire someone to do it has no relevance to the policy of either the Bankruptcy Code or [RCRA]."¹²⁷ The court also rejected Apex's argument that, if it had known in 1986 when it declared bankruptcy that it could be liable for \$150 million in clean-up costs, it would have liquidated instead of re-organized.¹²⁸ Apex thus remained liable for remediating the contamination even though it no longer owned or operated the refinery.

The question whether remediation orders constitute "claims" in insolvency proceedings has more recently been considered by the Supreme Court of Canada in *Newfoundland & Labrador v. AbitibiBowater, Inc.*¹²⁹ AbitibiBowater, Inc. ("Abitibi"), a financially distressed company which had been involved in industrial activity in the Newfoundland and Labrador Province, obtained a stay of proceedings under the Companies' Creditors Arrangement Act ("CCAA").¹³⁰ Some months later, orders under the Environmental Protection Act¹³¹ ("EPA Orders") were issued, by virtue of which Abitibi was required to carry out remediation activities. The enforceability of the EPA Orders depended on their falling outside the CCAA definition of "claims" subject to the claims process, on the basis that they

¹²⁶ See 42 U.S.C. § 6973(a) (2012) ("upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the[EPA] may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both").

¹²⁷ *United States v. Apex Oil Co.*, 579 F.3d 734, 736-37 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010).

¹²⁸ *Id.*

¹²⁹ 2012 SCC 67 (Can.).

¹³⁰ R.S.C. 1985, c. C-36 (Can.).

¹³¹ S.N.L. 2002, c. E-142 (Can.).

were non-monetary statutory obligations.¹³² Treating the EPA Orders as claims would enable Abitibi to emerge from the CCAA restructuring “free of the obligation, able to recommence business without remediating the properties it polluted, the cost of which would fall on the Newfoundland and Labrador public.”¹³³ On the other hand, as regulatory orders, they would “remain in effect until the property has been cleaned up or the matter otherwise resolved,” thereby surviving the company’s restructuring.¹³⁴ The “distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in CCAA restructuring or bankruptcy” was therefore fundamental,¹³⁵ more specifically the question at what point a regulatory obligation arising from environmental protection legislation could be recognized as a claim capable of being proved or compromised under the CCAA.

The Supreme Court found that the requirements for a provable claim were satisfied insofar as there was a debt, liability or obligation owed to the Province, which had identified itself as a creditor by exercising its enforcement power against Abitibi, and the environmental damage had occurred before the commencement of the CCAA proceedings.¹³⁶ The third element, “that it be possible to attach a monetary value to the obligation,” necessitated a consideration of the question whether “orders that are not expressed in monetary terms can be translated into such terms.”¹³⁷ Where there were sufficient indications and certainty that the regulatory body which triggered the enforcement mechanism would “ultimately perform remediation work and assert a monetary claim to have its costs reimbursed,” the court would find that an EPA Order was subject to the insolvency process.¹³⁸ The court was unpersuaded by the argument that classing a regulatory order as a claim would undermine the polluter pays principle by extinguishing Abitibi’s environmental obligations:

This objection demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor’s environmental obligations any more than subjecting any creditor’s claim to that process extinguishes the debtor’s obligation to pay its debts. It merely ensures that the creditor’s claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province’s position would result not only in a su-

¹³² 2012 SCC 67, ¶¶ 10-11, 14-15.

¹³³ *Id.* ¶ 64.

¹³⁴ *Id.* ¶¶ 71-72.

¹³⁵ *Id.* ¶ 74.

¹³⁶ *Id.* ¶¶ 26-29.

¹³⁷ *Id.* ¶ 30.

¹³⁸ *Id.* ¶ 36.

per-priority, but in the acceptance of a “third-party-pay” principle in place of the polluter-pay principle.

Nor does subjecting the orders to the insolvency process amount to issuing a license to pollute, since insolvency proceedings do not concern the debtor’s future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colorful analogy of two American scholars, “Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute.”¹³⁹

Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities.¹⁴⁰

The court concluded that an environmental order issued by a regulatory body was capable of being treated as a contingent claim and admitted to the claims process if there was sufficient certainty that the regulatory body would bring a monetary claim against the debtor.¹⁴¹ Having established that the Province would remediate the environmental contamination itself,¹⁴² its claim was one of a monetary nature and the EPA Orders would consequently not be exempted¹⁴³ from the stay of proceedings and eventual compromise of claims in Abitibi’s restructuring under the CCAA.

ii. Abandonment of burdensome property

The U.S. Bankruptcy Code authorizes a bankruptcy trustee to “abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.”¹⁴⁴ The Bankruptcy Code does not contain any express exceptions to this power.¹⁴⁵ The issue in *Mid-*

¹³⁹ *Id.* ¶¶ 40-42 (quoting Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1200 (1984)).

¹⁴⁰ *Id.* ¶ 42.

¹⁴¹ *Id.* ¶ 54.

¹⁴² *Cf. id.* ¶ 86 (McLachlin C.J., dissenting; preferring higher threshold of “likelihood approaching certainty” that regulatory body would perform remedial work); *id.* ¶ 101 (LeBel J., concurring in finding insufficient evidence the Province would perform remedial work itself).

¹⁴³ *Id.* ¶ 62.

¹⁴⁴ 11 U.S.C. § 554(a) (2012) (“After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate”).

¹⁴⁵ *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 509 (1986) (Rehnquist, J., dissenting) (“section 554(a) is “absolute in its terms [and] suggests that a trustee’s power to abandon is limited only by considerations of the property’s value to the

*lantic National Bank v. New Jersey Department of Environmental Protection*¹⁴⁶ was whether such a power was nevertheless implicit in the Code. The case concerned a company that processed waste oil. The company had breached its permit by accepting over 400,000 gallons of oil contaminated by polychlorinated biphenyls, leading the New Jersey Department of Environmental Protection to order it to cease operating. During negotiations between the company and the Department concerning the clean up, the company filed a chapter 11 petition for re-organization. After the Department issued an order requiring the company to clean up the facility, the company converted its chapter 11 proceeding to a chapter 7 liquidation proceeding. The bankruptcy trustee subsequently determined that the facility was a net burden to the bankruptcy estate and, following unsuccessful attempts to sell it, notified the court and creditors that he would abandon it. The Bankruptcy Court approved the abandonment and subsequently approved the trustee's abandonment of contaminated oil at another facility owned by the company.

The Third Circuit Court of Appeals reversed the Bankruptcy Court's decision. The U.S. Supreme Court (in a 5:4 decision), affirmed the Third Circuit, stating that "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety."¹⁴⁷ The Court emphasized that the exception from the Bankruptcy Code is narrow, commenting that it "does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm."¹⁴⁸

Most courts that have subsequently determined the extent of a bankruptcy trustee's powers to abandon a contaminated site have construed the exception narrowly to require imminent and identifiable harm to human health.¹⁴⁹ Another factor considered by them is the assets in the bankruptcy

estate. It makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations").

¹⁴⁶ *Id.* at 494.

¹⁴⁷ *Id.* at 502.

¹⁴⁸ *Id.* at 502, n.9.

¹⁴⁹ *See, e.g., In re Smith-Douglass, Inc.*, 856 F.2d 12, 15 (4th Cir. 1988). The court stated that "Not surprisingly, the bankruptcy courts interpreting *Midlantic* have reached inconsistent results. Some courts have determined that the *Midlantic* exception applies only where there is an imminent danger to public health and safety. *Id.*; *see, e.g., In re Purco, Inc.*, 76 B.R. 523, 533 (Bankr. W.D. Pa. 1987); *In re Franklin Signal Corp.*, 65 B.R. 268, 271-72 (Bankr. D. Minn. 1986). Other courts have determined that *Midlantic* requires full compliance, prior to abandonment, with the applicable environmental law. *See In re Peerless Plating Co.*, 70 B.R. 943, 946-47 n.1 (Bankr. W.D. Mich. 1987." *Id.*; *see also In re L.F. Jennings Oil Co.*, 4 F.3d 887, 890 (10th Cir. 1993). ("abundantly clear from the record on appeal that [the site] was not, at the time of abandonment, an immediate threat to public health or safety"); *see also Mary J. Koks & Tim Million,*

estate, which may be so limited that they would not cover the cost of cleaning up contamination even if the bankruptcy trustee was to abandon the site.¹⁵⁰

B. Environmental claims in insolvency proceedings in the United Kingdom

The first cases involving environmental claims in insolvency proceedings in the United Kingdom arose, not from Part 2A or other legislation requiring the remediation of contamination, but from waste management legislation. The issue was whether the liquidator of an insolvency estate could disclaim a waste management license as “onerous property” under section 178 of the IA 1986. Effective disclaimer facilitates the release of the insolvent estate from the burden of unprofitable contracts or unsaleable property by terminating the debtor’s rights, interests and liabilities therein.¹⁵¹

These powers are intended to assist the insolvency practitioner to bring about the liquidation of the company, without being hampered by property or obligations which might be considered a liability, or valueless, and which would interfere with distribution of any remaining assets of the company to unsecured creditors, once the claims of preferred and secured creditors have been met.¹⁵²

As shown below, English courts have established that the exercise of the disclaimer power is not constrained by provisions in environmental legislation governing clean-up obligations or the termination of licenses.¹⁵³

The Court of Appeal decided in *Re Celtic Extraction* that there was no basis on which the Waste Framework Directive could be construed to find that the polluter pays principle should prevail over unsecured creditors’ interests in the assets available for distribution.¹⁵⁴ The court held that that in the absence of clear wording, the statutory inconsistency would

Environmental Issues in Bankruptcy, 40 TEX. ENVTL. L.J. 43, 59-62 (2009/2010). (discussing majority and minority positions); Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 361-72 (2004) (discussing case law on abandonment power).

¹⁵⁰ See, e.g., *In re Oklahoma Ref. Co.*, 63 B.R. 562 (Bankr. W.D. Okla. 1986) (contamination “does not present immediate and menacing harm to public health and safety. Moreover, abandonment will not aggravate the existing situation, create a genuine emergency nor increase the likelihood of disaster or intensification of polluting agent. . . . For all purposes the difference between denying and allowing abandonment produces the same result. Under either scenario there are no funds available to finance the closure plan or the post-closure monitoring”).

¹⁵¹ See IA 1986, § 178 (Eng. & Wales), and Companies Act 1963, § 290 (Ir.).

¹⁵² Carolyn Shelbourn, *Can the Insolvent Polluter Pay? Environmental Licences and the Insolvent Company*, 12 J. ENVTL. L. 207, 221 (2000).

¹⁵³ See, e.g., Waste Management Act 1996, § 58 (Ir.), and EPA 1990, § 35(11) (U.K.).

¹⁵⁴ [1999] 4 All E.R. 684, ¶ 39; see Council Directive 75/442 on waste, art. 15, 1975 O.J. (L 194), 39 (repealed).

be resolved in favor of a narrow construction of the polluter pays principle, to prevent its application “to cases where the polluter cannot pay.”¹⁵⁵ This decision thus clashes with the interpretation of the Waste Framework Directive by the Court of Justice of the European Union (“CJEU”), albeit in a different context. The CJEU concluded, in a case involving a claim by a governmental authority for clean-up costs against a company that produced the oil spilled from the *Erika* off the coast of Brittany, that “whatever system is in place for allocating responsibility for environmental damage, it must ensure that the state is not burdened with the costs.”¹⁵⁶ The CJEU rejected the reasoning of Advocate General Kokott that liability could be shifted to the public, concluding instead that the producer or previous holder of the waste should be liable if it contributed to the risk that pollution would occur.¹⁵⁷

In *Re Celtic Extraction*, the Court of Appeal concluded that the power to disclaim a waste management license as “onerous property”¹⁵⁸ under section 178 of IA 1986 was not restricted by section 35(11) of the EPA 1990, which provided for waste management licenses to continue in force until their revocation or surrender.¹⁵⁹ The court distinguished between termination by act of parties under section 35(11) and the “external statutory force” of the disclaimer provision (section 178), ultimately placing “prima-

¹⁵⁵ [1999] 4 All E.R. ¶ 39.

¹⁵⁶ Case C-188/07, *Commune de Mesquer v. Total France SA*, 2008 E.C.R. I-4501, ¶ 82. The Waste Framework Directive provides that “[i]n accordance with the ‘polluter pays’ principle, the cost of disposing of waste, less any proceeds derived from treating the waste, shall be borne by . . . the holder who has waste handled by a waste collector or by an undertaking . . . and/or the previous holders or the producer of the product from which the waste came.” Council Directive 75/442 on waste, art. 15, 1975 O.J. (L 194), 39 (repealed). Article 15 of the revised Waste Framework Directive (Directive 2008/98 on waste, 2008 O.J. (L 312), 3) provides that “In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders. . . . Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of the produce may share these costs.” The CJEU had concluded in an earlier case that holders of waste may be liable regardless of whether they produced the waste or possess it when the pollution occurs. Case No. C-1/03, *Van de Walle v. Texaco Belgium SA*, 2004 E.C.R. I-7613, ¶ 57.

¹⁵⁷ See David Hart Q.C. & Rachel Marcus, *The Polluter-Pays Principle: Mesquer and the New Waste Framework Directive*, 6 ENVTL. LIABILITY 195, 198-99 (2008). Liability attaches only to the extent that the person was responsible for the pollution. See C-293/97, *R. v. Sec’y of State (ex parte Standley)*, 1999 E.C.R. I-02603, ¶ 51 (“As regards the polluter pays principle, suffice it to say that the Directive does not mean that farmers must take on burdens for the elimination of polluter to which they have not contributed”).

¹⁵⁸ IA 1986, § 178(3) (defined as “(a) any unprofitable contract, and (b) any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act”).

¹⁵⁹ [2000] 2 W.L.R. 991, [2001] Ch. 475, 478 (Court of Appeal) (Eng.).

cy upon the orderly winding-up of companies in advance of deploying the resources available to mitigate environmental harm.”¹⁶⁰

In *Re Irish Ispat Ltd.*,¹⁶¹ the Irish High Court also considered waste legislation in a case involving the imposition of liability for the cost of remediating contamination on a liquidator, with the result that the costs would be transferred to the creditors of the estate. That is, the assets of the insolvency estate would be used to pay the costs of remediation rather than being paid to the creditors. The issue was whether the provisions of the Waste Management Act 1996 “should be applied in priority” to the provisions of the Companies Act 1963. The court echoed the view in *Re Celtic Extraction* that the polluter pays principle could not apply to prevent disclaimer where the company had no assets.¹⁶² Furthermore, the court rejected the suggestion that large shareholder loans owed to Irish Ispat’s parent company should be differentiated from other debts “and presumably in some way be made amenable to mitigating or remedying pollution” – there was no known principle of law which could support the notion of permitting certain debts which had been proved in the winding-up “from benefiting from the *pari passu* rule and being diverted to another purpose.”¹⁶³

However, the experience in similar cases in New Zealand and Australia shows that different considerations regarding disclaimer can be applied to companies which go into voluntary liquidation with sufficient assets to discharge their debts. The cases of *Tubbs v. Futurity Investments Ltd.*¹⁶⁴ and *Sullivan v. Energy Services International Pty. Ltd.*¹⁶⁵ involved unsuccessful attempts to disclaim toxic substances and contaminated waste. The courts noted the risk that allowing disclaimer would enable voluntary liquidation to provide a means for companies to avoid their regulatory obligations and “improve the payout to creditors,”¹⁶⁶ more so “where the

¹⁶⁰ See Robert Lee & Tamara Egede, *Bank Lending and the Environment: Not Liability but Responsibility*, 2007 J. BUS. L. 868, 879; see also Carolyn Shelbourn, *supra* note 152, at 218 (notwithstanding that the “restrictions on the transfer or surrender of waste management licences had been introduced to ‘prevent problems which had arisen under earlier legislation’”).

¹⁶¹ [2004] I.E.H.C. 278 (Ir.). It should be noted however that the status of the polluter pays principle under Irish law is a matter “of some dispute.” See *John Ronan & Sons v. Clean Build Ltd.*, [2011] I.E.H.C. 350, ¶ 5.1 (Ir.); see also *Environmental Protection Agency v. Neiphin Trading Ltd.*, [2011] I.E.H.C. 67, ¶¶ 6.13-6.48 (Ir.).

¹⁶² *Re Irish Ispat Ltd.*, [2004] I.E.H.C. 278 (Irl.).

¹⁶³ *Id.*

¹⁶⁴ [1998] 1 NZLR 471 (High Court, Christchurch, N.Z.). This echoes the view expressed in English cases “that a company in financial difficulties may not go into voluntary liquidation solely to avoid its environmental liabilities.” Carolyn Shelbourn, *supra* note 152, at 225; *Re Mineral Resources*, [1999] 1 All E.R. 746, 765 (Ch., Companies Court) (Eng.); *Re Wilmott Trading* (Nos. 1 & 2), [1999] 2 B.C.L.C. 541, 544 (Ch., Companies Court) (Eng.).

¹⁶⁵ [2002] NSWSC 937 (S. Ct. NSW) (Austl.).

¹⁶⁶ See *Tubbs v. Futurity Investments Ltd.*, [1998] 1 NZLR 471, 479-80 (High Court, Christchurch) (N.Z.).

Environmental Claims and Insolvent Companies

whole of the evidence strongly suggests a device by those controlling the company to avoid liability.”¹⁶⁷ In circumstances where sufficient funds are available to meet creditor claims, it would therefore seem that the arguments outlined above with respect to the protection of creditors¹⁶⁸ apply with equal force to efforts by debtor companies to transfer the burden of clean-up obligations to the State¹⁶⁹ or third parties.¹⁷⁰

Notwithstanding the English authority of *Re Celtic Extraction*, environmental claims in insolvency proceedings are much less likely to involve waste management licenses in the future even if a claim was to arise that is sufficiently different to distinguish it from that case. Even though there are a large number of closed landfills that still have licenses and have not satisfied the criteria for surrender of those licenses due to their environmental condition,¹⁷¹ landfills operating after July 2001 must make financial provision to meet closure and post-closure obligations in their permits.¹⁷² The obligations include a requirement for the financial provision to be maintained for at least 30 years from the date on which a landfill is closed in order to ensure that funds are available to carry out remediation measures in the event that the closed landfill causes pollution or harm to human health.¹⁷³ The Environment Agency has also taken measures to ensure that financial provision mechanisms are accessible if a landfill operator becomes

¹⁶⁷ *Sullivan v. Energy Services Intl. Pty. Ltd.*, [2002] NSWSC 937 (S. Ct. NSW), ¶ 32 (Austl.).

¹⁶⁸ See *Re Celtic Extraction*, [2000] 2 W.L.R. 991, [2001] Ch. 475 (Court of Appeal) (Eng.); *Re Irish Ispat*, [2004] I.E.H.C. 278 (Ir.).

¹⁶⁹ *Tubbs v. Futurity Investments Ltd.*, [1998] 1 NZLR 471, 478, 480 (High Court, Christchurch) (N.Z.).

¹⁷⁰ *Sullivan v. Energy Services Int'l Pty. Ltd.*, [2002] NSWSC 937 (S. Ct. NSW), ¶ 47 (Austl.).

¹⁷¹ Approximately 1,500 landfills that were closed, largely because they did not meet the more stringent standards introduced by the Landfill Directive, still have licenses. Of these closed landfills, 26% are owned by large companies, 75 by local authorities, and 65% by small- to medium- sized companies. Approximately half of these landfills pose a high risk of polluting groundwater. The Environment Agency has succeeded in persuading the owners of only three of them to surrender their licences. See *Agency Grapples with Closed Landfill Legacy*, 434 ENDS Rep. 20-21 (Mar. 28, 2011).

¹⁷² Article 8(a)(iv) of the Landfill Directive provides that “adequate provisions, by way of a financial security or any other equivalent, on the basis of modalities to be decided by Member States, has been or will be made by the applicant prior to the commencement of disposal operations to ensure that the obligations (including after-care provisions) arising under the permit issued under the provisions of this Directive are discharged and that the closure procedures required by Article 13 are followed. This security or its equivalent shall be kept as long as required by maintenance and after-care operation of the site in accordance with Article 13(d).” Council Directive 1999/31 on the landfill of waste, 1999 O.J. (L 182), 1, 7; see Environment Agency, *Financial Provision for Landfill* ¶ 1.2 (Doc No 22_06, Apr. 21, 2011).

¹⁷³ Council Directive 1999/31 on the Landfill of Waste, art. 10, 1999 O.J. (L 182), 1, 7.

insolvent.¹⁷⁴ Future cases are more likely to involve Part 2A or, perhaps, as in the recent Scottish Coal case discussed below, planning obligations and other environmental licenses.¹⁷⁵

Since *Re Celtic Extraction*, it seems to have been assumed that the power to disclaim onerous property in an insolvency proceeding includes the disclaimer of contaminated land. Thus, there would have to be at least “imminent and identifiable harm” to human health, as in the *Midlantic* exception, for a court – even if it was considered appropriate under U.K. law – to consider an exception to the disclaimer power. As discussed, however, Part 2A is much weaker than CERCLA (or, indeed, most State mini-CERCLAs) and does not provide powers to local authorities to require appropriate persons to remediate contamination that “may present an imminent and substantial endangerment to health or the environment,” as in CERCLA. Still further, Part 2A is designed to postpone remediation rather than swiftly to carry it out.¹⁷⁶

The case in which the power to disclaim a contaminated site was assumed is *Environment Agency v. Hillridge Ltd.*¹⁷⁷ *Hillridge* involved the issue of whether the Environment Agency, as joint holder of a trust fund established as financial provision for the license, could access the fund.¹⁷⁸ The trust fund had been established by Hillridge Ltd., the holder of the waste management license, to satisfy the terms and conditions of the license. The liquidator had not only disclaimed the license as onerous property, it had disclaimed the quarry in which the landfill was located, which was owned by Hillridge’s parent company, Waste Point Ltd. The judgment simply notes that “[u]ntil disclaimed by the joint liquidators of Waste Point on December 14, 2001, the Quarry had belonged at all material times to Waste Point. As a result of that disclaimer, Waste Point’s freehold interest in the Quarry escheated to the Crown.”¹⁷⁹ The disclaimer of the site was not even an issue in the case despite Bradford City Council, the local authority, having determined that it was contaminated land under Part 2A on 16 January 2003, before the case was decided. Bradford City Council subsequently remediated the site at public expense, including at least one grant

¹⁷⁴ See *Agency to Tighten Grip on Financial Provisions for Landfill*, 356 ENDS Rep. 38-39 (Sept. 1, 2004).

¹⁷⁵ See *Re Directions*, Nimmo [2013] CSOH 124 ¶¶ 34-68 (Scot.) (appeal pending).

¹⁷⁶ See text accompanying notes 102-103.

¹⁷⁷ [2003] EWHC 3023, [2004] 2 B.C.L.C. 358 (Ch.) (Eng.).

¹⁷⁸ See *Row on Financial Cover for Waste Sites Deepens*, 269 ENDS Rep. 34 (June 1997). Under its agreement with the Environment Agency, Hillridge paid £367,273 into a joint trust account with the Environment Agency. The money included £332,583.78 from an accumulation account that had been established with the Bradford Metropolitan Borough Council as part of a section 106 agreement under the Town and Country Planning regime. By 30 September 2003, the joint trust fund contained £391,610.18, including further payments by West Point Ltd and interest. *Env’t. Agency v. Hillridge Ltd.*, [2003] EWHC 3023, [2004] 2 B.C.L.C. 358, ¶¶ 8-10 (Ch.) (Eng.).

¹⁷⁹ *Env’t. Agency v. Hillridge Ltd.*, [2003] EWHC 3023, [2004] 2 B.C.L.C. 358, ¶ 3 (Ch.) (Eng.).

Environmental Claims and Insolvent Companies

of £2 million from the contaminated land capital projects program.¹⁸⁰ Thus, whilst the contamination may not have posed imminent harm, it was certainly substantial.

The Scottish Coal case, examined further in section VIII of this article, also involved the disclaimer of contaminated land and environmental permits. The permits were for carrying out operations at Scottish Coal's open cast mining sites to protect the environment from water pollution. Scottish Coal was also obliged under planning law to restore the sites when mining ceased.¹⁸¹ The legal issues in the case, which is on appeal, differ markedly from those under English law because there is no equivalent of section 178 of the IA 1986 under Scots law. Lord Hodge agreed that the liquidators could disclaim the land and permits but did so because the court had to reach a decision that did not affect "referred matters," that is, matters that had not devolved to Scotland under the Scotland Act 1998. Whereas environmental law had devolved, insolvency law had not. The court was bound, therefore, to construe the relevant environmental law, the Water Environment (Controlled Activities) (Scotland) Regulations 2011, narrowly so as not to create a new liquidation expense that would rank ahead of the claims of preferential creditors.¹⁸²

The costs that the public may have to bear are huge. Scottish Coal had been spending about £1.4 million each month to maintain its sites in compliance with the environmental permits. Even after selling some sites, it still has to spend £478,000 each month to maintain the unsold sites, with the result that all funds in the insolvency estate would be gone in between 20 and 22 months without paying any creditors. Complying with planning requirements to remediate its sites would cost about £73 million.¹⁸³

In discussing *Re Celtic Extraction*, Lord Hodge concluded that provisions in the environmental permits held by Scottish Coal that differed from those in the waste management licenses would have led him to conclude that the liquidators were required to comply with the surrender procedures in the permits. He also concluded that rulings by the CJEU since *Re Celtic Extraction* would have led him to construe the environmental legislation (which is derived from E.U. law) under which the permits were issued broadly.¹⁸⁴ In particular, he commented that:

¹⁸⁰ See Marc Meneaud, *£2m Won to Clear Up Manywells Tip*, TELEGRAPH & ARGUS (Apr. 14, 2009, 7:33 PM); Bradford Dist. Council, *Manywells Landfill Remediation Newsletter* (July 2006).

¹⁸¹ *Re Directions, Nimmo*, [2013] C.S.O.H. 124, ¶ 5 (Scot.) (appeal pending); see Water Environment (Controlled Activities) (Scotland) Regulations 2011, S.S.I. 2011/209.

¹⁸² *Re Directions, Nimmo*, [2013] C.S.O.H. 124, ¶¶ 64-68 (Scot.) (appeal pending).

¹⁸³ *Id.* ¶¶ 6-7. Scottish Coal had £27 million in restoration bonds for its sites in East Ayrshire but complying with planning conditions in restoring those sites would cost between £48 million and £90 million. See Isabella Kominski, *KPMG Not Liable for Scottish Mine Restoration*, 463 ENDS Rep. 21 (Sept. 2013).

¹⁸⁴ *Re Directions, Nimmo*, [2013] C.S.O.H. 124, ¶¶ 54-55 (Scot.) (appeal pending).

there is a strong public interest in the maintenance of a healthy environment, the remediation of pollution and the protection of biodiversity. There is a conflict between the results sought by the directive and the insolvency regime. I do not think that the insolvency regime has any primacy which means that [the Scottish transposing legislation] can exclude a liquidator's power to disclaim only if . . . it says so expressly.¹⁸⁵

An appeal by the Scottish Environment Protection Agency was heard in early September. The Agency commented, prior to the hearing, that it “believes in the polluter pays principle, which means that work to prevent damage to the environment should be funded by those whose activities created the risk of pollution.”¹⁸⁶

Other insolvencies involving environmental claims have also occurred in the United Kingdom in 2013. For example, Greensolutions (Glasgow), a Northern Irish company, operated a soil washing business at a former gasworks site owned by Clyde Gateway (a regeneration agency) in Dalmarnock. Following a dispute with Clyde Gateway, Greensolutions moved its business to another site, leaving 6,500 cubic meters of spoil in four heaps at the Dalmarnock site.¹⁸⁷ On 25 July 2013, the High Court of Justice in Northern Ireland accepted a petition by the Commissioners of H.M. Revenue & Customs to wind up the company. The Official Receiver was appointed as liquidator.¹⁸⁸

Another example involves Lawrence Recycling and Waste Management, which entered administration in September 2013. The company, which had expanded in 2008,¹⁸⁹ managed and operated a site at Kidderminster at which it had a permit to process 250,000 tonnes of waste per year. Massive fires occurred at the site in December 2012 and June 2013, with the latter taking seven-and-a-half weeks to extinguish due to the amount of waste waiting to be recycled at the site. The Environment Agency, Wyre Forest District Council, Hereford and Worcester Fire and Rescue Service, and Worcestershire County Council incurred costs of £250,000 as a result of the second fire. The costs included demolishing buildings at the site to allow access to the burning waste, removing and landfilling burnt waste, and using aeration equipment to prevent further fish kills and pollution from fire-fighting water from entering the Staffordshire and Worces-

¹⁸⁵ *Id.* ¶ 51.

¹⁸⁶ *SEPA Statement re Court of Session Decision*, SCOTTISH ENVIRONMENT PROTECTION AGENCY (July 18, 2013), http://www.sepa.org.uk/about_us/news/2013/sepa_statement_re_court_of_ses.aspx.

¹⁸⁷ See David Leask, *Row over Contaminated Soil at Clyde Gateway Site*, EVENING TIMES (July 31, 2013), <http://www.eveningtimes.co.uk/news/row-over-contaminated-soil-at-clyde-gateway-site-131935n.21738198>.

¹⁸⁸ See Jon Reeds, *Cluster Site Company Liquidated*, BROWNFIELD BRIEFING (Aug. 7, 2013), <http://www.brownfieldbriefing.com/news/cluster-site-company-liquidated> (available on subscription).

¹⁸⁹ See *Case Study: Lawrence Recycling and Waste Management; Materials Recovery Facility Opens New £10M Facility*, WRAP (Dec. 2009), www.wrap.org.uk/sites/files/wrap/LawrenceWEB.pdf.

tershire Canal. In addition, the Environment Agency invoiced the company £12,686 and £120,000 for costs incurred due to the December 2012 and June 2013 fires, respectively.¹⁹⁰ The Environment Agency and Wyre Forest District Council are creditors in the insolvency proceedings.¹⁹¹

V. CORPORATE VEIL-PIERCING AND DIRECTORS' LIABILITY IN RESPONSE TO ENVIRONMENTAL CLAIMS

The role of companies in the context of environmental liability not only raises concerns in relation to the prospect of environmental claims being discharged through insolvency proceedings,¹⁹² but also more specifically the operation of the fundamental concepts of limited liability and separate corporate personality.¹⁹³ These areas of English and Irish company law have not however been specially adapted to give effect to the goal of environmental protection, as explained in section VI below. The necessity therefore remains for finding ways to enhance the contaminated land regime through reliance on alternative routes to attaching liability, aimed at ensuring stronger compliance with the polluter pays principle. Some of these alternative methods are considered in section VII.

¹⁹⁰ See *Agencies Confirm Steps to Put out Fire at Lawrence Recycling*, WYRE FOREST DIST. COUNCIL (July 17, 2013), <http://www.wyreforestdc.gov.uk/cms/communications/news/2013/july-2013/agencies-confirm-confirm-steps.aspx>; *Public Agencies Confirm Response to Fire at Lawrence Recycling*, WYRE FOREST DIST. COUNCIL (June 26, 2013), <http://www.wyreforestdc.gov.uk/cms/communications/news/2013/june-2013/multi-agency-response-update.aspx>; Becky Carr, *Bill Continues to Mount for Lawrence Recycling Fire*, *The Shuttle* (Aug. 8, 2013, 8:45 AM), http://www.kidderminstershuttle.co.uk/news/10599399.Bill_continues_to_mount_for_Lawrence_Recycling_fire/.

¹⁹¹ See Becky Carr, *Authorities Respond to Lawrence Entering Administration*, *WORCESTER NEWS* (Sept. 12, 2013, 6:50 AM), http://www.worcesternews.co.uk/news/10668853.Authorities_respond_to_Lawrence_s_entering_administration/.

¹⁹² See generally Jeffrey S. Theuer, *Aligning Environmental Policy and Bankruptcy Protection: Who Pays for Environmental Claims under the Bankruptcy Code?*, 13 T.M. COOLEY L. REV. 465 (1996); Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331 (2004); Arlene Elgart Mirsky, Richard J. Conway, Jr. & Geralyn G. Humphrey, *The Interface between Bankruptcy and Environmental Laws*, 46 BUS. LAW. 623 (1991).

¹⁹³ See generally George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151 (1991); David S. Bakst, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive*, 19 B.C. INT'L & COMP. L. REV. 323 (1996); Karyn S. Bergmann, *Bankruptcy, Limited Liability and CERCLA: Closing the Loophole and Parting the Veil*, Univ. Md. Pub. L. Research Paper No. 2004-02.

VI. CLAIMS AGAINST DIRECTORS AND OFFICERS OF INSOLVENT COMPANIES AND COMPANIES WITH LIMITED ASSETS

There are no English cases regarding whether the corporate veil may be pierced to hold a director or officer liable for the costs of remediating contamination when the company has insufficient assets or is insolvent. The only reported English case is *Buckinghamshire County Council v. Briar*,¹⁹⁴ in which Mr. and Mrs. Briar were held liable under conventional principles for the costs of cleaning up a site on which waste had been unlawfully tipped. The court concluded that the corporate veil should be pierced on the basis that the company to which they had transferred the land was a façade or sham and had been used as a device “to conceal the true facts.”¹⁹⁵

Courts in Ireland and, to a lesser extent Canada, have been faced with the difficult issue of whether directors and officers of companies that have insufficient funds to remediate contamination are liable for the costs of remediating it.

A. *Environmental Claims against Directors and Officers in Ireland*

The issue in *Environmental Protection Agency v. Neiphin Trading Ltd.*¹⁹⁶ was whether the Irish High Court had the power to impose “fall back” orders on directors and officers of a company that had insufficient assets to remediate contamination caused by it. The court found that the power to make fall-back orders sprang from its inherent veil-piercing jurisdiction, and not from provisions of the Waste Management Act 1996 or the polluter pays principle:

[A]lthough the principle of separate corporate personality is not set in stone . . . the Court cannot disregard the fundamental nature of the separate legal personality principle and . . . in the absence of an express statutory abridgment of that principle, the Court should lean against an interpretation permitting the corporate veil to be pierced. This is in the interests of legal certainty, a very important principle underpinning our law.

[A]lthough a jurisdiction does already exist to lift the veil of incorporation in the case of a company being used for a fraudulent or other improper purpose that jurisdiction, which is of long standing, is intended to ensure (a) that a statutory privilege is not abused, and (b) that the Court’s own process is not abused. Every Court is entitled as a matter of inherent jurisdiction to seek to protect its own process and may in an appropriate case lift the corporate veil to ensure that its order are not frustrated by a cynical and strategic reliance on the principle of separate corporate personality by the directors (or shareholders) of a company. Whenever, under the planning code, a Court has seen fit to lift the corporate veil . . . it has

¹⁹⁴ [2003] ENV. L. REV. 583 (Eng.).

¹⁹⁵ *Id.* ¶ [152] (referring to *Trustor A.B. v. Smallbone* (No. 2), [2001] 1 W.L.R. 1177 (Ch.) (Eng.)).

¹⁹⁶ [2011] I.E.H.C. 67 (Ir.).

Environmental Claims and Insolvent Companies

invariably done so to that end. If the polluter pays principle only required the lifting of the veil in similar circumstances s.57 and s.58 could be harmoniously interpreted on the basis that the necessary jurisdiction already exists and is of long standing. However, it demands more than that. It demands that the polluter should pay in all circumstances which may require the veil to be lifted in any case where a company cannot comply, even in cases where the shareholders /directors are not fraudulently or improperly attempting to hide behind the company. The jurisprudence of the Irish Courts has long set its face against such an incursion. Absent the existence of a fraudulent or improper purpose the Courts will not lift the corporate veil unless authorized to do so by statute.¹⁹⁷

Thus, “insofar as the polluter pays principle forms part of the landscape of environmental law” in Ireland, its scope did not appear to extend to enabling the courts to impose fall-back orders on individuals whose sole connection to the environmental pollution was their position as directors or shareholders of a company held liable under the waste management legislation.¹⁹⁸ In other words, “the ‘polluter pays’ principle cannot . . . be used to infer provisions into the law which simply are not there” thereby imposing liability where it would not otherwise exist.¹⁹⁹,

It should however be noted that this decision was made against the backdrop of “a dispute as to the status of the ‘polluter pays’ principle in EU law and the extent to which those very Directives which the 1996 [Waste Management] Act was enacted to transpose actually require the application of the ‘polluter pays’ principle.”²⁰⁰ The Irish High Court concluded from a consideration of the 1996 Act as a whole that the polluter pays principle had only been incorporated to a “fairly limited” extent by the Irish legislature.²⁰¹ There were “very limited references” to it within the 1996 Act, and the provision which was previously seen²⁰² as incorporating the principle “merely define[d] it.”²⁰³ As claims in Ireland have tended to involve waste legislation,²⁰⁴ this is a significant aspect of the *Neiphin* judgment.

¹⁹⁷ *Id.* ¶¶ 6.50-52.

¹⁹⁸ *John Ronan & Sons v. Clean Build Ltd.*, [2011] I.E.H.C. 350, ¶ 6.18 (Ir.).

¹⁹⁹ *Id.* (paraphrasing Edward J’s conclusion in *Neiphin Trading*).

²⁰⁰ *Envtl. Prot. Agency v. Neiphin Trading Ltd.* [2011] I.E.H.C. 67, ¶ 6.13 (Ir.).

²⁰¹ *Id.* ¶ 6.48.

²⁰² *Waste Management Act 1996*, § 5 (construed differently in *Wicklow County Council v. Fenton* (No. 2), [2002] I.E.H.C. 350 (Ir.)).

²⁰³ *Id.* ¶ 6.48.

²⁰⁴ Ireland does not have a regime to remediate contamination from historic pollution. Article 15.5 of the Irish Constitution bars the imposition of retroactive liability. Irish Const. art. 15.5(1) (“Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.”); see Aoife Shields, *Critical Analysis of the Land Damage Provisions of the Environmental Liability Directive*, 16(2) IRISH PLANNING & ENVTL. L.J. 57, 59-60 (2009) (discussing article 15.5 in reference to remediation of contamination).

This may be seen from the subsequent decision of the Irish High Court in *John Ronan & Sons v. Clean Build Ltd.*,²⁰⁵ which also involved the question of liability under the Waste Management Act 1996. Clarke J. recognized that “the status of the ‘polluter pays’ principle under Irish law but moreover the question of its relevance are matters of some dispute” before turning to examine “the wider context and genesis” of the principle and review the Irish jurisprudence.²⁰⁶ He considered the finding in *Neiphin* that the polluter pays principle could not be used to infer non-existent provisions into the law did “not suggest the polluter pays principle should not be given any consideration *at all* by the court nor [did] it address circumstances where a director or shareholder is found to be independently liable under the 1996 Act.”²⁰⁷ Thus, “where primary liability under the Act could be found to attach to a respondent, who also happened to be a director or shareholder of another respondent, then there was no need to make a ‘fall-back’ order unless such liability were found to have been incorrectly attributed in view of the provisions of the 1996 Act.”²⁰⁸ It was

clear that a person in a position similar to that of being a manager, supervisor or operator of a relevant activity is a holder for the purposes of the 1996 Act. The fact that the business may be conducted by a corporate entity does not prevent individuals (whether they be directors, shareholders or otherwise) from being managers, supervisors or operators.²⁰⁹

Personal liability could accordingly be imposed on the directors on the basis of their “active role in the management and control of the site.”²¹⁰ It is inferred from the reasoning in this case that directors with a more passive role in the management of a company would not be caught by the definition of a “holder” of waste.²¹¹

B. Environmental Claims against Directors and Officers in Canada

A recent case involving claims against directors and officers for remediating contamination concerns Northstar Aerospace (Canada) Inc. and its predecessors (“Northstar”). Northstar owned and operated a helicopter and aircraft parts manufacturing facility in Cambridge, Ontario, from 1981 to 2010. In 2004, Northstar discovered trichloroethylene (“TCE”) and hexavalent chromium in groundwater migrating from the site into a nearby residential area. Concentrations of TCE in 450 residences exceeded health-based standards. Northstar notified the Ontario Ministry of Envi-

²⁰⁵ [2011] I.E.H.C. 350 (Ir.).

²⁰⁶ *Envtl. Prot. Agency v. Neiphin Trading Ltd.* [2011] I.E.H.C. 67, ¶ 5.1 (Ir.).

²⁰⁷ *Id.* ¶ 6.18 (emphasis in original).

²⁰⁸ *Id.* ¶ 6.9.

²⁰⁹ *Id.* ¶ 7.1.

²¹⁰ *Id.* ¶¶ 7.1-3.

²¹¹ Alison Fanagan, *Director Liability for Clean Up and Related Issues*, 2 ENVTL. LIABILITY 48, 50 (2012).

Environmental Claims and Insolvent Companies

ronment (“MOE”)²¹² and, between 2004 and 2012, voluntarily carried out investigatory, mitigation and remedial measures, including monitoring air in the residences, and created an accounting reserve of C\$22.8 million for the measures.

In 2012, after the MOE became concerned that Northstar would not have sufficient funds to continue remediating and monitoring the contamination, it issued EPA Orders against Northstar and its U.S. parent company, Northstar Aerospace Inc., requiring them to continue carrying out the measures and to provide C\$10 million in financial assurance to ensure funding for the measures.

On 14 June 2012, Northstar and two related Canadian companies applied for and were granted orders protecting them and staying proceedings against them and their directors and officers under the CCAA. At the same time, Northstar’s parent company filed proceedings in U.S. Bankruptcy Court. All the directors of Northstar, none of which had held their positions when the contamination occurred, resigned, leaving two officers to manage the company and continue remedial measures to the extent permitted under the CCAA order. The court further ordered that the directors and officers should be granted a charge on the companies’ property not exceeding C\$1,750,000 as security for indemnities by the companies to them.

On 27 June 2012, the court approved the sale of Northstar’s assets, rejecting the MOE’s request to disapprove the sale or not distribute the proceeds on the basis that its orders were regulatory orders not subject to the stay. The court concluded that the orders should be stayed because their purpose was enforcement of Northstar’s payment obligations. Virtually all of Northstar’s assets other than the site were subsequently sold and distributed. The sale proceeds were insufficient to pay Northstar’s secured lenders, leaving no assets available for unsecured creditors. On 2 August 2012, the court ordered a claims procedure against Northstar’s directors and officers concerning obligations and liabilities that had arisen after the CCAA proceedings had begun.

On 24 August 2012, Northstar was declared bankrupt and ceased carrying out remedial measures. The remaining asset, the site, vested in the

²¹² The account of the proceedings against Northstar is derived from Baker v. Director, (Case Nos. 12-158 to 12-169, Environmental Review Tribunal, Mar. 22, 1=2013); Government of Ontario, Rationale for Exemption to Public Comment (EBR Registry No. 011-7787, Ministry Reference No. 4242-8UQP7D, Dec. 14, 2012), http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTE4MTc1&statusId=MTc2ODQ1_ (last visited, Sept 1, 2013); and the following law firm accounts: Goodman’s Update, *Environmental Law* (July 26, 2013); Davies, *Directors and Officers Liable for Interim Clean-up Costs* (July 15, 2013); Osler, *Ontario Divisional Court Confirms that Former Directors and Officers Must Remediate While Order is Under Appeal* (July 8, 2013); & Heenan Blaikie LLP, *How Much Should Directors and Officers of Insolvent Companies Pay for Clean-Ups?* (June 21, 2013).

trustee in bankruptcy, who disclaimed its interest in it, with the result that the MOE had a secured claim for remedial and monitoring measures against the site and an unsatisfied secured claim against Northstar. The MOE then continued the remedial measures.

On 14 November 2012, soon after the stay expired, the MOE issued a further EPA Order against Northstar's 12 former directors and officers requiring them to carry out measures that the MOE had previously required Northstar to carry out at an estimated annual cost of C\$1.4 million. The MOE also claimed against them for about C\$15 million for its past and future remedial costs, contending that they knew about the contamination and had managed and controlled the site between 2003 and 2012. The EPA Order has priority to existing secured claims, meaning that if the MOE's claims are accepted, up to C\$1.75 million from the proceeds of the sale of the site would be paid to the MOE. There are, however, no bidders for the site.

The directors and officers appealed to the Environmental Review Tribunal to stay the order on the grounds that they did not cause the contamination or have the requisite control of Northstar's activities and property. The Tribunal refused, concluding that they had not established that paying remedial costs would result in irreparable harm to them. The directors and officers appealed and sought judicial review to the Ontario Divisional Court on the basis that they could not defray or recover the costs. The court rejected the appeals on the basis that an interim decision of the Tribunal is not subject to an appeal and that judicial review may only be sought following a final decision by the Tribunal. The court noted that the Environmental Protection Act specifically bars the Tribunal from staying the operation of a decision if the stay would endanger human health or safety or impair or result in a serious risk of impairment of any property, plant or animal.

However, although an overall stay was not precluded by section 143(3) of the Act since the MOE's actions in taking over the remediation work had reduced the threat to human health and safety posed by the contaminants at the site, the appellants had not shown that the financial harm they would suffer would be irreparable and this strictly financial prejudice should be weighed against the "harm to the public interest that would result from the granting of a stay."²¹³ Ironically, although the Tribunal's assessment of the "irreparable harm" factor had noted that the directors might be able to recover the costs of complying with the EPA Order from a C\$1.75 million charge on the assets of Northstar Canada, set aside in the CCAA proceedings to indemnify the directors and officers of the company ("D&O Charge");²¹⁴ it was determined by the CCAA court that the direc-

²¹³ *Baker v. Director, Ministry of the Env't, Environmental Review Tribunal Case Nos.*: 12-158 to 12-169, ¶ 88 (Can.).

²¹⁴ *Id.* ¶¶ 76 & 83; *Baker v. Director, Ministry of the Env't*, 2013 ONSC 4142, ¶ 20 (Can.).

tors and officers were “not entitled to the benefit of the D&O Charge Reserve.”²¹⁵ Moreover, the MOE’s claims against the directors and officers did not entitle it to recourse against the D&O Charge as this would enable it to improve its unsecured status by issuing EPA Orders for remediation “after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings,” thereby achieving indirectly a result which it could not achieve directly.²¹⁶

Ultimately therefore, not only were the directors and officers required to comply with the EPA Order to remediate while it was under appeal, but the litigation demonstrates the high levels of personal liability to which directors and officers are exposed in the context of environmental liability, and the inadequacy of the insolvency regime to provide relief at the expense of the priority status of creditors.²¹⁷ In contrast to cases where debtor companies and directors are exempt from liability and the cost of remediation is shouldered by public authorities, the subjection to clean-up liabilities in this case of directors who had no personal involvement in the circumstances surrounding the contamination, may be a source of some disquiet.²¹⁸ At the other extreme, the outcome may encourage regulatory authorities to more proactively seek to ensure that clean-up responsibilities are imposed on directors and officers at the earliest opportunity.

VII. DEVELOPING OTHER AVENUES OF LIABILITY

The heightened focus on directors’ liability seen above in relation to Ireland and Canada draws attention to the importance of developing other effective avenues of liability to respond to the problem of corporate environmental liability. This is considered below with respect to direct parent company liability, and the development of directors’ duties in the United Kingdom.

A. Direct Parent Company Liability

Although the ability to pierce the corporate veil to reach parent companies is extremely limited in English law,²¹⁹ the recent Court of Appeal decision in *Chandler v. Cape PLC*,²²⁰ raises the prospect of direct liability based on a parent company’s conduct. The matter involved a claim by an employee who had contracted asbestosis through his employment with a

²¹⁵ *In re Northstar Aerospace, Inc.*, 2013 ONSC 1780, ¶¶ 27-34 (Can.).

²¹⁶ *Id.* ¶ 35.

²¹⁷ *See id.* ¶¶ 16 & 34-35.

²¹⁸ C. Cornell, *Who Should Pay for Brownfield Cleanup?*, BUILDING (Aug, 1 2013); J. Gray, *Directors face prospect of unlimited liability in pollution case*, GLOBE AND MAIL (May 1, 2013), noting comment by environmental lawyer Dianne Saxe: “Really, what they are saying is, officers and directors, whether you have done anything wrong or not, retroactively, you have given a blank cheque for whatever we decide to order to you to do.”

²¹⁹ *Adams v. Cape Industries PLC*, [1990] Ch. 433 (Eng.).

²²⁰ [2012] EWCA Civ 525 (Eng.).

subsidiary of Cape PLC, and the question was thus whether Cape PLC bore any liability as the parent of the employer company. In particular, could a duty of care on the part of Cape PLC to its subsidiary's employees be established on the basis of an assumption of responsibility?²²¹ Assessing the evidence, the court found that Cape PLC owed a direct duty of care to the employees, and that this case demonstrated that

in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case:

- (1) the businesses of the parent and subsidiary are in a relevant respect the same;
- (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
- (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.²²²

The decision is expected to pave the way for more cases to be brought against parent companies arising from the operations of their subsidiaries where it can be shown that the parent company's conduct justifies the imposition of liability.²²³ It furthermore highlights, in corporate group contexts and parent/subsidiary relationships, the implications of sharing information or technical knowledge.²²⁴ The outcome is thus strongly relevant from an environmental protection perspective, and although it remains to be seen whether – and how – this approach might develop beyond the field of health and safety, particularly in relation to late-manifesting harms or damage; it accords with the U.S. approach to direct liability of parent companies. In *United States v. Bestfoods*,²²⁵ an action for the costs of cleaning up industrial waste, the U.S. Supreme Court held that “a corporate parent that actively participated in, and exercised control over, the operations of [a polluting facility owned and operated by the subsidiary]

²²¹ *Id.* ¶ 62.

²²² *Id.* ¶ 80.

²²³ Brian Cain, *Parent's Liability for a Subsidiary*, 36 COMPANY SEC'Y'S REV. 7, 54, 55 (2012); see also Rehana Azib, *Health and Wealth*, [2012] NEW L.J. 798 (from health and safety perspective, factual scenario in *Chandler* is unlikely to arise in future due to compulsory insurance for employers since 1972).

²²⁴ See, e.g., Martin Petrin, *Assumption of Responsibility in Corporate Groups: Chandler v Cape PLC*, 76 MODERN L. REV. 589, 618 (2013) (“Cape would have been better off and could possibly even have escaped liability had it not conducted any asbestos and health related research and had it taken a decidedly ‘hands-off’ approach to health issues arising in group companies”).

²²⁵ 524 U.S. 51 (1998).

Environmental Claims and Insolvent Companies

may be held directly liable in its own right as an operator of the facility”;²²⁶ “The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary.”²²⁷ By comparison, activities involving the facility which were consistent with the parent company’s role as investor, “such as monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures,” would not invoke direct liability.²²⁸ The central issue was whether “in degree and detail,” actions directed at the facility on behalf of the parent company were “eccentric under accepted norms of parental oversight of a subsidiary’s facility.”²²⁹

Bestfoods shows that a parent company may be directly liable as an “operator” on a construction of relevant environmental legislation,²³⁰ quite independently of the application of tort-based concepts of responsibility seen in *Chandler*. Direct liability recognizes the strong influence exerted by parent companies on the activities of their subsidiaries.²³¹ The decision in *Chandler* has moreover drawn attention to the importance of tort law as an instrument for environmental protection. Tort law, as a compensation and risk-control mechanism,²³² supports the goals of environmental protection in two significant ways:

Tort law allows the victims of irresponsible corporate conduct to bring actions against the enterprise and to seek damages for the harm caused by business activities. This results not only in the direct compensation of injured parties but also forces corporations to incorporate negative externalities into the costs of their business activities. This provides a disincentive to the externalization of risks, deters corporations from engaging in overly risky activities and motivates corporations to apply and monitor certain corporate standards.²³³

Nevertheless, it is acknowledged that as a mechanism focused on offering redress in respect of harm to persons and property, tort law is “ill equipped to deal with environmental issues.”²³⁴ This includes situations

²²⁶ *Id.* at 55.

²²⁷ *Id.* at 68 (quoting Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASH. U.L. QUARTERLY 223, 269 (1994)).

²²⁸ *Id.* at 72 (quoting Oswald, *supra* note 211, at 282).

²²⁹ *United States v. Best Foods*, 524 U.S. at 72.

²³⁰ CERCLA in this case.

²³¹ See Bastian Reinschmidt, *The Law of Tort: A Useful Tool to Further Corporate Social Responsibility?*, [2013] COMPANY LAW 103, 108 (direct liability provides grounds for treating parent companies as sole/joint tortfeasors); cf. Petrin, *supra* note 224, at 612-13 (critiquing control factor considered in *Chandler*).

²³² See Reinschmidt, *supra* note 231, at 106.

²³³ *Id.*

²³⁴ *Id.* at 110.

where, for instance, the damaged natural resources are un-owned²³⁵ or no person is affected.²³⁶ Although strong arguments can be made in favor of expanding the scope of tort law to provide protection for environmental interests,²³⁷ its inherent limitations may prevent it from playing a major role in this context. Tort law focuses on harm rather than risks,²³⁸ and as a mechanism aimed at cure rather than prevention,²³⁹ encounters difficulties such as establishing causation and responsibility in complex cases²⁴⁰ and the quantification of harm.²⁴¹ An alteration to “the internal conceptual and normative geography of tort law”²⁴² would be necessary to overcome its principal fault-liability base,²⁴³ and its emphasis on harm to persons.²⁴⁴ Suggestions include “extending the catalogue of rights” recognized by tort law to encompass individual interests in the environment, and imposing forms of strict liability for more hazardous activities.²⁴⁵ For the time being however, the ability to pursue a parent company as sole/joint tortfeasor²⁴⁶ as seen in *Chandler*, provides a significant advantage bearing in mind the low incidence of veil-piercing with respect to tort claims.²⁴⁷ Tort law can thus enable reparation to be provided which would otherwise be unavailable as a result of the operation of established principles of corporate law, such as separate legal personality.²⁴⁸

²³⁵ See Michael Anderson, *Transnational Corporations and Environmental Damage : Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 409 (2002).

²³⁶ See Reinschmidt, *supra* note 231, at 106.

²³⁷ See *id.* at 110-11; Anderson, *supra* note 235, at 408-10.

²³⁸ Peter Cane, *Using Tort Law to Enforce Environmental Regulations?*, 41 WASHBURN L.J. 427, 429 (2002).

²³⁹ *Id.* at 441.

²⁴⁰ Anderson, *supra* note 235, at 409.

²⁴¹ *Id.* at 410.

²⁴² Reinschmidt, *supra* note 231, at 110.

²⁴³ Cane, *supra* note 238, at 448.

²⁴⁴ *Id.*; Reinschmidt, *supra* note 231, at 110.

²⁴⁵ Reinschmidt, *id.*

²⁴⁶ See *id.* at 108 (proposing same).

²⁴⁷ Charles Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, 3 CO. FINANCIAL & INSOLVENCY L. REV. 15, 24 (1993); see U.S. study by Robert Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1058 (1991); and in Australia by Ian M. Ramsay & David B. Noakes, *Piercing the Corporate Veil in Australia*, 19 CO. & SECURITIES L.J. 250-71 (2001), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=299488 at 2 (last visited Sept. 14, 2013).

²⁴⁸ See David M. Ong, *The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives*, 12 EUROPEAN J. INTL. L. 685, 698 (2001) (“established corporate legal principles such as that which provides for the separate legal personality of different companies within the same group of companies prevent the imposition of corporate environmental liability on the whole group”).

Environmental Claims and Insolvent Companies

B. Incorporation of Environmental Concerns into Directors' Duties in the United Kingdom

The necessity for finding ways to surmount the barriers presented by traditional corporate law principles is further demonstrated by the U.K. experience of the introduction of a statutory duty for directors to promote the company's success with regard to various factors, including "the impact of the company's operations on the community and the environment."²⁴⁹ Viewed against the backdrop of proposals for the reform of corporate governance to "include incorporation of environmental concerns within the scope of directors' duties, either explicitly by legislation, or implicitly by the extension of fiduciary duties owed to the company"²⁵⁰ it may be seen as a progressive step.²⁵¹ However, a reading of the provision shows that

In construing the statutory list of factors relevant to determine whether a director acted to promote the success of the company, it is essential to interpret the constituent parts of the list in the context of promoting the best interests of company shareholders. In the context of shareholder interests, one would imagine, although it is not specifically alluded to in the list of factors to be considered, that success will continue to be viewed primarily in a commercial context, so measured by the profitability of the company and its ability to declare healthy dividends.²⁵²

In promoting the company's success "for the benefit of its members as a whole," it is not evident whether a director will be liable for a breach of the section 172 duty if despite "generating profits and a healthy dividend, matters relevant to . . . the community, environment or future business reputation of the company are only afforded a negligible or indeed nil consideration."²⁵³ These misgivings are reinforced by the outcome of an early attempt to enforce this aspect of the section 172 duty in the case of *R. (on the application of People and Planet) v. H.M. Treasury*.²⁵⁴ This involved an

²⁴⁹ Companies Act 2006, c. 46, § 172(1)(d).

²⁵⁰ Ong, *supra* note 248, at 692.

²⁵¹ MARK STALLWORTHY, UNDERSTANDING ENVIRONMENTAL LAW (2008), 185; Cynthia A. Williams & John M. Conley, *Triumph or Tragedy? The Curious Path of Disclosure Reform in the U.K.*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 317, 320 (2007).

²⁵² Stephen Griffin, *The Regulation of Directors under the Companies Act 2006*, [2008] CO. L. NEWSLETTER 1, 2. The relevant subsection reads "172(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to— (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company." *Id.*

²⁵³ Griffin, *supra* note 252, at 2.

²⁵⁴ [2009] EWHC 3020 (Q.B.D. Admin.) (Eng.).

application by People and Planet, an organization campaigning for action on climate change and respect for human rights, to bring judicial review proceedings in relation to the policy adopted by H.M. Treasury with regards to the Government's 70 per cent shareholding in the Royal Bank of Scotland ("RBS") acquired as a result of substantial financial support provided during the market turmoil of 2008. The court rejected the argument that H.M. Treasury should have sought to impose its policies vis-à-vis combating climate change and the promotion of human rights on RBS' Board of Directors on the ground that it "would clearly have a tendency to come into conflict with, and hence would cut across, the duties of the RBS Board as set out in section 172(1),"²⁵⁵ including their statutory obligation "to manage the company for the benefit of the shareholders as a whole and acting fairly as between them."²⁵⁶ It would furthermore give rise to "a real risk of litigation" by minority shareholders complaining that the Government's efforts to impose its policy on the Board of RBS had detrimentally affected the value of their shares.²⁵⁷ Decisions regarding the management of RBS were matters for the judgment of the directors of RBS.²⁵⁸ While H.M. Treasury could "properly seek to influence the Board of RBS to have regard to environmental and human rights considerations in accordance with the Board's duty under section 172," the pursuit of a more interventionist policy would create a risk of pressing the RBS Board beyond the limits of their own duties.²⁵⁹ The case may thus be seen as illustrating the extent to which section 172 "has raised expectations that it cannot deliver," and the ineffectuality of company law as a "vehicle for the achievement of environmental or human rights objectives beyond what the law requires generally."²⁶⁰ It also weakens somewhat the prospect that stakeholders to whom no direct duty is owed under section 172 may still bring judicial challenges against deficiencies in directors' decision-making with respect to "stakeholder regard and engagement."²⁶¹ Recent empirical research has found that in well-run companies engagement with stakeholders can surpass the "mere consideration of interests" indicated in section 172, encompassing "consultation and feedback, resulting in a loop of continuous learning and modification on the part of the company."²⁶² Thus while the impact of section 172 appears limited by virtue of its construction and enforceability,²⁶³

²⁵⁵ *Id.* ¶ 34.

²⁵⁶ *Id.* ¶ 2.

²⁵⁷ *Id.*

²⁵⁸ *Id.* ¶ 35.

²⁵⁹ *Id.*

²⁶⁰ Stephen Copp, *S.172 of the Companies Act 2006 Fails People and Planet?*, [2010] Co. LAW. 406, 408.

²⁶¹ Ahmed Al-Hawamdeh, Iris Chiu, Marc Goergen, Christine Mallin & Eve Mitleton-Kelly, *The Interpretation of the Directors' Duty under Section 172 Companies Act 2006: Insights from Complexity Theory*, [2013] J. BUS. L. 417, 430 & 432.

²⁶² *Id.* at 432.

²⁶³ See, e.g., analysis by Carrie Bradshaw, *The Environmental Business Case and Enlightened Shareholder Value*, [2012] LEGAL S. 1; Charlotte Villiers, *Directors' Duties*

Environmental Claims and Insolvent Companies

it may nevertheless assist in exerting a positive influence on corporate processes and conduct.

The possibility of an expansive application of section 172 is furthermore hampered by the dual role of the provision. It not only forms an express duty for directors, but within the statutory framework for the overall enforcement of directors' duties through a derivative action, the view of a director acting in accordance with section 172 presents a mandatory and a discretionary bar to a court's permission to continue a derivative claim. That is to say, where a member of the company seeks permission to continue a derivative claim under section 261 or section 262, a court *must* dismiss the application if it is satisfied (*inter alia*) that a person acting in accordance with section 172 would not seek to continue the claim; or if the application is not precluded by one of the mandatory bars to continuance in section 263(2), the court *must take into account (inter alia)* the importance that a person acting in accordance with section 172 would attach to continuing the claim.²⁶⁴ The cases applying this "hypothetical director" test show that it has been strongly influential in the development of the recently-introduced statutory derivative action.²⁶⁵ Of particular interest is the judicial implementation of the test with reference to factors centered on the financial and commercial consequences of the proceedings for the company:

They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (*e.g.* by losing the services of a valuable employee or alienating a key supplier or customer) and so on.²⁶⁶

Notably, "[t]he weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a

and the Company's Internal Structures Under the UK Companies Act 2006: Obstacles for Sustainable Development, (2010) Univ. Oslo Faculty of Law Legal Studies Research Paper Series No. 2010-03; Deryn Fisher, *The Enlightened Shareholder – Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of Their Decisions on Third Parties?*, [2009] INTL. CO. & COM. L. REV. 10.

²⁶⁴ Companies Act 2006, c.46, §§ 263(2)(a), 263(3)(b) (Eng.).

²⁶⁵ See *id.*, c. 46, pt. 11 (Eng.); *Franbar Holdings v. Patel*, [2008] EWHC 1534 (Eng.); *Mission Capital v. Sinclair*, [2008] EWHC 1339 (Eng.); *Stimpson v. Southern Private Landlords Ass'n.*, [2009] EWHC 2072 (Eng.); *Iesini v. Westrip Holdings Ltd.*, [2009] EWHC 2526 (Eng.); *Kiani v. Cooper*, [2010] EWHC 577 (Eng.); *Stainer v. Lee*, [2010] EWHC 1534 (Eng.); *Kleanthous v. Paphitis*, [2011] EWHC 2287 (Eng.); *Parry v. Bartlett*, [2011] EWHC 3146 (Eng.).

²⁶⁶ *Iesini v. Westrip Holdings Ltd.*, [2009] EWHC 2526, ¶ 85 (Eng.); adopted in *Kiani v. Cooper*, [2010] EWHC 577, ¶ 13 (Eng.); and *Stainer v. Lee*, [2010] EWHC 1534, ¶ 27 (Eng.).

clear case.” Therefore the courts remain “wary of . . . substituting their judgment for the business judgment of directors,”²⁶⁷ but it is clear that their perspective of the hypothetical directors’ views is shaped by the direct interests of the company rather than much wider considerations. Human rights, community and environmental issues may be treated as “external to the company” while those pertaining to “employees and creditors are internal.”²⁶⁸ For the moment, it seems that corporate social responsibility concerns “will be considered by a court if the claimant can establish a direct benefit to the company through bringing a claim.”²⁶⁹ The courts’ endorsement of a stakeholder-driven performance by directors of their section 172 duty to promote the company’s success would thus sit uncomfortably with the status of the hypothetical director test as a check on the enforcement of directors’ duties generally.

In the absence of a directors’ duty which sanctions “profit-sacrificing behavior motivated by environmental concerns”²⁷⁰ and complementary ease of enforcement, it is also arguable that the prospect of criminal liability provides stronger incentives for directors to comply with environmental requirements. With respect to the EPA 1990 for instance, which provides for corporate and personal criminal liability where an offence “is proved to have been committed with the consent or connivance of, or . . . attributable to any neglect on the part of any director, manager, secretary or other similar officer,”²⁷¹ it is noted that the presence of sound environmental management systems may provide a defense.²⁷² This is particularly relevant to offences which do not provide for strict liability, but are couched in terms of reasonableness, practicability and diligence.²⁷³ Ong makes a similar observation in relation to fault-based criminal liability, that

where a corporate offence has in fact been committed, it will be very difficult to avoid a finding of negligence on the part of one or more of the directors or other company officers, unless there is convincing evidence of the existence and efficient operation of sound and comprehensive corpo-

²⁶⁷ Al-Hawamdeh, *et al.*, *supra* note 261, at 432.

²⁶⁸ David Gibbs, *Has the Statutory Derivative Claim Fulfilled its Objectives? The Hypothetical Director and CSR*, [2011] CO. LAW. 76, 80; *see also* Bradshaw, *supra* note 263, at 155 (“company is a ‘club’, where shareholders are . . . in the club, and non-shareholding stakeholders deal with the company from the outside”).

²⁶⁹ Gibbs, *supra* note 268, at 82.

²⁷⁰ Bradshaw, *supra* note 263, at 16-17.

²⁷¹ EPA, § 157(1). All the major environmental legislation in the United Kingdom includes similar liability provisions for directors and officers. *See, e.g.*, Water Resources Act 1991, c. 57, § 217(1), *as amended by* Water Act 2003, sched. 7, ¶ 12 (Eng. & Wales); Environmental Permitting (England and Wales) Regulations 2010, S.I. 2010/675, reg. 41.

²⁷² *See* Valerie Hall, *When Pollution Leads to Prosecution*, [1997] 7 ESTATES GAZETTE 131.

²⁷³ *See id.*

Environmental Claims and Insolvent Companies

rate environmental management systems designed to ensure full compliance with the law.²⁷⁴

It has been held by a U.K. court that the policy underlying provisions relating to corporate offences is to “encourage those who direct or control [companies or corporate bodies] to promote the purposes of the legislation as a whole.”²⁷⁵ Consequently, a director may be prosecuted in accordance with the EPA 1990 without the company having been convicted of the offence or prosecuted in the same proceedings.²⁷⁶ This is in keeping with the notion that environmental statutes seek to promote responsible conduct and are often underpinned by the philosophy that environmental harm is avertible.²⁷⁷ The treatment of environmental offences is further supported by the formal oversight and review of sentencing practices, to ensure clarity and consistency.²⁷⁸ The desire to avoid criminal liability should encourage boards of directors to pursue “sound corporate environmental management policy” which “transcends mere compliance with environmental law and becomes intrinsic to the overall corporate policy decision-making structure.”²⁷⁹ This deterrent effect is reinforced by the exposure of directors who have been convicted of an indictable offence in connection with the management of a company, to disqualification from the promotion, formation, or management of another company without the leave of the court, under the U.K. Company Directors Disqualification Act 1986.²⁸⁰ Corporate environmental management systems therefore not only contribute to the protection of companies and their officers from possible environmental liability, but enable them to strengthen their corporate reputation, and gain a competitive advantage as well as “strategic data for longer

²⁷⁴ Ong, *supra* note 248, at 706.

²⁷⁵ *Maclachlan v. Harris*, 2009 S.C.C.R. 783, ¶ 11 (High Court of Judiciary) (Scot.).

²⁷⁶ EPA 1990, § 157(1) (“Where an offence under any provision of this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly”).

²⁷⁷ Lucia Ann Silecchia, *Pinning the Blame and Piercing the Veil in the Mists of Metaphor: the Supreme Court’s New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform*, 67 *FORDHAM L. REV.* 115, 185-86 (1998).

²⁷⁸ *See, e.g.*, Sentencing Council, *Environmental Offences Guideline Consultation* (Crown, 2013) (Eng.).

²⁷⁹ Ong, *supra* note 248, at 707.

²⁸⁰ Section 2(1) reads: (1) The court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management, liquidation or striking off of a company, with the receivership of a company’s property or with his being an administrative receiver of a company. Company Directors Disqualification Act 1986, c. 46, § 2(1); *see* Hall, *supra* note 272.

term business planning.”²⁸¹ Exposure to criminal sanctions in insolvency may, by contrast, bring the interests of the company and its management into direct conflict with their environmental responsibilities, as seen in the recent liquidation of the Scottish Coal Company Ltd., in which the liquidators’ concern that the risks associated with open cast mining sites “could involve potential liabilities which could incur criminal penalties” was among the factors justifying the disclaimer of certain sites and statutory licenses shortly after the commencement of the liquidation.²⁸²

VIII. MINIMIZING THE IMPACT OF ENVIRONMENTAL INSOLVENCIES IN PRACTICE

Recent U.K. liquidations demonstrate the extent to which efforts are made in practice to reduce the impact of environmental insolvencies. For the Scottish Coal Company Ltd. and U.K. Coal Operations Ltd., discussed in Part IV above, entry into liquidation provided a means of protecting the insolvent estate from depletion through compliance with on-going clean-up or maintenance obligations. In *Re Directions, Nimmo*,²⁸³ involving the disclaimer by Scottish Coal Company (“SCC”) of some of its sites and statutory licenses or permits, it was acknowledged that:

SCC’s directors applied for the company to be wound up rather than appoint an administrator because it was insolvent and did not wish the cost of performing its environmental obligations to use up the funds realized from the sale of its assets. . . . The [liquidators] wish to protect SCC’s unsecured creditors and the bank, as holder of the floating charge, from the dissipation of the proceeds of disposal of SCC’s assets which continued performance of the statutory obligations will entail.²⁸⁴

The funds available would meet the considerable cost of maintaining the sites under the liquidators’ control (which had gone down from £1.4 million to £478,000 following the sale of several sites) for no more than 20 to 22 months.²⁸⁵ Compared with the estimated £10.5 million to be raised from the realization of assets, the costs of restoring the sites in accordance with SCC’s obligations would be about £73 million.²⁸⁶ Similarly, U.K. Coal’s liquidators justified the disclaimer of a colliery destroyed by fire immediately following their appointment on the basis that this “was a high risk site with substantial liabilities attaching to it. The costs of securing and holding the mine (which we expected to exceed £100,000 per week) would

²⁸¹ Ong, *supra* note 248, at 708.

²⁸² See *Opencast Mining in East Ayrshire – Update (Report by Chief Executive)*, East Ayrshire Council Cabinet, May 24, 2013, ¶ 8.

²⁸³ [2013] C.S.O.H. 124 (Scot.) (appeal pending).

²⁸⁴ *Id.* ¶¶ 6 & 7.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

have been an expense and, as such, these costs would have been paid ahead of the dividend to creditors.”²⁸⁷

However, an examination of both insolvencies also reveals that disclaimer was effected in the context of transactions encompassing sales of other assets, making it possible for some business operations and employment to be preserved.²⁸⁸ U.K. Coal first entered administration, a statutory procedure whose primary goal is the rescue of the company as a going concern,²⁸⁹ and completed a restructuring which included the transfer of the majority of its business and assets and a compromise with major creditors, before entering liquidation and disclaiming the damaged mine.²⁹⁰ To expedite the formal administration procedure, which only lasted a few days, the administrators were excused by the High Court²⁹¹ from compliance with the statutory requirements to send out proposals for achieving the purposes of the administration,²⁹² and convening an initial creditors’ meeting²⁹³ on the basis of commercial necessity. As part of what the court described as “restructuring following sophisticated advice,”²⁹⁴ the national Pension Protection Fund (“PPF”) took over U.K. Coal’s £543 million pension deficit.²⁹⁵ In return, it would receive payments in the form of debt instruments from the new company to which the viable mining operations had been transferred, which were “expected, over time, to be materially higher than any sum it would have received” had the company simply gone into liquidation.²⁹⁶

In similar vein, the acquisition of assets from SCC and another liquidating company Aardvark (TMC) Ltd. was structured in a way which sought to combine the immediate purchase of viable sites with the longer-term absorption of sites requiring restoration.²⁹⁷ Independently of the sale

²⁸⁷ *Ocanti Opco Ltd. - in Liquidation (formerly UK Coal Operations Limited)*, PwC, <http://www.pwc.co.uk/business-recovery/administrations/ukcoal/index.jhtml> (last visited Aug. 27, 2013).

²⁸⁸ *See id.*; *see also* Robbie Dinwoodie, *Hundreds of Jobs to be Saved as Coal Mines are Transferred*, HERALD SCOTLAND (July 6, 2013).

²⁸⁹ IA 1986, ¶ 3(1), Sched. B1 (U.K.).

²⁹⁰ *See* PwC statement, *supra* note 287.

²⁹¹ *In re U.K. Coal Operations Ltd* [2013] EWHC 2581.

²⁹² IA 1986, ¶ 49, Sched. B1 (U.K.).

²⁹³ IA 1986, ¶ 51, Sched. B1 (U.K.).

²⁹⁴ *In re U.K. Coal Operations Ltd* [2013] EWHC 2581, para [2].

²⁹⁵ Andrew Bounds, *PPF to Take on U.K. Coal Pensions*, FINANCIAL TIMES (June 29, 2013).

²⁹⁶ Press Release, *UK Coal and the Pension Protection Fund*, PENSION PROTECTION FUND (July 9, 2013),

<http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemid=329&archive=1>. *See generally* Briefing Note, *Making a Recovery* (describing role in company restructurings), PENSION PROTECTION FUND,

http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/Making_a_recovery.pdf (last visited Sept. 2, 2013).

²⁹⁷ *See* news releases by the purchaser Hargreaves Services plc, *Acquisition of Assets from Aardvark (TMC) Limited (in creditors’ voluntary liquidation)* (May 16, 2013),

of secured debt, movable and immovable property, the two insolvent companies' interest in problematic sites was hived down to companies owned by them ("HiveCos") with the aim of addressing "outstanding restoration liabilities."²⁹⁸ The purchaser, Hargreaves Services plc., ("HSP") would support mining activities at the HiveCo sites,²⁹⁹ in addition to gaining exclusive options for the future purchase of shares in the HiveCos.³⁰⁰ These options would be exercised to take over the HiveCos and integrate them into HSP's corporate group if the "outstanding restoration issues [were] resolved on commercially acceptable terms."³⁰¹ It was observed on behalf of HSP that a restructuring process of this kind "significantly reduced" the number of properties requiring disclaimer by the liquidators.³⁰² This indicates that there is scope for pragmatic solutions to evolve in response to environmental liabilities, and such solutions may be more heavily reliant on contractual techniques. Confining our concerns to the problems associated with disclaimer risks obscuring the related transactions within a bespoke company rescue initiative. It furthermore creates the danger that legal reforms focused on particular aspects of the treatment of environmental liability in insolvency may undermine the flexibility and effectiveness of the practical solutions which are currently being deployed.

IX. CONCLUSIONS

While the reach of the polluter pays principle has been extended from the international trade context to national regimes for the remediation of contamination from historic pollution, company and insolvency law remain remarkably untouched. Although the discussion in Part II demonstrates differing approaches between the United States and the United Kingdom to this issue, strong similarities are identifiable between many of the difficulties which arise in insolvency/bankruptcy proceedings. These include the discharge of liabilities through re-organization and the abandonment or disclaimer of burdensome property, and have been shown to be pertinent to other common law jurisdictions including Canada, Ireland, Australia and New Zealand. The case authorities from these jurisdictions are linked by the limited application of the polluter pays principle in the

<http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-item&item=1508983072358950> and *Acquisition of Assets from The Scottish Coal Company Limited in Liquidation* ("Scottish Coal"), (July 5, 2013), <http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-item&item=1546188226560000>.

²⁹⁸ *Id.*

²⁹⁹ *Id.* (care and maintenance in case of SCC; and mining services, production and marketing of coal with respect to Aardvark).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See Hargreaves Services PLC, RNS No. 8376E (May 16, 2013) (statement of Chief Executive Officer Gordon Banham), *available at* <http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-item&item=1508983072358950>, (last visited Sept. 2, 2013).

Environmental Claims and Insolvent Companies

context of insolvency proceedings. The successful imposition of directors' liability in recent Irish and Canadian cases has leaned heavily on the role of the environmental legislation, rather than the intervention of company or insolvency law.

At the same time, the pre-occupation with the relationship between the principle of limited liability and the protection of the environment³⁰³ reflects an expectation that insofar as environmental harm is caused by companies, company law will provide a means of resolving it. It therefore remains crucial to examine developments in this field in light of their implications for environmental protection. This includes the recognition of direct parent company liability, and developments in corporate governance which give rise to some anticipation of the emergence of a directors' duty to protect environmental interests³⁰⁴ – especially at present when consideration is being given by the U.K. Government to proposals for strengthening the regulation of directors by amending their statutory duties for key sectors, enabling regulators to disqualify directors in their sector; and permitting material breaches of relevant sectoral regulation, together with the scale of loss suffered by creditors and impact on wider society, to be taken into account in disqualification proceedings.³⁰⁵ Targeting parent company and managerial decision-making vis-à-vis a company's activities³⁰⁶ can contribute to the development of more responsible conduct on the part of its controllers, while other areas of law such as tort law and criminal law can likewise play an important part in improving business practices and expanding corporate environmental liability.

The restructuring activities of the Scottish Coal Company and U.K. Coal Ltd. demonstrate the potential for creative practical responses to environmental insolvencies, which place limited reliance on formal procedures. More soberingly though, they indicate that high site maintenance and restoration costs are seen as destructive to attempts to rescue the business and in fact encourage recourse to liquidation proceedings for the purpose of disclaiming sites and licenses. This dichotomy exemplifies the continuing challenge for the various national regimes outlined in this paper, of working towards a more collaborative relationship between environmental, company and insolvency law.

³⁰³ See, e.g., Dent, Jr., *supra* note 193; Bakst, *supra* note 193; Cindy Schipani, *Infiltration of Enterprise Theory into Environmental Jurisprudence*, 22 J. CORP. L. 599, 614-19 (1997).

³⁰⁴ Ong, *supra* note 248, at 688, 723-24.

³⁰⁵ *Transparency & Trust: Enhancing the Transparency of U.K. Company Ownership and Increasing Trust in U.K. Business*, Discussion Paper (Department for Business Innovation and Skills, July 2013).

³⁰⁶ See, e.g., Silecchia, *supra* note 277, at 194 (focus in *Bestfoods* on facility “forces courts to inquire into the actual process of environmental decision-making”); *id.* at 172 (decision placed “attention where it should be: on the connection between parent companies and contaminated sites, not in the artificial corporate connections between parents and subsidiaries”).



British Journal of American Legal Studies
Birmingham City University School of Law
City North Campus, Birmingham, B42 2SU
United Kingdom

www.bcu.ac.uk/bjals