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# A CENTURY IN THE MAKING: THE GLORIOUS REVOLUTION, THE AMERICAN REVOLUTION, AND THE ORIGINS OF THE U.S. CONSTITUTION'S EIGHTH AMENDMENT

John D. Bessler\*

## ABSTRACT

The sixteen words in the U.S. Constitution's Eighth Amendment have their roots in England's Glorious Revolution of 1688–89. This Article traces the historical events that initially gave rise to the prohibitions against excessive bail, excessive fines, and cruel and unusual punishments. Those three proscriptions can be found in the English Declaration of Rights and in its statutory counterpart, the English Bill of Rights. In particular, the Article describes the legal cases and draconian punishments during the Stuart dynasty that led English and Scottish parliamentarians to insist on protections against cruelty and excessive governmental actions. In describing the grotesque punishments of Titus Oates and others during the reign of King James II, the Article sheds light on the origins of the language of Section 10 of the English Bill of Rights. That language became a model for similarly worded provisions in early American constitutions and declarations of rights, including the Virginia Declaration of Rights, that were linguistic forerunners of the Eighth Amendment. The U.S. Constitution's Eighth Amendment, ratified in 1791, became the law of the land more than 100 years after the Glorious Revolution, though that provision of the U.S. Bill of Rights was shaped by the Enlightenment as well as by early American understandings of English law and custom. The Article describes the seventeenth-century origins of the Eighth Amendment's prohibitions and the Enlightenment's impact on eighteenth-century thinkers, while highlighting how existing American prohibitions against excessive bail, excessive fines, and cruel and unusual punishments are now understood to bar acts inconsistent with "the evolving standards of decency that mark the progress of a maturing society." The Article concludes by outlining the implications of the Eighth Amendment's history for modern American jurisprudence. In doing so, it provides a critique of the U.S. Supreme Court's recent Eighth Amendment decision in *Bucklew v. Precythe*.

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## INTRODUCTION

The meaning of the U.S. Constitution's Eighth Amendment has long been treated as an enigma.<sup>1</sup> Since its ratification in 1791, the significance of the Eighth Amendment's sixteen words<sup>2</sup> has been fiercely debated—and hotly contested—by innumerable scholars and law professors,<sup>3</sup> countless judges,<sup>4</sup> practicing lawyers,<sup>5</sup> and members of the American public more broadly.<sup>6</sup> It is a debate with important, sometimes life-or-death, consequences,<sup>7</sup> and it is one that has played out in countless law review

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<sup>1</sup> See Joseph L. Hoffmann, "The 'Cruel and Unusual Punishment' Clause," in *THE BILL OF RIGHTS IN MODERN AMERICA* 173 (David J. Bodenhamer & James W. Ely, Jr. eds., rev. & expanded ed. 2000) ("The cruel and unusual punishment clause of the Eighth Amendment today remains a constitutional enigma.").

<sup>2</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>3</sup> Compare RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 1–6 (1982) (arguing that the Supreme Court's 5–4 decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which declared the death penalty to be a "cruel and unusual" punishment, was wrongly decided), with HUGO ADAM BEDAU, *KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA* 91 (2004) (arguing that "an appropriate moral reading of the Eighth Amendment yields the conclusion that the death penalty is, indeed, unconstitutional"). A number of prominent scholars have written about the Eighth Amendment. See, e.g., Deborah W. Denno, *Execution and the Forgotten Eighth Amendment*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 547–77 (James Acker, Robert Bohm & Charles Lanier eds., 1998); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009); Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817 (2016); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567 (2010).

<sup>4</sup> Compare *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes."), with Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 523 (2017) ("[F]or over a half-century, at least thirty-five federal and state judges have concluded that the death penalty is unconstitutional per se.").

<sup>5</sup> See, e.g., COLIN DAYAN, *THE STORY OF CRUEL AND UNUSUAL* (2007).

<sup>6</sup> See, e.g., Bob Herbert, *In America; Cruel and Unusual*, N.Y. TIMES (Mar. 8, 2001), <https://nyti.ms/2IByrwG>; Carl Hiaasen, *Cruel and Unusual Ways of Execution*, MIAMI HERALD (May 3, 2014), <https://www.miamiherald.com/opinion/opn-columns-blogs/carl-hiaasen/article1963811.html> [<http://perma.cc/9H2L-UGT3>].

<sup>7</sup> See generally JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* (2012) [hereinafter BESSLER, *CRUEL AND UNUSUAL*]; MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2011) (discussing the history and development of the Eighth Amendment).

articles,<sup>8</sup> in state and federal courts,<sup>9</sup> and before the highest court in the land, the Supreme Court of the United States.<sup>10</sup>

Although the Eighth Amendment's prohibitions originally applied only against the federal government,<sup>11</sup> the U.S. Supreme Court—using its selective incorporation doctrine<sup>12</sup>—made the ban on “cruel and unusual punishments” applicable against the

<sup>8</sup> See, e.g., William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105 (2018); Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113 (2016); Phyllis Goldfarb, *Arriving Where We've Been: Death's Indignity and the Eighth Amendment*, 102 IOWA L. REV. BULL. 386 (2018); Scott W. Howe, *The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail*, 43 HOFSTRA L. REV. 1039 (2015); Robert Johnson, *Solitary Confinement Until Death by State-Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process*, 73 WASH. & LEE L. REV. 1213 (2016); Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129.

<sup>9</sup> See, e.g., Larry C. Berkson, *The Eighth Amendment: A New Frontier of Creative Constitutional Law*, in CIVIL LIBERTIES: POLICY AND POLICY MAKING 107 (Stephen L. Wasby ed., 1976):

[T]he concept of cruel and unusual punishment has, until very recently, remained an obscure, if important, part of the Bill of Rights. For example, after an exhaustive search of opinions reported prior to 1870, only 20 cases were found that dealt with the prohibition. Beginning with that date, however, larger number of cases raising the issue did begin appearing before state and federal courts. The total by 1916 was slightly over 200 cases. The number of cases reported during each subsequent ten-year period rose in rather even increments until the 1955–66 era. At that time, litigation of the inhibition nearly doubled (253 cases).

<sup>10</sup> See generally CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016) (focusing on the Eighth Amendment as interpreted historically by the Supreme Court).

<sup>11</sup> See *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); see also GEORGE F. COLE, CHRISTOPHER E. SMITH & CHRISTINA DEJONG, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 169 (15th ed. 2017) (“For most of U.S. history, the Bill of Rights did not apply to most criminal cases, because it was designed to protect people from abusive actions by the federal government.”).

<sup>12</sup> See KÄREN MATISON HESS & CHRISTINE HESS ORTHMANN, *INTRODUCTION TO LAW ENFORCEMENT AND CRIMINAL JUSTICE* 55 (10th ed. 2012) (“The selective incorporation doctrine holds that only those provisions of the Bill of Rights fundamental to the American legal process are made applicable to the states through the due process clause.”); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1327 (1977) (noting that, under the selective incorporation doctrine, “once it is decided that a particular guarantee is fundamental, that guarantee is incorporated into the Fourteenth Amendment ‘whole and intact’ and is enforced against the states by the same standards applied to the federal government”); see also David Sloss, *Incorporation, Federalism, and International Human Rights*, in HUMAN RIGHTS AND LEGAL JUDGMENTS: THE AMERICAN STORY 84–85 (Austin Sarat ed., 2017) (discussing the Supreme Court’s selective incorporation doctrine).

states in 1962<sup>13</sup> in *Robinson v. California*.<sup>14</sup> In 1971, consistent with the history surrounding the Fourteenth Amendment's post-Civil War ratification,<sup>15</sup> the U.S.

<sup>13</sup> William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977) (noting that “[t]he eighth amendment’s prohibition of cruel and unusual punishment was applied to state action in 1962 . . . .” (citing *Robinson v. California*, 370 U.S. 660 (1962))).

<sup>14</sup> 370 U.S. 660 (1962). See also NANCY D. CAMPBELL, *DISCOVERING ADDICTION: THE SCIENCE AND POLITICS OF SUBSTANCE ABUSE RESEARCH* 135 (2007) (“The U.S. Supreme Court interpreted addiction as a condition akin to illness in *Robinson v. California* (1962), opining that ‘even one day in prison would be a cruel and unusual punishment for the “crime” of having a common cold.’”).

<sup>15</sup> John D. Bessler, *The Inequality of America’s Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 541 (2016) [hereinafter Bessler, *The Inequality of America’s Death Penalty*]. See also 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, 83 (2008) (“Thirty-four states—or an Article V, three-quarters consensus—in 1868 had clauses in their state constitutions that banned cruel and unusual punishments.”); *id.* (“Ninety-one percent of all Americans in 1868—again a huge supermajority—lived in states with bans on cruel and unusual punishments.”). Even before the Fourteenth Amendment’s ratification, the prohibition against “cruel and unusual punishments” was being interpreted in northern locales to bar the torturous execution of slaves. *Negro Roasting*, PORTLAND ADVERTISER & GAZETTE OF ME., July 13, 1830, at 2:

The abominable punishment of burning alive is inflicted in S. Carolina, and some other of the Southern States, upon their slaves, convicted of certain aggravated crimes. Edgefield District is a place famed for these exhibitions of human torture. The victim is chained to a stake, and a pile of light combustible wood built up around him, in the form of a cob-house. The pile is set on fire, and the wretch left to his agonies until relieved by suffocation. Such a punishment is unquestionably a violation of the Constitution, which says, “cruel and unusual punishments shall not be inflicted . . . .”;

NAT’L GAZETTE, Aug. 10, 1830, at 2 (referring to “the recent burning of a negro in South Carolina, as a public punishment,” concluding that “the form of punishment is unworthy of a civilized age and enlightened country[,]” and editorializing: “[i]t is prescribed in the 8th Amendment to the Constitution, that ‘cruel and unusual punishments shall not be inflicted.’ Burning is unquestionably included in that description. The spirit and design of that clause should be respected, even if the Constitution does not reach the case of a slave.”).

And that was so even as the “cruel and unusual punishments” language was being read in southern states to legitimize the torturous whipping of slaves because whipping, in the South, was then employed as a common, or *usual*, punishment against slaves. BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 314. *But cf.* RALEIGH REG. & N.C. ST. GAZETTE, Mar. 26, 1824, at 1:

A person of the name of Tinsley was convicted at Richmond, on Monday last, of exhibiting a Faro Table, which offence is, by the laws of Virginia, punishable by imprisonment and stripes, at the discretion of the Judge. The verdict of the Jury was—“We of the jury find the prisoner guilty; but, inasmuch as we consider the punishment by stripes at the whipping-post “*cruel and unusual*,” we recommend him to the mercy of the Court.”

Supreme Court also assumed that the bar on “excessive bail” is a fundamental legal protection that is applicable against the states.<sup>16</sup> How the Eighth Amendment is interpreted, of course, has profound implications for America’s criminal justice system, and for how individual criminal suspects and offenders are treated within it.<sup>17</sup> Because the stakes are so high, a reexamination of the Eighth Amendment’s history, and the modern-day implications of the Eighth Amendment’s origins, is in order.<sup>18</sup>

The debate over the U.S. Constitution’s Eighth Amendment has divided jurists and legal scholars into two competing camps: *originalists* and *living constitutionalists*, the latter group sometimes referred to derisively as *non-originalists*.<sup>19</sup> Even

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<sup>16</sup> *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (noting that bail is “basic to our system of law” and that the “Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment”). In *Timbs v. Indiana*, the U.S. Supreme Court also held that the Eighth Amendment’s Excessive Fines Clause applies against the states. No. 17-1091 (U.S. Feb. 20, 2019). See also *id.* at 4–5 (discussing the history of the text of the Excessive Fines Clause); *id.* at 4–8 (Thomas, J., concurring) (discussing the history of the text of the Excessive Fines Clause). In 1909, the Supreme Court held that “[t]he fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the state” and that the Court “can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.” *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (citing *Coffey v. Harlan Cty.*, 204 U.S. 659 (1907)). In *Coffey*, the Supreme Court emphasized that “[o]ne of the limitations upon the power of the State, imposed by the Fourteenth Amendment, is that the State shall not deprive any person of life, liberty, or property without due process of law.” 204 U.S. at 663.

<sup>17</sup> See, e.g., BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* (2017); see also KENNETH BRESLER, *CONSTITUTIONAL LAW FOR CRIMINAL JUSTICE PROFESSIONALS AND STUDENTS: A PLAIN LANGUAGE EXPLANATION OF CONSTITUTIONAL LAW* 369–90 (2014).

<sup>18</sup> The Eighth Amendment’s English origins were explored in considerable detail by one scholar, Anthony Granucci, back in 1969. See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839 (1969). The digitization of historical sources allows further, more detailed exploration of the Eighth Amendment’s seventeenth-century origins. A lot of scholarly attention has recently been focused on the Eighth Amendment’s history. For example, one legal scholar, John Stinneford, has examined the roots of the “cruel” and “unusual” terminology used in the Eighth Amendment’s cruel and unusual punishments prohibition. See John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) [hereinafter Stinneford, *The Original Meaning of “Unusual”*]; John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441 (2017).

<sup>19</sup> ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* (2016); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 41 (Grant Huscroft & Bradley W. Miller eds., 2011). Compare RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 127 (1994) (“The Eighth Amendment forbids ‘cruel and unusual punishment,’ but it does not indicate whether any particular methods of executing criminals—hanging or electrocution, for example—are cruel or, indeed, whether the death penalty is itself cruel no



within those two broad categories, however, there is—not surprisingly—considerable variation.<sup>20</sup> The Justices of the U.S. Supreme Court, all of whom have differing views of the Constitution and the import of its words, have themselves decided many Eighth Amendment cases by 5–4 votes.<sup>21</sup> Those closely divided opinions have come in cases dealing with challenges to everything from conditions of confinement<sup>22</sup> to terms of imprisonment<sup>23</sup> to the death penalty.<sup>24</sup> For instance, while a majority of the Justices have upheld the death penalty’s constitutionality since the mid-1970s in multiple cases,<sup>25</sup> both Justices William Brennan and Thurgood Marshall, while on

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matter what method of execution is used.”), with Antonin Scalia, “Response,” in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 145 (2018) (“[I]t is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment.”), and ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 192 (Christopher J. Scalia & Edward Whelan eds., 2017) (“[P]erhaps the area of our jurisprudence that most clearly reflects the ‘living Constitution’ philosophy is that which pertains to the Eighth Amendment, the provision of our Bill of Rights that proscribes ‘cruel and unusual punishments.’”).

<sup>20</sup> ERIC J. SEGALL, *ORIGINALISM AS FAITH* 8 (2018) (“There is no single definition of originalism just as there is no overarching agreement among non-originalists as to the best way for judges to interpret the Constitution.”); Randy J. Kozel, *Constitutional Method and the Path of Precedent*, in *PRECEDENT IN THE UNITED STATES SUPREME COURT* 175 (Christopher J. Peters ed., 2013) (“Like originalists, living constitutionalists subscribe to varying belief sets.”). In a book titled *Living Originalism*, scholar Jack Balkin observes that “[t]he Eighth Amendment’s prohibitions on ‘cruel and unusual punishments’ ban punishments that are cruel and unusual as judged by contemporary application of these concepts and principles, not by how people living in 1791 would have applied them.” JACK M. BALKIN, *LIVING ORIGINALISM* 6 (2011).

<sup>21</sup> See, e.g., CHARLIE EASTAUGH, *UNCONSTITUTIONAL SOLITUDE: SOLITARY CONFINEMENT AND THE US CONSTITUTION’S EVOLVING STANDARDS OF DECENCY* 80 (2017) (“In 2003, the Court handed down two landmark Eighth Amendment decisions on the same day: *Lockyer v Andrade* and *Ewing v California*. Both concerned petitioners from California, and the same Justices split 5–4 in each case.”); *ENCYCLOPEDIA OF AMERICAN CIVIL RIGHTS AND LIBERTIES* 789 (Kara E. Stooksbury, John M. Scheb II & Otis H. Stephens Jr. eds., 2017) (“[I]n *Roper v Simmons* (2005), the Court split 5–4 in striking down the death penalty for offenders who were juveniles at the time of their crimes.”). See also *Roper v. Simmons*, 543 U.S. 551 (2005); *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003).

<sup>22</sup> *Brown v. Plata*, 563 U.S. 493 (2011).

<sup>23</sup> E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* 134 (2009) (“Since 1980 the Supreme Court has decided six cases in which the duration of a prison sentence was attacked on Eighth Amendment grounds. All six cases were 5–4 decisions in form or substance . . .”).

<sup>24</sup> For example, the Supreme Court’s decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), which upheld the State of Oklahoma’s lethal-injection protocol, was decided by a 5–4 vote. See STEPHEN BREYER, *AGAINST THE DEATH PENALTY* (John D. Bessler ed., 2016) (reprinting Justice Breyer’s dissent in *Glossip* and contextualizing and annotating that dissent); see also *Bucklew v. Precythe*, No. 17-8151 (U.S. Apr. 1, 2019) (upholding lethal injection as a method of execution for a Missouri inmate).

<sup>25</sup> *Glossip*, 135 S. Ct. at 2726; *Baze v. Rees*, 553 U.S. 35 (2008); *Gregg v. Georgia*, 428 U.S. 153 (1976).

the nation's highest court, continually wrote that capital punishment should be declared a per se violation of the Cruel and Unusual Punishments Clause.<sup>26</sup> The duel over the Eighth Amendment's meaning and proper interpretation<sup>27</sup> can itself be seen as framing the debate about how to read the U.S. Constitution as a whole.<sup>28</sup>

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<sup>26</sup> MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL* (1996). Justice William Brennan—a long-time opponent of capital punishment—once offered: “With respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment.” William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 331 (1986). I have articulated my own views on the Eighth Amendment and its relationship with the death penalty in a series of recent law review articles. See John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7 (2018); Bessler, *The Inequality of America's Death Penalty*, *supra* note 15; John D. Bessler, *The Law's Evolution: From Medieval Executions to a Peremptory, International Law Norm Against Capital Punishment*, 3 BECCARIA. REVUE D'HISTOIRE DU DROIT DE PUNIR 255 (2017); John D. Bessler, *The Long March Toward Abolition: From the Enlightenment to the United Nations and the Death Penalty's Slow Demise*, U. FLA. J.L. PUB. POL'Y (forthcoming 2019); John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L.J. 781 (2018).

<sup>27</sup> In a prior book, I detailed the history of the U.S. Constitution's Cruel and Unusual Punishments Clause. BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7. This Article delves even deeper into the English roots of the Eighth Amendment and contains historical information on all three of its clauses.

<sup>28</sup> See, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 6 (1991) (“In the Constitution of the United States, men like Madison bequeathed to subsequent generations a framework for balancing liberty against power. However, it is only a framework; it is not a blueprint. Its Eighth Amendment prohibits the infliction of ‘cruel and unusual punishment,’ but gives no examples of permissible or impermissible punishments.”). The contentious debate over the Eighth Amendment's interpretation may even have implications beyond America's borders. See JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 179 (2006) (noting that, when the United States ratified the U.N. Convention Against Torture, the Senate was encouraged to ratify the treaty, which prohibits torture and “cruel, inhuman, or degrading treatment or punishment,” subject to a reservation that the treaty's language would be interpreted to mean the same thing as the Eighth Amendment's cruel and unusual punishments prohibition); JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* 170 (2014) (noting that “when the United States became one of the original signing nations” of the Universal Declaration of Human Rights, adopted in 1948, which prohibits “torture” and “cruel, inhuman or degrading treatment or punishment,” “legal experts on both sides of the Atlantic assumed that these words meant largely the same thing as the Eighth Amendment's ban on ‘cruel and unusual punishment’”). *But see* STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 238 (2016) (“One could argue that the death penalty cases present no general ‘foreign law’ issue, for the relevant constitutional provision, the Eighth Amendment, refers to ‘unusual punishments’ without specifying whether ‘unusual’ matters only in relation to the United States, to countries that follow the common law, to European nations, or to some other subset of the world's nations.”).



This Article traces the Eighth Amendment's English and common-law roots,<sup>29</sup> a history closely associated with England's Glorious Revolution of 1688–89,<sup>30</sup> which took place a century before the U.S. Constitution's ratification.<sup>31</sup> The Glorious Revolution, in which King James II—a Catholic monarch of the Stuart dynasty—was forced to abdicate the throne, led to the ascendancy of the Protestant co-regents, William and Mary,<sup>32</sup> while provoking its own effects in colonial America, too.<sup>33</sup> The Glorious Revolution impacted societies around the globe,<sup>34</sup> and produced the legal

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<sup>29</sup> The English Bill of Rights, which set forth, among others, the rights now set forth in the Eighth Amendment, was rooted in “ancient” privileges. I MARK A. GRABER & HOWARD GILLMAN, *THE COMPLETE AMERICAN CONSTITUTIONALISM: INTRODUCTION AND THE COLONIAL ERA* 55 (2015) (“The American revolutionaries who demanded their rights engaged in practices that were both centuries old and novel. From at least 1215, the year the Magna Carta was promulgated and signed, Englishmen had demanded that their King respect their rights. Over the years these rights became embodied in such parliamentary enactments as the English Bill of Rights (1689) . . . .”); *THE TIMES* (London), Mar. 3, 1786 (“Charles the I. lost his head, and James the II. to preserve his life, pusillanimously abdicated the throne. This happy event produced the glorious Revolution, when the Bill of Rights was enacted declaratory of the ancient and indubitable privileges of the people of England.”).

<sup>30</sup> *THE ENCYCLOPEDIA OF POLITICAL REVOLUTIONS* 52–55 (Jack A. Goldstone ed., 1998) (discussing the “Glorious Revolution” of 1688–89).

<sup>31</sup> PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010).

<sup>32</sup> A “Glorious Revolution” also took place in America. *See, e.g.*, DAVID S. LOVEJOY, *THE GLORIOUS REVOLUTION IN AMERICA*, at xi (1987) (“Once Englishmen turned their backs on James II, a number of colonists rebelled against his governors in America. They claimed their acts were part of a revolution they shared with their cousins at home against arbitrary government and the threat of Catholicism.”).

<sup>33</sup> *THE GLORIOUS REVOLUTION IN AMERICA: DOCUMENTS ON THE COLONIAL CRISIS OF 1689*, at 3 (Michael G. Hall, Lawrence H. Leder & Michael Kammen eds., 1964) (“The Glorious Revolution of 1688, which forced James II from the English throne and established the reign of William and Mary, created a major crisis among the English colonies in America. Following news of England’s revolution, a series of rebellions and insurrections erupted in colonial America from Massachusetts to Carolina.”).

<sup>34</sup> *See generally* *THE ANGLO-DUTCH MOMENT: ESSAYS ON THE GLORIOUS REVOLUTION AND ITS WORLD IMPACT* (Jonathan I. Israel ed., 1991) (containing chapters on the Dutch role in the Glorious Revolution, as well as the impact of the Glorious Revolution in England, Scotland, Ireland, and in the American colonies). *See also id.* at 89 (noting that the English Declaration of Rights “looked at those actions of James II (and, to a much lesser extent, those of Charles II in the years 1681–85) which were in breach of existing law, and confirmed the illegality of those royal acts”); *id.* at 89 n.50 (“Most prominently in the clauses against abuses in treason trials (which looked back to the trials of the Rye House plotters) and the levying of excessive fines (principally referring to the 1682 fine of Sir Thomas Pilkington and the 1684 fine on Sir Samuel Barnardiston.”); MATTHEW JENKINSON, *CULTURE AND POLITICS AT THE COURT OF CHARLES II, 1660–1685*, at 187 (2010) (noting that the “Rye House Plot of March/April 1683” was “a conspiracy, allegedly conceived at a manor house in Hoddesdon, Hertfordshire, for a hundred armed men to ambush the king and his brother as they returned to London from Newmarket”); *id.* (“The plotters were arrested; some were sent to the Tower during June and July. Those who were executed suffered their fate the coming winter.”);

landscape-changing English Declaration of Rights.<sup>35</sup> That Declaration, in turn, led to the passage, in 1689, of its statutory counterpart, the English Bill of Rights.<sup>36</sup> Those English legal instruments served as a model for the Virginia Declaration of Rights<sup>37</sup> drafted by George Mason,<sup>38</sup> with the English Declaration also serving as a template for the American Declaration of Independence<sup>39</sup> drafted principally by Thomas Jefferson.<sup>40</sup> All three clauses of the U.S. Constitution's Eighth Amendment—the Excessive Bail Clause, the Excessive Fines Clause, and the Cruel and Unusual Punishments Clause—are derived from the English Bill of Rights.<sup>41</sup>

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*accord* THE HUTCHINSON ILLUSTRATED ENCYCLOPEDIA OF BRITISH HISTORY (Simon Hall ed., 2017) (noting that the “Rye House Plot conspiracy of 1683 [was led] by English Whig extremists against Charles II because of his Roman Catholic leanings”; that the plotters “intended to murder Charles and his brother James, Duke of York, at Rye House, Hoddesdon, Hertfordshire,” as they returned to London from the Newmarket races “but the plot was betrayed”; and that “[t]he Duke of Monmouth was involved, and alleged conspirators, including Lord William Russell and Algernon Sidney (1622–1683), were executed for complicity”).

<sup>35</sup> The English Declaration of Rights was the Eighth Amendment's linguistic forerunner. *See* BAYARD MARIN, *INSIDE JUSTICE: A COMPARATIVE ANALYSIS OF PRACTICES AND PROCEDURES FOR THE DETERMINATION OF OFFENSES AGAINST DISCIPLINE IN PRISONS OF BRITAIN AND THE UNITED STATES* 246 (1983) (“The English Declaration of Rights 1688 contains language so similar that its role as precedent is obvious.”); *but see id.* (“However, it is not so clear that the founders of the American Constitution, in copying the words, copied the English meaning; that is, as a limitation upon barbarous tortures, such as disemboweling and quartering, practiced under the Stuart kings.”).

<sup>36</sup> Gerard N. Magliocca, *The Bill of Rights as a Term of Art*, 92 NOTRE DAME L. REV. 231, 241 n.55 (2016) (“The English Declaration of Rights was issued by an irregular Parliament sitting without a king, and after William III was crowned the Declaration was reenacted as the Bill of Rights.”). *See also* 2 THE STATUTES: WILLIAM & MARY TO 10 GEORGE III. A.D. 1688–1770, at 9–10 (1871).

<sup>37</sup> VIRGINIA DECLARATION OF RIGHTS (June 12, 1776).

<sup>38</sup> JEFF BROADWATER, *GEORGE MASON: FORGOTTEN FOUNDERS* 80–81, 87–88 (2006) (noting Mason's role in drafting the Virginia Declaration of Rights and how he drew on a variety of sources, including the English Bill of Rights, in drafting that document).

<sup>39</sup> DECLARATION OF INDEPENDENCE (U.S. 1776). *See also* 1 ENCYCLOPEDIA OF HUMAN RIGHTS 53 (David P. Forsythe ed., 2009) (“The influence of the English Bill of Rights is evident in the Declaration of Independence; it set a precedent for the American colonists by declaring to their king that they had rights, the king had violated those rights, and they would not tolerate any such violations in the future.”); *cf. id.* (“The American founders did not simply copy the ideas found in the English Bill of Rights; they modified and expanded upon those ideas in a way that reflects the political and philosophical environment of eighteenth-century colonial America.”).

<sup>40</sup> GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978).

<sup>41</sup> *See, e.g.,* *Weems v. United States*, 217 U.S. 349, 372 (1910):

Patrick Henry said that there was danger in the adoption of the Constitution without a bill of rights. Mr. Wilson considered that it was unnecessary, and had been purposely omitted from the Constitution. Both, indeed, referred to the tyranny of the Stuarts. Henry said that the people of England in the bill of rights prescribed to William, Prince of Orange,

The seventeenth-century Glorious Revolution had reverberations in colonial America, with eighteenth-century American revolutionaries looking to the guarantees of English law in forging American law. Part I of this Article traces the English history that produced the prohibitions in the English Bill of Rights on excessive bail, excessive fines, and cruel and unusual punishments. The story of early American constitutions and the Eighth Amendment, which contain those same prohibitions,<sup>42</sup> thus does not begin with the first revolutionary constitutions in 1776, the Eighth Amendment's 1789 adoption by the United States Congress, or the Eighth Amendment's 1791 ratification by the states.<sup>43</sup> Instead, the heritage of the Eighth Amendment—or, more accurately, that of the Eighth Amendment's *textual provisions*—begins in England, America's mother country, from whence its language originates.<sup>44</sup> In recalling the Eighth Amendment's seventeenth-century origins, Part II of this Article discusses the American Revolution, early American constitutions echoing the three prohibitions first set forth in Section 10 of the English Bill of Rights,<sup>45</sup> and the writings of early legal commentators on the Eighth Amendment.

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upon what terms he should reign. Wilson said that '[t]he doctrine and practice of a declaration of rights have been borrowed from the conduct of the people of England on some remarkable occasions; but the principles and maxims on which their government is constituted are widely different from those of ours.' It appears, therefore, that Wilson, and those who thought like Wilson, felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation. Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts.

<sup>42</sup> U.S. CONST. amend. VIII.

<sup>43</sup> The first ten amendments of the U.S. Constitution, known as the Bill of Rights, were passed by Congress on September 25, 1789, and ratified on December 15, 1791. See CHRISTINE BARBOUR & GERALD C. WRIGHT, KEEPING THE REPUBLIC: POWER AND CITIZENSHIP IN AMERICAN POLITICS 139 (6th ed. 2014); see also Amanda L. Tyler et al., *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1916 (2012) (according to Judge Diane P. Wood: "[T]he meaning of the words, 'cruel and unusual,' against the backdrop of 1688 had already changed a bit by the time we get to 1791, at the time the Eighth Amendment is adopted, and that the people who used that term knew that.").

<sup>44</sup> Cf. BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 162–63.

<sup>45</sup> English Bill of Rights, 1689, 1 W. & M., c. 2; WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 18 (1996) ("Section 10 of the English Bill of Rights is the direct ancestor of constitutional provisions in other countries that remain applicable to this day. The Eighth Amendment to the Constitution of the United States borrows the phrase virtually word for word, and it is included in many of the state constitutions as well.").

The Eighth Amendment's prohibitions were not adopted in a vacuum, but were, because of their English heritage, more than a century in the making. Part II of the Article specifically highlights how the Enlightenment—in particular, the principles laid down by writers such as the French political theorist, Montesquieu, and the Italian philosopher, Cesare Beccaria—materially changed the lens through which colonial and early Americans viewed capital and corporal punishments and the criminal-law concepts of excessiveness, proportionality, and “cruel and unusual punishments.”<sup>46</sup> Both Montesquieu and Beccaria were concerned about despotism and abuses of power, and both concluded, in what can be seen as an Enlightenment legal maxim, that any punishment not derived from “necessity” (or “absolute necessity,” as Beccaria put it<sup>47</sup>) is “tyrannical.”<sup>48</sup> Such views—the ones laid down in the mid-1700s by Montesquieu, the French baron, and Beccaria, the Italian marquis—materially shaped Anglo-American views in the decades to come.<sup>49</sup> The Article concludes by discussing the implications of the Eighth Amendment's history—one grounded in both the Enlightenment and English law—for modern Eighth Amendment jurisprudence.<sup>50</sup>

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<sup>46</sup> English Bill of Rights, *supra* note 45. *See, e.g.*, JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* (2014) [hereinafter BESSLER, *THE BIRTH OF AMERICAN LAW*] (documenting the influence of Cesare Beccaria's ideas in America); COLLEEN A. SHEEHAN, *JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT* 58 (2009) (“Montesquieu's influence on Madison and the American Founders, particularly evident in the theory of separation of powers that informs the United States Constitution, is well noted by scholars.”); *The Marquis Beccaria: An Italian Penal Reformer's Meteoric Rise in the British Isles in the Transatlantic Republic of Letters* (forthcoming in 2019 in *Diciottesimo secolo*) (discussing the early embrace of Cesare Beccaria's ideas).

<sup>47</sup> JOHN HOSTETTLER, *CESARE BECCARIA: THE GENIUS OF ‘ON CRIMES AND PUNISHMENTS’* 72 (2011) (noting that Beccaria adopted Montesquieu's view that unnecessary punishments are tyrannical).

<sup>48</sup> KEEGAN CALLANAN, *MONTESQUIEU'S LIBERALISM AND THE PROBLEM OF UNIVERSAL POLITICS* 250 (2018) (noting Montesquieu's view, as expressed in *The Spirit of the Laws*: “Every penalty that does not derive from necessity is tyrannical. The law is not a pure act of power . . .”); HOSTETTLER, *supra* note 47, at 72.

<sup>49</sup> *See generally* JOHN D. BESSLER, *THE BARON AND THE MARQUIS: LIBERTY, TYRANNY, AND THE ENLIGHTENMENT MAXIM THAT CAN REMAKE AMERICAN CRIMINAL JUSTICE* (2019) (discussing the Eighth Amendment's history in the context of the Enlightenment and the popular eighteenth-century maxim created by Montesquieu—and publicized by Cesare Beccaria—that any punishment that goes beyond necessity is tyrannical). Indeed, the Eighth Amendment cannot be properly understood without studying the Enlightenment and eighteenth-century penal reform efforts. *See, e.g.*, Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 *J. CRIM. L. & CRIMINOLOGY* 405 (2016).

<sup>50</sup> *See* BESSLER, *supra* note 49; *see also* 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).

## I. THE ENGLISH BILL OF RIGHTS

A. *The Glorious Revolution of 1688–89*

In England, the Glorious Revolution<sup>51</sup> led to the overthrow of King James II (James VII of Scotland),<sup>52</sup> and to a Declaration of Rights, and then to its statutory counterpart, the English Bill of Rights,<sup>53</sup> that proclaimed in these hortatory words:

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<sup>51</sup> The Glorious Revolution was a seminal event in England, and it was still being commemorated and celebrated long after the fact. *See Commemoration of the Glorious Revolution, 1688*, THE TIMES, Nov. 3, 1788, at 1; *see also* IPSWICH J., Dec. 29, 1792, at 4 (referring to “the glorious Revolution in 1688” that “is equally dear to us” and saying that “we hold ourselves equally bound to maintain it”); *Dulwich in the County of Surrey*, THE TIMES, Dec. 26, 1792, at 4; BATH CHRON., Dec. 27, 1792, at 1 (“We solemnly pledge ourselves individually to each other, and collectively with all our fellow-subjects, that we will to the utmost of our power, and at the expence of every thing dear to us, maintain and support the principles of the BRITISH CONSTITUTION, as established at the Glorious Revolution . . .”); *Mr. Curran’s Speech*, N. STAR, Jan. 30, 1794, at 2–3 (“He here adverted to the circumstances which tended to bring about the glorious Revolution of Great Britain in the year 1688, by which British freedom was placed on its present basis. Had the tyrant of that day listened to the complaints of his people, and abstained from arbitrary and unconstitutional stretches of power, he might have remained a King respected by all his subjects, and neither he nor his family and posterity would be reduced to the wretched condition of foreign exiles. He had his corrupt judges, and venal tools to execute submissively his orders.”); PENN. GAZETTE, Aug. 28, 1766, at 2 (referring to “the late glorious Revolution” as “the grand æra of British liberty”); DERBY MERCURY, Nov. 16, 1764, at 3 (“By *Opposition*, also, England effected the glorious Revolution, obtained our present happy Constitution . . .”); JACKSON’S OXFORD J., Oct. 3, 1772, at 1 (“Your ancestors gained unfading laurels by saving their country in times of extreme national danger, when a glorious Revolution set us free.”). The Glorious Revolution was also well-remembered in the United States long after it had occurred. *See The Petition and Remonstrance of the Committee of the City and Liberties of Philadelphia*, DUNLAP’S PENN. PACKET, Nov. 13, 1775, at 1 (noting that “the glorious revolution” had “placed the present Royal Family upon the *British* throne”); PENN. GAZETTE, Nov. 8, 1775, at 2 (referring to “the glorious revolution, under which the said Society of *Quakers*, as well as others, enjoy their present religious and civil rights”). The American colonists themselves referred to their own revolution as “a glorious revolution.” *Instructions to the Representatives of the Town of Boston*, CALEDONIAN MERCURY, July 9, 1776, at 3 (“At a time when, in all probability, the whole united colonies are upon the verge of a glorious revolution . . .”); *Philadelphensis*, INDEP. GAZETTEER, Dec. 19, 1787, at 3 (referencing “our glorious revolution”).

<sup>52</sup> STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION 480 (2009) (“The revolutionaries of 1688–89 were motivated to overthrow James II and create a new kind of English government because they were concerned not only about their religion but also about England’s foreign policy and England’s political economy.”).

<sup>53</sup> English Bill of Rights, *supra* note 45. *See also* NICK O’NEILL, SIMON RICE & ROGER DOUGLAS, RETREAT FROM INJUSTICE: HUMAN RIGHTS LAW IN AUSTRALIA 7 n.40 (2d ed. 2004):

The *Bill of Rights* is sometimes given the date 1688 because the *Declaration of Rights* was passed on 13 February 1689 and at that time and



“That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.”<sup>54</sup> The full text of the Declaration of Rights, drafted by the Convention Parliament,<sup>55</sup> was presented to Prince William of Orange and his wife, Mary, in a ceremony in London on February 13, 1689.<sup>56</sup> It was read by a clerk at Whitehall Palace’s ornate Banqueting House in William and Mary’s presence, with the lords on the right and the commons on the left.<sup>57</sup> Less than two months later, on April 11, 1689, William and Mary, robed in crimson velvet attire, would be crowned as England’s king and queen at Westminster Abbey.<sup>58</sup>

The story of the Glorious Revolution is a fascinating one, full of royal intrigue and a desire of the English people to have a greater say in their own governance.<sup>59</sup> The largely Protestant subjects of England’s Catholic monarch, King James II, had

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until the *Calendar (New Style) Act* 1750, the new Calendar year began on 25 March rather than 1 January. However, the *Declaration* was not enacted in statutory form, as the *Bill of Rights*, until 25 October 1689.

<sup>54</sup> English Bill of Rights, *supra* note 45; *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991).

<sup>55</sup> GEORGE L. CHERRY, *THE CONVENTION PARLIAMENT 1689: A BIOGRAPHICAL STUDY OF ITS MEMBERS* (1966) (providing biographies of members of the Convention Parliament).

<sup>56</sup> ABEL BOYER, *THE HISTORY OF KING WILLIAM THE THIRD* 354–56 (1702); Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 31 (2000); Michael S. Woodruff, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241, 288 (2013).

<sup>57</sup> ROBERT BUCHOLZ & NEWTON KEY, *EARLY MODERN ENGLAND 1485–1714: A NARRATIVE HISTORY* 309 (2d ed. 2009); JOHN LINGARD, *ABRIDGEMENT OF THE HISTORY OF ENGLAND* 591–92 (1873); *ENGLAND’S RISE TO GREATNESS, 1660–1763*, at 130–32 (Stephen B. Baxter ed., 1983); 2 *THE HISTORY OF ENGLAND: DURING THE REIGNS OF KING WILLIAM, QUEEN ANNE, AND KING GEORGE THE FIRST* 53–55 (1746) (“*By a LOVER of TRUTH and LIBERTY.*”). See also CHARLES K. ROWLEY & BIN WU, *BRITANNIA 1066–1884: FROM MEDIEVAL ABSOLUTISM TO THE BIRTH OF FREEDOM UNDER CONSTITUTIONAL MONARCHY, LIMITED SUFFRAGE, AND THE RULE OF LAW* 102 (2014):

*The Heads of Grievances*, the first draft of the *Declaration of Rights*, contained 28 articles reported out by a committee of the House of Commons on February 2, 1689. Due to pressures from abroad and at home, a prompt resolution of the issues was given top priority. On February 8, the House of Commons instructed the committee to delete the articles that required new laws and retained 11 clauses from the original *Heads of Grievances*. The Declaration of Rights restated the ancient rights and liberties of England. The final version of 13 articles indicted James II for his subversion of laws and imposed restrictions on monarchical power.

Article 10 of the final version provided “[t]hat excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1249–50 (1987).

<sup>58</sup> Lois G. Schwoerer, *The Coronation of William and Mary, April 11, 1689*, in *THE REVOLUTION OF 1688–1689: CHANGING PERSPECTIVES* 107 (Lois G. Schwoerer ed., 1992).

<sup>59</sup> STEVEN C. A. PINCUS, *ENGLAND’S GLORIOUS REVOLUTION 1688–1689: A BRIEF HISTORY WITH DOCUMENTS* (2006).

accumulated a long list of grievances against him, with James II having assumed the throne in 1685 after the death of his brother, Charles II.<sup>60</sup> In the Glorious Revolution, James II was forced from the throne, to be replaced by the new co-regents, William III and Mary II, after the Convention Parliament had drafted the Declaration of Rights to guarantee the rights and liberties of British subjects.<sup>61</sup> While William's mother was the daughter of King Charles I, the English king who had been publicly beheaded with an executioner's axe in 1649,<sup>62</sup> William's wife, Mary, was King James II's own daughter.<sup>63</sup> The Convention Parliament had first met at Westminster on January 22, 1689, after the unpopular James II had fled England, going into exile following his son-in-law William's invasion of England in November 1688.<sup>64</sup>

The Glorious Revolution was about more than a prince's quest to accumulate greater power.<sup>65</sup> William, a Dutch stadtholder and the Prince of Orange before assuming the British throne, had been invited in June 1688 by seven Protestant nobles, known as the "Immortal Seven," to restore "the Lawes and Liberties of England."<sup>66</sup> Henry Sydney (also spelled Sidney) wrote the invitation, which recited that "the people are so generally dissatisfied with the present conduct of the government, in relation to their religion, liberties and properties (all of which have been greatly invaded)."<sup>67</sup> That invitation, sent by men who had been deeply affected by the reign of the Stuarts, had been carried to Holland by an admiral disguised as a common sailor.<sup>68</sup> Henry Sydney, who, as an envoy to Holland, had befriended the Prince of Orange in 1680, was the brother of the late Algernon Sydney and a man destined to be named, in 1694, as the 1st Earl of Romney.<sup>69</sup> The English politician Algernon Sydney, later revered by American revolutionaries for his devotion to the cause of liberty and republicanism, had been executed in 1683 for treason during Charles II's

<sup>60</sup> Charles R. Eskridge III, *Modern Lessons from Original Steps Towards the American Bill of Rights*, 19 TEX. REV. L. & POL. 25, 37–38 (2014); Woodruff, *supra* note 56, at 287–88.

<sup>61</sup> Peter Lanston Fitzgerald, *An English Bill of Rights? Some Observations from Her Majesty's Former Colonies in America*, 70 GEO. L.J., 1229, 1234 (1982); Richard S. Kay, *William III and the Legalist Revolution*, 32 CONN. L. REV. 1645, 1646 (2000).

<sup>62</sup> See generally CHARLES SPENCER, *KILLERS OF THE KING: THE MEN WHO DARED TO EXECUTE CHARLES I* (2015) (discussing the death of Charles I).

<sup>63</sup> *Id.* at 294; JOHN VAN DER KISTE, *WILLIAM AND MARY: HEROES OF THE GLORIOUS REVOLUTION* (2011), preface; Kay, *supra* note 61.

<sup>64</sup> BUCHOLZ & KEY, *supra* note 57, at 308; PINCUS, *supra* note 52, at 227.

<sup>65</sup> PINCUS, *supra* note 52.

<sup>66</sup> STEPHEN BAINES, *CAPTAIN COOK'S MERCHANT SHIPS: FREELove, THREE BROTHERS, MARY, FRIENDSHIP, ENDEAVOUR, ADVENTURE, RESOLUTION AND DISCOVERY*, ch. 2 (2015); Woodruff, *supra* note 56, at 287–88.

<sup>67</sup> See BAINES, *supra* note 66, at ch. 2; NEVILLE WILLIAMS, *THE EIGHTEENTH CENTURY CONSTITUTION 1688–1815: DOCUMENTS AND COMMENTARY* 8 (Cambridge Univ. Press 1970).

<sup>68</sup> 5 THE CAMBRIDGE MODERN HISTORY 242 (A. W. Ward, G. W. Prothero & Stanley Leathes eds., 1908); BAINES, *supra* note 66, at ch. 2.

<sup>69</sup> SIDNEY J. LOW & F. S. PULLING, *THE DICTIONARY OF ENGLISH HISTORY* 945–46 (1910).

reign.<sup>70</sup> His most famous work, *Discourses Concerning Government*, was published posthumously in 1698 after he had become, as one source puts it, a “victim of Stuart despotism.”<sup>71</sup>

Henry Sydney’s invitation to William was joined by Henry Compton, the Church of England’s suspended Bishop of London; William Cavendish, the Earl of Devonshire, and Charles Talbot, the Earl of Shrewsbury, who were both Whigs; Thomas Osborne, the Earl of Danby, and Richard Lumley, a baron and colonel in the British army, who were both Tories; and Edward Russell, an officer in the Royal Navy and the 1st Earl of Orford.<sup>72</sup> Because the seven men sought a military invasion, the invitation was treasonable, with its seven subscribers signing it using ciphers (i.e., code numbers) instead of their actual names.<sup>73</sup> Despite the peril it put them in, the invitation served its intended purpose. On October 10, 1688, the Prince of Orange issued a declaration—the opening volley of the Glorious Revolution—setting forth “the reasons inducing him to appear in arms in the Kingdom of England, and for preserving the Protestant religion, and for restoring the laws and liberties of England,

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<sup>70</sup> ALAN CRAIG HOUSTON, *ALGERNON SIDNEY AND THE REPUBLICAN HERITAGE IN ENGLAND AND AMERICA* 4, 223–24 (1991). Algernon Sidney, who was executed during the reign of Charles II, was an important figure in English history:

Algernon Sidney was beheaded in 1683 by British authorities for treason and conspiracy to assassinate the king. His unfinished insurrectionist tract, the *Discourses Concerning Government*, was seized upon his arrest and used as evidence against him. One historian has referred to the *Discourses*, published in 1698, as a “textbook of revolution.” Indeed, as a martyr to the “Old Cause” of liberty, Sidney inspired generations of leaders and intellectuals, particularly in America. Thomas Jefferson listed him alongside John Locke as a major influence on the Declaration of Independence.

SCOTT A. NELSON, *THE DISCOURSES OF ALGERNON SIDNEY* (1993) (inside cover material).

<sup>71</sup> 2 *A HOUSE DIVIDING AGAINST ITSELF, 1836–1840: THE LETTERS OF WILLIAM LLOYD GARRISON* 222 n.2 (Louis Ruchames ed., 1971); HOUSTON, *supra* note 70, at 235.

<sup>72</sup> ANDREW D. M. BEAUMONT, *COLONIAL AMERICA AND THE EARL OF HALIFAX 1748–1761*, at 15 (2015); GERARD CASEY, *FREEDOM’S PROGRESS? A HISTORY OF POLITICAL THOUGHT* ch. 22 n.10 (2008); AMANDA FOREMAN, *THE DUCHESS* 15 (2008); EDWARD GREGG, *QUEEN ANNE* 134 (2001); RICHARD LODGE, *THE HISTORY OF ENGLAND: FROM THE RESTORATION TO THE DEATH OF WILLIAM III*, at 278–79 (1910); LOW & PULLING, *supra* note 69; 2 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND* 399 (1901); ANTTI MATIKKALA, *THE ORDERS OF KNIGHTHOOD AND THE FORMATION OF THE BRITISH HONOURS SYSTEM 1660–1760*, at 130 (2008); ANDREW RAWSON, *TREACHERY AND RETRIBUTION: ENGLAND’S DUKES, MARQUESSSES AND EARLS 1066–1707*, at 171 (2017); BENJAMIN TERRY, *A HISTORY OF ENGLAND: FROM THE EARLIEST TIMES TO THE DEATH OF QUEEN VICTORIA* 794 (1902); WILLIAMS, *supra* note 67, at 8–20; 34 *DICTIONARY OF NATIONAL BIOGRAPHY* 275 (Sidney Lee ed., 1893).

<sup>73</sup> 2 GERALD BRENAN & EDWARD PHILLIPS STATHAM, *THE HOUSE OF HOWARD* 604 n.1 (1907); MAUREEN WALLER, *UNGRATEFUL DAUGHTERS: THE STUART PRINCESSES WHO STOLE THEIR FATHER’S CROWN* 158 (2002).

Scotland, and Ireland.”<sup>74</sup> “It is both certain and evident to all men, that the public peace and happiness of any state or kingdom cannot be preserved where the Law, Liberties, and Customs, established by the lawful authority in it, are openly transgressed and annulled,” William’s declaration audaciously proclaimed.<sup>75</sup> The declaration emphasized that “we cannot any longer forbear to declare that, to our great regret,” King James II’s “evil counsellors” had acted in violation of the Magna Carta<sup>76</sup> and had “subjected” the subjects of the realm to “despotic power” and “arbitrary government.”<sup>77</sup>

In Britain, there had been for years a rampant fear of Catholic tyranny or “popery,” then identified with the powerful, long-reigning French king, Louis XIV,<sup>78</sup> an ally of Charles II and Charles’ younger brother, the Duke of York.<sup>79</sup> In 1683, an English Whig conspiracy to assassinate Charles II and his brother James, then the Duke of York, had been foiled,<sup>80</sup> with a number of men put to their deaths for their participation in the so-called “Rye House Plot.”<sup>81</sup> Because Charles II did not father an heir in wedlock before his death in 1685, the fears of politicians in the British Isles were realized when, just two years after the Rye House Plot had been exposed, a known Catholic—James II—rose to the throne.<sup>82</sup> The imprisonment in 1688 of

<sup>74</sup> “Declaration of the Prince of Orange, October 10, 1688,” <http://www.jacobite.ca/documents/16881010.htm> [<http://perma.cc/L9JJ-54ZZ>].

<sup>75</sup> WILLIAMS, *supra* note 67, at 10.

<sup>76</sup> See generally DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA (2004).

<sup>77</sup> ROBERT BEDDARD, A KINGDOM WITHOUT A KING: THE JOURNAL OF THE PROVISIONAL GOVERNMENT IN THE REVOLUTION OF 1688, at 124–28, 145–49 (1988); THE WORLD OF WILLIAM AND MARY: ANGLO-DUTCH PERSPECTIVES ON THE REVOLUTION OF 1688–89, at 105 (Dale Hoak & Mordechai Feingold eds., 1996); “Declaration of the Prince of Orange, October 10, 1688,” *supra* note 74.

<sup>78</sup> The Roman Catholic “*Roi Soleil*” (Sun King) Louis XIV lived from 1638–1715. He reigned as King of France from 1643 until his death. After reaching the age of majority in 1651, he ruled personally from 1661 following the death of Cardinal Jules Mazarin, an Italian-born diplomat and politician who served Louis XIV. See JOHN S.C. ABBOTT, LOUIS XIV (1903); ALAN JAMES, THE ORIGINS OF FRENCH ABSOLUTISM 1598–1661, at 91 (2013).

<sup>79</sup> See Fiona Keating, *Revolution 17th-Century Style: How a Fear of Catholics Led to the Last Successful Invasion of England*, INT’L BUS. TIMES (Nov. 7, 2015, 8:00 PM), <https://www.ibtimes.co.uk/revolution-17th-century-style-how-fear-catholics-led-last-successful-invasion-england-1527188> [<http://perma.cc/XSY4-WH6U>]. The relationship between Charles II and Louis XIV involved French monetary subsidies, and on his deathbed, Charles II converted to Catholicism. WILLIAM YOUNG, INTERNATIONAL POLITICS AND WARFARE IN THE AGE OF LOUIS XIV AND PETER THE GREAT: A GUIDE TO THE HISTORICAL LITERATURE 203 (2004); see also DAVID HICKMAN, THE SUN KING: LOUIS XIV, FRANCE AND EUROPE, 1643–1715, at 75–76 (2016).

<sup>80</sup> CLARE JACKSON, RESTORATION SCOTLAND, 1660–1690: ROYALIST POLITICS, RELIGION AND IDEAS 36 (2003).

<sup>81</sup> 6 ISRAEL SMITH CLARE & MOSES COIT TYLER, THE WORLD’S HISTORY ILLUMINATED: ENGLISH REFORMATION TO FALL OF POLAND 2233–34 (1897) (noting the execution of conspirators associated with the Rye House Plot).

<sup>82</sup> Edward Vallance, *The Glorious Revolution*, BBC (Feb. 17, 2011), [http://www.bbc.co.uk/history/british/civil\\_war\\_revolution/glorious\\_revolution\\_01.shtml](http://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml) [<http://perma.cc/WF9S-P794>].

seven Anglican bishops in the Tower of London—clergymen, including the Archbishop of Canterbury, who had defied an order that the bishops read the Declaration of Indulgence<sup>83</sup>—brought the long-simmering Catholic-versus-Protestant feud to a head.<sup>84</sup> The bishops were put on trial at the Court of King’s Bench for seditious libel on June 29, 1688 after signing a petition to the king, but just a day later, on June 30, the jury found them not guilty, handing James II a major and humiliating defeat.<sup>85</sup> The trial of the seven bishops in mid-1688 solidified opposition to James II and proved to be a prelude to the Glorious Revolution.<sup>86</sup>

*B. The English Declaration of Rights, the English Bill of Rights, and the Scottish Claim of Right*

On January 28, 1689, less than a week after the Convention Parliament had first convened, its House of Commons fearlessly resolved:

[T]hat King James the Second, having endeavoured to subvert the constitution of this kingdom, by breaking the original contract between king and people, and by the advice of Jesuits and other wicked persons, having violated the fundamental laws, and having withdrawn himself out of the kingdom, has abdicated the government and that the throne is thereby vacant.<sup>87</sup>

The English Declaration of Rights, as one source notes, “reaffirmed the principle of the 1628 Petition of Right, denying the divine right of kings and setting forth thirteen basic rights that Parliament regarded as the ‘true, ancient, and indubitable rights and liberties of the people’ of the English kingdom.”<sup>88</sup> The English Bill of

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<sup>83</sup> SOURCES AND DEBATES IN ENGLISH HISTORY 1485–1714, at 234–35, 255 (Newton Key & Robert Bucholz eds., 2009) (noting and reprinting James II’s Declaration of Indulgence of April 4, 1687 and reissued April 27, 1688).

<sup>84</sup> RICHARD DAVEY, THE TOWER OF LONDON 313 (1910).

<sup>85</sup> WILLIAM GIBSON, JAMES II AND THE TRIAL OF THE SEVEN BISHOPS 123–24, 132, 140 (2009). For more information on the foundations of the Glorious Revolution, see JOHN MILLER, THE GLORIOUS REVOLUTION (2d ed. 1997).

<sup>86</sup> GIBSON, *supra* note 85, at ix (2009) (“[W]hat happened in England in 1688–89 is that men and women chose Protestantism over monarchy . . . . Even James II (and VII of Scotland), after the Revolution, ascribed his loss of the throne to the ‘groundless’ fears the Church had about Catholicism.”).

<sup>87</sup> John Miller, *The Glorious Revolution: ‘Contract’ and ‘Abdication’ Reconsidered*, 25 HIST. J. 541, 541 (1982).

<sup>88</sup> AKHIL REED AMAR & LES ADAMS, THE BILL OF RIGHTS PRIMER: A CITIZEN’S GUIDE-BOOK TO THE AMERICAN BILL OF RIGHTS 12 (2013). *See also id.* at 9–10:

Several hundred years of English history were to pass after the signing of Magna Carta before England was presented with the next seminal document in its constitutional history, The Petition of Right, drafted by



Rights itself took note of how James II and his “evil counsellors” had subverted “the Protestant religion and the laws and liberties of this kingdom” by, among other things, “committing and prosecuting . . . worthy prelates for humbly petitioning” the king.<sup>89</sup>

Along with England, both Ireland and Scotland were also part of James II’s realm, though James II—because of Scottish history—went by James VII in his Scottish kingdom.<sup>90</sup> In Edinburgh, on April 11, 1689, the same day William and Mary were crowned as England’s new king and queen, the Declaration of the Estates of the Kingdom of Scotland, containing the Claim of Right, and the Offer of the Crown to their Majesties King William and Queen Mary, was issued.<sup>91</sup> Like the English Bill of Rights, it similarly declared that “King *James* the Seventh, being a professed *Papist*,” had failed to take “the Oath required by Law . . . to maintain the Protestant Religion”; did, through “the Advice of Wicked and Evil Counsellors, Invade the Fundamental Constitution of this Kingdom, and Altered it from a Legal Limited Monarchy, to an Arbitrary Despotic Power”; and had, thereby, “Forfeited the Right to the Crown, and the Throne is become Vacant.”<sup>92</sup> That Scottish Declaration further asserted that James had subverted “the *Protestant* Religion,” had violated “the Laws and Liberties of the Kingdom,”<sup>93</sup> and also contained the following recital, among many others, about how his reign had violated Scottish liberty: “By imposing Exorbitant Fines, to the Value of the Parties Estates, exacting extravagant Bail; and disposing Fines and Forfeitures before any Process or Conviction.”<sup>94</sup> The Scottish declaration further pronounced “[t]hat the imposing of extraordinary Fines, the exacting of exorbitant Bail, and the disposing of Fines and Forfeitures, before Sentence, are contrary to Law.”<sup>95</sup>

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the English Parliament and presented to King Charles I in 1628. The petition reflected the gradual development of individual liberties that had been implied long before in the provisions of Magna Carta, and foretold the codification of those liberties, which would occur sixty-one years later with the passage of the English Bill of Rights.

<sup>89</sup> English Bill of Rights, *supra* note 45. See also AGNES STRICKLAND, THE LIVES OF THE SEVEN BISHOPS COMMITTED TO THE TOWER IN 1688, at 1 (1866):

The revolution which drove the male line of the Royal House of Stuart from the throne of Great Britain was precipitated by the courageous resistance of seven intrepid prelates to the unconstitutional exercise of the royal prerogative attempted by James II.—a fact no one who dispassionately studies the events of that period can doubt.

<sup>90</sup> THE REIGNS OF CHARLES II AND JAMES VII AND II, at 51 (Lionel K. J. Glassey ed., 1997).

<sup>91</sup> The Declaration of the Estates of the Kingdom of the Scotland, containing the Claim of Right, and the Offer of the Crown to their Majesties King William and Queen Mary, Apr. 11, 1689, *reprinted in* THE ACTS OF THE PARLIAMENTS OF SCOTLAND 206–11 (1908).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* See also The Declaration of the Estates of the Kingdom of Scotland containing the Claim of Right and the offer of the Croune to the King & Queen of England, *in* WILLIAM

The late seventeenth-century transition in monarchical power that occurred in England and Scotland was tied up squarely with issues relating to religion (i.e., a fear of Catholicism). More broadly, it was also about checking royal power and restoring the rights and civil liberties of English and Scottish subjects.<sup>96</sup> On January 22, 1689, in each house of England's Convention Parliament, a letter from Prince William had been read to the peers and to the assembled members of the Commons at its outset.<sup>97</sup> "My Lords and Gentlemen," the letter began, with William asserting, "I have endeavoured to the utmost of my power, to perform what was desired from me," so as to achieve "the public peace and safety," since "the administration of affairs was put into my hands."<sup>98</sup> "It now lieth upon you," it declared, "to lay the foundations of a firm security for your religion, your laws, and your liberties."<sup>99</sup> "I do not doubt," his letter continued, "but that by such a full and free representative of the nation, as is now met," the British people might arrive at a "happy and lasting settlement."<sup>100</sup> "[I]t hath pleased God hitherto to bless my good intentions with so great success," William proclaimed, adding: "I trust in him, that he will complete his own work, by sending a spirit of peace and union to influence your counsels."<sup>101</sup> It was the Convention Parliament, which offered the crown to William and Mary under the parliamentary conditions it crafted, that produced the historic English Declaration of Rights.<sup>102</sup>

The Convention Parliament identified specific grievances that it wanted addressed, seeking to limit the kinds of abuses of power that had taken place during the reign of the Stuarts, including after King James II had taken the reins of royal prerogative.<sup>103</sup> Indeed, the House of Commons of England's Convention Parliament produced twenty-three "Heads of Grievance" that targeted the abuses of James II and those of the House of Stuart.<sup>104</sup> Those were produced by a committee of thirty-nine members chaired by a lawyer, Sir George Treby, with that committee having been tasked with drafting the "heads of things that were absolutely essential to secure the

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ALEXANDER, AN ABRIDGEMENT OF THE ACTS OF THE PARLIAMENTS OF SCOTLAND, FROM THE REIGN OF JAMES THE FIRST IN 1424 TO THE UNION WITH ENGLAND IN 1707, at 336 (1841) ("By imposing exorbitant fines to the value of the pairties Estates exacting extravagant Baile and disposing fines and forefaultors befor any proces or Conviction. . . . ALL which are utterly and directly contrairy to the knoune lawes, statutes and freedomes of this realme."); *id.* at 337 ("That the Imposing of extraordinary fynes, The exacting of exorbitant Baile and the disposing of fynes and forefaultors befor sentence are Contrary to law.").

<sup>96</sup> JACKSON, *supra* note 80, at 121–25.

<sup>97</sup> 2 RAPIN DE THOYRAS, THE HISTORY OF ENGLAND, FROM THE EARLIEST PERIODS 322 (Nicolas Tindal trans., 1820).

<sup>98</sup> *Id.* at 322–23.

<sup>99</sup> *Id.* at 323.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> HISTORICAL DICTIONARY OF STUART ENGLAND, 1603–1689, at 151 (Ronald H. Fritze & William B. Robison eds., 1996).

<sup>103</sup> WILLIAMS, *supra* note 67, at 2.

<sup>104</sup> HISTORICAL DICTIONARY OF STUART ENGLAND, *supra* note 102, at 126.

nation's religion, laws and liberties."<sup>105</sup> In the parliamentary debate, Sir Richard Temple—one of the Convention Parliament's most frequent speakers—had presented “three heads essentially necessary” for reform, with the first two focused on Parliament and the third centered on judicial abuses.<sup>106</sup> “Extravagant bail,” one member of Parliament raised as a particular concern.<sup>107</sup> With the committee's report given to the House of Commons on February 2, 1689, and with five more grievances added by the House of Commons itself, the nineteenth grievance read: “The requiring excessive bail of persons committed in criminal cases, and imposing excessive fines and illegal punishments to be prevented.”<sup>108</sup> Before being finalized, those grievances were later whittled down to thirteen. Another committee, chaired by John Somers, a radical Whig lawyer educated at Oxford and at the Middle Temple, formed on February 7 to amend the motion that would, less than a week later, declare William and Mary the King and Queen of England.<sup>109</sup>

The final version of the Declaration of Rights—the one presented to Prince William and Princess Mary on February 13—listed, among those thirteen grievances, 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 subjects”; “excessive fines have been imposed”; and “illegal and cruel punishments inflicted.”<sup>110</sup> To rectify the articulated wrongs, the English Declaration of Rights then declared in its tenth article: “[t]hat excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.”<sup>111</sup> That Declaration of Rights thus laid out the multiple abuses of James II, his ministers, and his judges, as well as the fundamental rights and liberties of British subjects.<sup>112</sup> “Over the next ten months,” one scholar,

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<sup>105</sup> *Id.* (entry for “Declaration of Rights (1689)”).

<sup>106</sup> Woodruff, *supra* note 56, at 288.

<sup>107</sup> *Id.*; Godfrey Davies, *The Political Career of Sir Richard Temple (1634–1697) and Buckingham Politics*, 4 HUNTINGTON LIBR. Q. 47, 78–79 (1940). *See also* 9 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 1233 (1811) (referring to 1736 debate in the House of Lords over a “Bill to prevent Smuggling” to “the security of the subject against unjust imprisonments, and the demanding of extravagant bail”).

<sup>108</sup> 4 JOHN LORD CAMPBELL, THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND, FROM THE EARLIEST TIMES TILL THE REIGN OF KING GEORGE IV, at 102 (2d Am. ed. 1851). *See also* *Ingraham v. Wright*, 430 U.S. 651, 655 (1977); 10 HC Jour. 17 (1688); Massey, *supra* note 57, at 1249–50; Woodruff, *supra* note 56, at 288.

<sup>109</sup> Massey, *supra* note 57, at 1249–50.

<sup>110</sup> English Bill of Rights, *supra* note 45. *See also In re Kemmler*, 136 U.S. 436, 446 (1890); *Mitchell v. State*, 34 A. 246, 247 (Md. 1896).

<sup>111</sup> Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35, 36 (2008). *See also* LORD NUGENT, SOME MEMORIALS OF JOHN HAMPDEN, HIS PARTY AND HIS TIMES 80 (3d ed., rev. 1854) (“Families were impoverished, some ruined, by excessive fines to the Courts of Wards for compounding wardships.”); LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS 1689 (1981) (reprinting “Heads of Grievances”).

<sup>112</sup> Pauline Miller, *Introduction to THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION OF THE UNITED STATES* 1, 2 (2008).

Michael Woodruff, observes of the period that followed the Declaration's presentation in mid-February 1689, "the Convention Parliament worked on giving statutory force to the rights and liberties asserted in the Declaration of Rights."<sup>113</sup> The English Bill of Rights received royal assent on December 16, 1689, and thus was enacted within the first year of William and Mary's reign. The statute was titled "An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown."<sup>114</sup>

Using the old-style Julian calendar, the English Bill of Rights, referencing the earlier declaration, recited that:

[T]he Lords Spiritual and Temporal, and Commons Assembled at Westminster, Lawfully, Fully and Freely Representing all the Estates of the People of this Realm, did upon the Thirteenth Day of February in the Year of our Lord One thousand six hundred eighty eight, Present unto Their Majesties, then called and known by the Names of Style of William and Mary, Prince and Princess of Orange, being present in their proper Persons a certain Declaration in Writing, made by the said Lords and Commons . . . .<sup>115</sup>

Under England's seventeenth-century Julian calendar, not abandoned for the Gregorian model until 1751, each new year did not start until March 25th, so the Declaration of Rights was then seen as a product of 1688, not 1689.<sup>116</sup> Before setting out, among other things, its prohibitions against "Excessive Bail," "Excessive Fines," and "cruel and unusual punishments," the English Bill of Rights condemned "the late King *James the Second*" and his "Evil Councillors, Judges and Ministers Employed by him" for subverting "the Protestant Religion, and the Laws of Liberties of this Kingdom."<sup>117</sup>

<sup>113</sup> Woodruff, *supra* note 56, at 289. See also English Bill of Rights, *supra* note 45.

<sup>114</sup> It is sometimes reported in English sources as "An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne." *The Bill of Rights 1689*, The Glorious Revolution, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/billofrights> [http://perma.cc/G85R-DR6V].

<sup>115</sup> *Id.* Some sources, using then-prevailing spelling conventions, noted that the English Bill of Rights recited that:

[T]he Lords Spirituall and Temporall and comons assembled at Westminster lawfully fully and freely representing all the Estates of the People of this Realme did upon the thirteenth day of February in the yeare of our Lord one thousand six hundred eighty eight present unto their Majesties then called and known by the Names of Stile of William and Mary Prince and Princesse of Orange being present in their proper Persons a certaine Declaration in Writeing made by the said Lords and comons . . . .

*Id.*

<sup>116</sup> PAUL BLAKE & MAGGIE LOUGHRAN, DISCOVER YOUR ROOTS: DIG UP YOUR FAMILY HISTORY AND OTHER BURIED TREASURES 89–90 (2006).

<sup>117</sup> English Bill of Rights, *supra* note 45, cl. 1 (1689).

Like the earlier declaration, the statutory Bill of Rights recited 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 Subjects”;<sup>118</sup> “excessive Fines have been imposed”;<sup>119</sup> and “illegal and cruel Punishments inflicted.”<sup>120</sup>

The English Declaration of Rights laid down an important historical marker, echoes of which can be clearly seen in America’s Declaration of Independence.<sup>121</sup> Both the English and American declarations forthrightly declared that people had certain rights and that a king had violated them.<sup>122</sup> Whereas the English declaration targeted King James II, who made a serious, but unsuccessful effort in 1689 and 1690 to regain the crown,<sup>123</sup> its American counterpart took aim at George III, the King of Great Britain from 1760 until his death in 1820.<sup>124</sup> In a fitting bit of symbolism, James II’s own father, Charles I of the House of Stuart, had, in 1649, been convicted of high treason and executed near the end of the English Civil War of 1642–51 outside the very Banqueting House where William and Mary listened attentively as the Declaration of Rights fashioned by the Convention Parliament was read aloud.<sup>125</sup> Charles I, who ruled from 1625 until his death, had quarreled bitterly with Parliament and asserted his belief in the “divine right of kings.”<sup>126</sup> He had dissolved multiple parliaments, provoked and then violated the famous Petition of Right in 1628,<sup>127</sup> and governed England without any parliament at all between 1629

<sup>118</sup> *Id.* cl. 10.

<sup>119</sup> *Id.* cl. 11.

<sup>120</sup> *Id.* cl. 12.

<sup>121</sup> See BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 178–80; see also Massey, *supra* note 57, at 1243.

<sup>122</sup> William F. Dana, *The Declaration of Independence*, 13 HARV. L. REV. 319, 334 (1900).

<sup>123</sup> JOHN MILLER, JAMES II 220–33 (3d ed. Yale Univ. Press 2000). James II was defeated in Ireland at the Battle of Boyne (1690) and died in exile in France. *Id.* at 240.

<sup>124</sup> Dana, *supra* note 122, at 334.

<sup>125</sup> Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1252, 1265 (2016); Anni Mäntyniemi, *Executed in the Open Street Before Whitehall*, HISTORIC ROYAL PALACES BLOGS (July 18, 2016), <https://blog.hrp.org.uk/curators/executed-in-the-street-before-banqueting-house/> [<http://perma.cc/E5P3-82AZ>].

<sup>126</sup> MILLER, *supra* note 123, at 34.

<sup>127</sup> The Petition of Right of 1628 spoke of the “Rights and Liberties of the Subjects” and recited, among other things, that “The Great Charter of the Liberties of England” had declared “[t]hat no Freeman may be taken or imprisoned or be disseised of his Freehold or Liberties, or his free Customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful Judgment of his Peers, or by the Law of the Land”; that in King Edward III’s reign it was declared and enacted by authority of Parliament, “that no man of what estate or condition that he be, should be put out of his Land or Tenements nor taken nor imprisoned nor disinherited nor put to death without being brought to answer by due process of law”; and that:

Nevertheless against the tenor of the said Statutes and other the good Laws and Statutes of your Realm to that end provided, divers of your Subjects have of late been imprisoned without any cause showed: And when for their deliverance they were brought before your Justices by



and 1640, ultimately plunging the country into a protracted civil war.<sup>128</sup> The English Civil War pitted Parliamentarians, or “Roundheads,” against the royalists, or “Cavaliers,” with the Parliamentarians finally prevailing at the Battle of Worcester on September 3, 1651.<sup>129</sup>

*C. The Causes of English Discontent Against the Reign of the Stuarts*

During his reign, Charles I had made extensive use of the Star Chamber,<sup>130</sup> the English court sitting without a jury at the royal Palace of Westminster that frequently imposed arbitrary fines, sentences of imprisonment, and, most infamously, had a reputation for grotesque abuses of power and resorting to methods of torture.<sup>131</sup> As one source notes, Charles I called the Star Chamber “into action a great deal, and extended its powers, and made it a means of great injustice and oppression.”<sup>132</sup> As

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your Majesty’s Writs of Habeas corpus there to undergo and receive as the Court should order, and their Keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty’s special command, signified by the Lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the Law.

Petition of Right, 3 Car. I, ch. 1 (1628), in 6 STATUTES OF THE REALM 23, 23.

<sup>128</sup> See MILLER, *supra* note 123, at 6–15; see also L.J. REEVE, CHARLES I AND THE ROAD TO PERSONAL RULE 20–23 (1989).

<sup>129</sup> REEVE, *supra* note 128, at 125–28; KEVIN SHARPE, THE PERSONAL RULE OF CHARLES I 98, 922 (1992). See also SAMUEL BANNISTER HARDING & ALBERT BUSHNELL HART, NEW MEDIEVAL AND MODERN HISTORY 429 (rev. 1920) (describing the “1629–1640” time frame as a “Period of arbitrary government”); THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 172 (G. R. Elton ed., 2d ed. 1982).

<sup>130</sup> The Star Chamber was so named because of the stars decorating the ceiling in the room in which it sat in the Palace of Westminster. See JOHN STOW, A SURVEY OF LONDON (rev. 1603), reprinted in JOHN STOW, A SURVEY OF LONDON (C.L. Kingsford ed., 1908), <https://www.british-history.ac.uk/no-series/survey-of-london-stow/1603/pp97-124> [<http://perma.cc/F5CA-FR4U>] (“This place is called the Starre Chamber, because the rooffe thereof is decked with the likenes of Stars guilt . . .”).

<sup>131</sup> See THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY, *supra* note 129, at 172; see also John Gunn & Paul Mevis, *Adversarial Versus Inquisitorial Systems of Trial and Investigation in Criminal Procedure*, in FORENSIC PSYCHIATRY AND PSYCHOLOGY IN EUROPE: A CROSS-BORDER STUDY GUIDE 9 (Kris Goethals ed., 2018):

The high-handed king [Charles I] forced disastrous wars and asked Parliament to raise the necessary funds. When this was refused, he disbanded Parliament and raised money by extortion from wealthy landowners. If a nobleman refused to pay up, he was arraigned before the Star Chamber. Arrested knights appealed to the common law for release from prison, but the king said he had unlimited powers because he ruled by divine right, and he dismissed Parliament.

<sup>132</sup> JACOB ABBOTT, CHARLES I, at 121 (1901).

a biography of Charles I reports: “[T]he Star Chamber under Charles I achieved such a level of notoriety for its capricious judgments and use of torture that the concept of a ‘Star Chamber’ lives on in the Anglo-Saxon legal tradition as the epitome of an arbitrary and uncontrolled court.”<sup>133</sup> Ultimately, Charles I was put on trial for his “wicked” and tyrannical practices “against the public interest, common right, liberty, justice, and peace of the people.”<sup>134</sup> The last recorded instance of torture occurred in the realm of Charles I in 1640 to secure a confession for treason, with the Star Chamber abolished the following year, in 1641.<sup>135</sup>

Historically speaking, the Star Chamber came to be associated with “exorbitant” fines<sup>136</sup> and “unchecked tyranny.”<sup>137</sup> For example, in 1630, a Scottish clergyman, Dr. Alexander Leighton, was sentenced by the Star Chamber to be branded, flogged, and pilloried,<sup>138</sup> to have his nose slit, and to have one of his ears cut off.<sup>139</sup> Likewise, in

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<sup>133</sup> JEREMY B. BIERBACH, FRONTIERS OF EQUALITY IN THE DEVELOPMENT OF EU AND US CITIZENSHIP 31 (2017).

<sup>134</sup> TOBY BARNARD, THE ENGLISH REPUBLIC 1649–1660, at 3 (2d ed. 1997); STEPHANIE A. MANN, SUPREMACY AND SURVIVAL: HOW CATHOLICS ENDURED THE ENGLISH REFORMATION, at xxxiii, 104, 110 (2007); 12 THE WORLD BOOK ENCYCLOPEDIA 83 (1930); Massey, *supra* note 57, at 1246.

<sup>135</sup> GEORGE RYLEY SCOTT, THE HISTORY OF TORTURE THROUGHOUT THE AGES 87 n.1 (2009); 22 THE NEW INTERNATIONAL ENCYCLOPAEDIA 366–67 (Daniel Coit Gilman, Harry Thurston Peck & Frank Moore Colby eds., 2d ed. 1916). *See also* EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS 1620–1692, at 107–08 (“Torture virtually disappeared after 1600, even as an extralegal process. Only seven cases were recorded during the reigns of James I and Charles I, and all seven involved state crimes. Although the threat of torture was used as late as 1662 to obtain a treason confession from Thomas Tonge, no actual use of torture after 1640 has been uncovered.”).

<sup>136</sup> DE THOYRAS, *supra* note 97, at 280 (noting that “Alderman *Chambers*” was condemned by the Star Chamber to “an exorbitant fine [of 2000*l.*] by which [and some other oppressions] he was reduced to a very low condition”).

<sup>137</sup> TERRY, *supra* note 72, at 658.

<sup>138</sup> The pillory, also sometimes called stocks, was a clamp which held the convict in position in public view while the public could jeer and pelt the victim. *See* Matthew Green, *A Grim And Gruesome History Of Public Shaming In London: Part 1*, LONDONIST (Dec. 2015), <https://londonist.com/2015/12/publicshaming1> [<http://perma.cc/L2LP-R4EQ>].

<sup>139</sup> TERRY, *supra* note 72. *See also* GREG ROZA, THE EIGHTH AMENDMENT: PREVENTING CRUEL AND UNUSUAL PUNISHMENT 10 (2011):

In 1630, for example, Puritan clergyman Alexander Leighton was charged with libel for writing a pamphlet that attacked the Anglican Church. Leighton was whipped so badly that he almost died. Then his hands and head were pilloried, or secured in a wooden restraint, and he was placed outside to be ridiculed by the public. He ear was nailed to the pillory, his cheek was branded, and his nose was slit; the next week he suffered that same fate on the opposite side of his face. After undergoing all of this, he was sentenced to life in prison and fined £10,000 (\$15,282)—an enormous sum for the time.

1634, a prominent lawyer, William Prynne, was fined £5,000 by the Star Chamber, ordered to be imprisoned for life, stripped of his Oxford degree and his professional membership in Lincoln's Inn, sent to the pillory, and had his ears cut off for publishing a book, *Histrionomastix*.<sup>140</sup> That book denounced all dramatic productions as the Devil's work, shortly after Charles I's wife, Queen Henrietta, as well as her ladies-in-waiting, had participated in a production of Walter Montagu's *The Shepherd's Paradise*.<sup>141</sup> After being confined in prison, Prynne was hauled back before the Star Chamber after attacking Matthew Wren, the Bishop of Norwich, and was again fined £5,000, had his life sentence confirmed, and was sent back to the pillory to have what remained of his ears cut off.<sup>142</sup> Prynne, held in the Tower of London, was branded on his cheeks with the letters "S. L." (for "Seditious Libeller") and would become known as "the man with no ears."<sup>143</sup>

Dr. Leighton and Prynne, along with others who had been imprisoned, were later freed, with Dr. Leighton's petition, which detailed his "mutilations and tortures," reportedly drawing "tears from almost every member of the House of Commons."<sup>144</sup> As that source notes of what happened after the convening of what came to be known as the Long Parliament: "The Star Chamber and High Commission Courts, the dreadful engines of oppression and arbitrary power in church and state, which had taken away the liberties, and confiscated the estates, and tortured the persons of the wealthy and the worthy in England, were dissolved, Aug. 1, 1641."<sup>145</sup> In Dr. Leighton's case, he had presented a petition on November 7, 1640, that complained of the cruelties he had endured, which led, in 1641, to the House of Commons resolving, among other things: "That the great fine of ten thousand pounds, laid upon Dr. Leighton by sentence of the star chamber, is illegal";<sup>146</sup> "That the sentence of the corporeal punishment, imposed upon Dr. Leighton, the whipping, branding, slitting the nose, cutting off his ears, setting in the pillory, and the execution thereof, and the imprisonment thereupon, is illegal."<sup>147</sup> "That Dr. Leighton ought to be freed from the great fine of ten thousand pounds, and from the sentence of perpetual imprisonment,

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<sup>140</sup> DAVID ROGERS, *BY ROYAL APPOINTMENT: TALES FROM THE PRIVY COUNSEL—THE UNKNOWN ARM OF GOVERNMENT* 120 (2015).

<sup>141</sup> IDA ASHWORTH TAYLOR, *THE LIFE OF QUEEN HENRIETTA MARIA* 160 (E. P. Dutton & Co. ed., 2d ed. 1906). *See also* ROGERS, *supra* note 140, at 120.

<sup>142</sup> James Hart, *In Search of Tradition: Goodridge v. Department of Public Health*, 82 DENV. U. L. REV. 79, 95 (2004).

<sup>143</sup> LOUIS EDWARD INGELHART, *PRESS AND SPEECH FREEDOMS IN THE WORLD, FROM ANTIQUITY UNTIL 1998: A CHRONOLOGY* 48 (1998). *See also* ROGERS, *supra* note 140, at 122.

<sup>144</sup> THOMAS LOCKERBY, *A SKETCH OF THE LIFE OF THE REV. JOHN BROWN, SOMETIME MINISTER OF THE GOSPEL IN WAMPHRAY; CONTAINING MANY OF HIS INTERESTING LETTERS HITHERTO UNPUBLISHED, WITH ILLUSTRATIVE NOTES, AND A HISTORICAL APPENDIX; EXHIBITING A FULL VIEW OF THE TIMES AND SUFFERINGS OF THE COVENANTERS* 393 (1839).

<sup>145</sup> *Id.*

<sup>146</sup> THOMAS SMITH, *SELECT MEMOIRS OF THE ENGLISH AND SCOTTISH DEVINES* 455–56 (C. Matthew McMahon & Therese McMahon eds., 2d ed. 2012).

<sup>147</sup> *Id.*

and to have his bonds delivered to him which he gave for his true imprisonment.”<sup>148</sup> “That Dr. Leighton ought to have good satisfaction and reparation for his great damages and sufferings sustained, by the illegal sentence of the star chamber.”<sup>149</sup>

While the infamous Star Chamber became known in America for its “outrageous deeds,”<sup>150</sup> the English Bill of Rights became known as the predecessor of American bills of rights, including the United States Bill of Rights.<sup>151</sup> The English Bill of Rights, which memorialized the end of James II’s reign and the beginning of William and Mary’s rule, sought to protect rights and liberties.<sup>152</sup> But it also, quite notoriously, included an overtly anti-Catholic provision which provided that “every person who shall marry a papist shall be excluded, and for ever be incapable to inherit, the crown of this realm.”<sup>153</sup> As historian Maura Jane Farrelly writes in *Anti-Catholicism in America, 1620–1860*:

After 1689, when an anti-Catholic coup in England known as the ‘Glorious Revolution’ firmly established that to be ‘English’ was to be ‘Protestant,’ the Puritans in North America also used their long-standing animosity toward the Catholic Church to assert their English identity to each other and to their countrymen on the other side of the Atlantic.<sup>154</sup>

Years before the Glorious Revolution, anti-Catholic sentiment had dominated English life.<sup>155</sup> James II, the Duke of York, before ascending to the throne in February 1685 upon Charles II’s death, had secretly converted to Catholicism in 1668 or 1669. This raised concerns among Protestants about unwelcome Roman Catholic influence once he assumed the throne.<sup>156</sup> Even before Charles II’s brother, James II, came to power, an anti-Catholic fervor bordering on hysteria had pervaded England and Scotland. Charles II, a Protestant who had Catholic sympathies, had led the Restoration, in which the English, Scottish, and Irish monarchies were all restored

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> AMAR & ADAMS, *supra* note 88, at 125.

<sup>151</sup> DOCUMENTS OF AMERICAN DEMOCRACY: A COLLECTION OF ESSENTIAL WORKS 29 (Roger L. Kemp ed., 2010).

<sup>152</sup> English Bill of Rights, *supra* note 45.

<sup>153</sup> 6 GEORGE L. CRAIK & CHARLES MACFARLANE, THE PICTORIAL HISTORY OF ENGLAND: BEING A HISTORY OF THE PEOPLE 219 (1847).

<sup>154</sup> MAURA JANE FARRELLY, ANTI-CATHOLICISM IN AMERICA, 1620–1860, at 5 (2018).

<sup>155</sup> Mary Stuart, Queen of Scots, a Roman Catholic, was beheaded in 1587. *See generally* JENNY WORMALD, MARY, QUEEN OF SCOTS: POLITICS, PASSION AND A KINGDOM LOST (2001) (detailing the life of Queen Mary of Scotland); *James II and VII*, THE STUART SUCCESSIONS PROJECT, <http://stuartsexeter.ac.uk/education/biographies/james-ii-and-vii/> [<http://perma.cc/JSF6-QUW8>].

<sup>156</sup> *James II and VII*, *supra* note 155.

under Charles II's authority following Oliver Cromwell's nearly five-year republican rule (and his son Richard Cromwell's brief, 264-day rule) as the Lord Protector of the short-lived Commonwealth of England, Scotland, and Ireland.<sup>157</sup> While Charles II ultimately converted to Catholicism on his deathbed in 1685,<sup>158</sup> the Glorious Revolution of 1688, which was grounded in Protestantism, established the terms on which the British people would continue to accept monarchical rule, and laid out the rights that had come to be seen as indispensable.<sup>159</sup> Though it was driven by anti-Catholic fervor, the Glorious Revolution produced a list of rights, many of which (including the rights to be free from excessive bail, excessive fines, and cruel and unusual punishments) had, at least on their face, nothing at all to do with religion.<sup>160</sup> Less than a decade after that revolution, in a tribute that followed Queen Mary II's death in 1694, one writer spoke in 1695 of "Liberties that we enjoy as the direct Fruits of the Revolution."<sup>161</sup> "We are now deliver'd from excessive Bails and Fines, and cruel unusual Punishments," the author stressed.<sup>162</sup>

James II's reign, which started on February 6, 1685, had been turbulent from the start.<sup>163</sup> In 1685, the newly crowned James II had quashed rebellions led by James Scott, the Duke of Monmouth, and one of the duke's Scottish allies, Archibald Campbell, the 9th Earl of Argyll.<sup>164</sup> Scott, the Duke of Monmouth and James II's nephew, was Charles II's firstborn son, though he was the child of Lucy Walter, a Welsh mistress whom James II derided as a "common prostitute."<sup>165</sup> Both the Duke of Monmouth and the Earl of Argyll were executed for high treason, the Duke in the

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<sup>157</sup> JULIA MARCIARI ALEXANDER & CATHERINE MACLEOD, *POLITICS, TRANSGRESSION, AND REPRESENTATION AT THE COURT OF CHARLES II*, at 17 (2007); 2 *A COLLECTION OF STATE TRACTS, PUBLISH'D DURING THE REIGN OF KING WILLIAM III*, at 1–2 (1706) [hereinafter 2 *A COLLECTION OF STATE TRACTS*]. Oliver Cromwell, a Puritan, had fought in the English Civil War and had been, in 1649, one of the signatories of Charles I's death warrant. He played a key role in the Rump Parliament (1649–1653) before becoming the Lord Protector of the Commonwealth of England, Scotland, and Ireland. *See generally* PETER GAUNT, *OLIVER CROMWELL* (1996); CHRISTOPHER HILL, *GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION* (Norman F. Cantor ed., 1970).

<sup>158</sup> KAREN EDMISTEN, *DEATHBED CONVERSIONS: FINDING FAITH AT THE FINISH LINE* 28–29 (2013).

<sup>159</sup> Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 *IOWA L. REV.* 735, 806–07 (2001).

<sup>160</sup> At that time, of course, the legal protections against excessive bail, excessive fines, and cruel and unusual punishments had a lot to do with protecting those with certain religious beliefs.

<sup>161</sup> 2 *A COLLECTION OF STATE TRACTS*, *supra* note 157, at 522–52.

<sup>162</sup> *Id.* at 526.

<sup>163</sup> MILLER, *supra* note 123, at 118–19.

<sup>164</sup> *Id.* at 136–43.

<sup>165</sup> *See generally* 4 SAMUEL PEPYS, *THE DIARY OF SAMUEL PEPYS* 311 (Henry B. Wheatley ed., 1893); Donald E. Wilkes, Jr. Collection: Duke of Monmouth, <http://libguides.law.uga.edu/c.php?g=177206&p=1164806> [<http://perma.cc/5M2B-VG8K>]. *See also* ANNA KEAY, *THE LAST ROYAL REBEL: THE LIFE AND DEATH OF JAMES, DUKE OF MONMOUTH* (2016).



Tower of London and the Earl in Edinburgh.<sup>166</sup> Indeed, after Argyll's Rising and the Duke of Monmouth's failed rebellion, scores of rebels—in the hundreds, though the exact number is unknown—were condemned to death, most notoriously by England's Lord Chief Justice George Jeffreys.<sup>167</sup> Jeffreys was sent by James II to swiftly mete out the king's justice, and the series of trials in which Monmouth's rebels were sentenced to die by Jeffreys came to be known as the "Bloody Assizes."<sup>168</sup> Many of the rebels in Argyll's Rising and Monmouth's Rebellion were hanged, grotesquely drawn and quartered, or sent to perform hard labor in the West Indies.<sup>169</sup>

Jeffreys even condemned to death an elderly woman, Lady Alice Lisle, for sheltering and feeding a rebel.<sup>170</sup> Her sentence—to be burned alive—was only changed to a beheading through a plea to King James II himself.<sup>171</sup> "The barbarity and breadth of the punishment," a history of the Stuart dynasty notes of the harsh treatment of the rebels, "gained Jeffreys and ultimately James reputations as cold-blooded murderers."<sup>172</sup> Prominent figures at the Convention Parliament—among them, Sir Richard Temple—showed considerable animosity toward Jeffreys,<sup>173</sup> with Jeffreys becoming known as England's "most reviled judge."<sup>174</sup> After the onset of the Glorious Revolution, Jeffreys had made plans to flee England on a coal-barge, but before he was able to escape, he'd been caught<sup>175</sup> and then confined in the Tower of London, where he

<sup>166</sup> See FREDERICK BURWICK, *PLAYING TO THE CROWD: LONDON POPULAR THEATRE, 1780–1830*, at 144 (2011); 2 JOHN DEBRETT, *THE PEERAGE OF THE UNITED KINGDOM OF GREAT BRITAIN & IRELAND* 616–17 (London, J. Mayes et al. eds., 9th ed. 1814); JAMES K. McDONELL & ROBERT B. CAMPBELL, *LORDS OF THE NORTH* 11 (1997).

<sup>167</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 967–68 (1991).

<sup>168</sup> *Id.*; Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 46–48 (2000). See also Note, *What is Cruel and Unusual Punishment?*, 24 HARV. L. REV. 54, 54–55 (1917).

<sup>169</sup> *Harmelin*, 501 U.S. at 967–68; CHARLES PASTOOR & GALEN K. JOHNSON, *HISTORICAL DICTIONARY OF THE PURITANS* 52 (2007).

<sup>170</sup> See James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 155 (1983); Virginia Salima Moorhead, *The Trial of Lady Alice Lisle*, ALEXANDER CAMPBELL KING L. LIB., U. GA. SCH. L., <http://libguides.law.uga.edu/c.php?g=177206&p=1164821> [<http://perma.cc/G6CB-2AA4>].

<sup>171</sup> Moorhead, *supra* note 170.

<sup>172</sup> *HISTORICAL DICTIONARY OF STUART ENGLAND*, *supra* note 102, at 48. See GWENDA MORGAN & PETER RUSHTON, *BANISHMENT IN THE EARLY ATLANTIC WORLD: CONVICTS, REBELS AND SLAVES* 76 (2013); *THE PANOPLIST, OR THE CHRISTIAN'S ARMORY* 341–42 (Boston, Crocker & Brewster, 1850). See also Stephen A. Timmons, *Executions Following Monmouth's Rebellion: A Missing Link*, 76 HIST. RES. 286–91 (2003).

<sup>173</sup> See Davies, *supra* note 107, at 79.

<sup>174</sup> Ruth Tyler Bryan, *George Jeffreys, First Baron Jeffreys of Wem*, ALEXANDER CAMPBELL KING L. LIB., U. GA. SCH. L., <http://libguides.law.uga.edu/c.php?g=177206&p=1164803> [<http://perma.cc/UQ7Z-PFS6>].

<sup>175</sup> See HUMPHREY W. WOOLRYCH, *THE LIFE OF JUDGE JEFFREYS, CHIEF JUSTICE OF THE KING'S BENCH UNDER CHARLES II., AND LORD HIGH CHANCELLOR OF ENGLAND DURING THE REIGN OF JAMES II.* 278–81 (Phila., Lindsay & Blakiston 1852).

later died.<sup>176</sup> Jeffreys was an alcoholic,<sup>177</sup> and after being recognized at the Red Cow, a pub near King Edward's Stairs where he was drinking "a pot of ale," it wasn't long before cries of "Vengeance! Justice! Justice!" had gone up from an angry mob.<sup>178</sup>

#### *D. The Case of Titus Oates*

Without a shadow of a doubt, English parliamentarians produced the Declaration of Rights (and its statutory counterpart) to secure what they perceived to be the indispensable rights and liberties of British subjects.<sup>179</sup> And it did not take long before its prohibitions against excessive bail, excessive fines, and cruel and unusual punishments took center stage.<sup>180</sup> Historical sources reveal that, following the onset of the Glorious Revolution, England's Parliament conducted a full-throated review of notorious actions and punishments meted out in James II's reign.<sup>181</sup> The review by Parliament of punishments handed out by the King's Bench during James II's reign is reflected in parliamentary debates that reveal the unique historical impulses (and impetus) behind the English Declaration of Rights.<sup>182</sup> "At the Revolution," one source notes of the Glorious Revolution, the disgraced Protestant clergyman Titus Oates—one of the prior targets of James II's wrath—"had been released, probably

<sup>176</sup> Bryan, *supra* note 174.

<sup>177</sup> DANIEL DIEHL & MARK P. DONNELLY, TALES FROM THE TOWER OF LONDON 146 (2004).

<sup>178</sup> WOOLRYCH, *supra* note 175, at 278–81.

<sup>179</sup> See English Bill of Rights, *supra* note 45; Harmelin v. Michigan, 501 U.S. 957, 967 (1911); Parr, *supra* note 168, at 43.

<sup>180</sup> THE HISTORY OF THE DESERTION, OR AN ACCOUNT OF ALL THE PUBLICK AFFAIRS IN ENGLAND, FROM THE BEGINNING OF SEPTEMBER 1688 TO THE TWELFTH OF FEBRUARY FOLLOWING 128–29 (London, Ric. Chiswell 1689) (containing the recitals condemning "Excessive Fines" and "Illegal and cruel Punishments," and reprinting the prohibition on "Excessive Bail," "Excessive Fines," and "cruel and unusual punishments"); THE HISTORY OF THE HOUSE OF ORANGE; OR, A BRIEF RELATION OF THE GLORIOUS AND MAGNANIMOUS ACHIEVEMENTS OF HIS MAJESTIES RENOWNED PREDECESSORS, AND LIKEWISE OF HIS OWN HEROIC ACTIONS TILL THE LATE WONDERFUL REVOLUTION 140–42 (London, Nath. Crouch ed., 1693) [hereinafter HISTORY OF THE HOUSE OF ORANGE] (same); 1 THE TWELFTH AND LAST COLLECTION OF PAPERS RELATING TO THE PRESENT JUNCTURE OF AFFAIRS IN ENGLAND AND SCOTLAND 17–18 (London, Richard Janeway ed., 1689) (same); UTRUM HORUM; OR GOD'S WAYS OF DISPOSING OF KINGDOMS: AND SOME CLERGY—MEN'S WAYS OF DISPOSING OF THEM 55, 57 (London, Richard Baldwin ed., 1691) [hereinafter UTRUM HORUM] (same); accord 1 OF THE USE AND ABUSE OF PARLIAMENTS: IN TWO HISTORICAL DISCOURSES 114 (London, 1744).

<sup>181</sup> See English Bill of Rights, *supra* note 45; HISTORY OF THE HOUSE OF ORANGE, *supra* note 180, at 140–42; 1 THE TWELFTH AND LAST COLLECTION OF PAPERS RELATING TO THE PRESENT JUNCTURE OF AFFAIRS IN ENGLAND AND SCOTLAND, *supra* note 180, at 16–17; UTRUM HORUM, *supra* note 180, at 51, 53–55.

<sup>182</sup> See HISTORY OF THE HOUSE OF ORANGE, *supra* note 180, at 140–41; 1 THE TWELFTH AND LAST COLLECTION OF PAPERS RELATING TO THE PRESENT JUNCTURE OF AFFAIRS IN ENGLAND AND SCOTLAND, *supra* note 180, at 16–17; UTRUM HORUM, *supra* note 180, at 51, 53–55.

because excessive fines and punishments had been declared illegal by the Declaration of Rights.”<sup>183</sup>

In fact, one of the most prominent cases that came into focus after the issuance of the English Declaration of Rights involved Titus Oates, the clergyman who’d been put on trial for perjury in 1685 at the outset of James II’s reign.<sup>184</sup> In 1678, Oates had falsely claimed that there was a diabolical, Jesuit-led “Popish Plot” to assassinate King Charles II,<sup>185</sup> and the falsities concocted by Oates had gone so far as to implicate the future Catholic king, the Duke of York, among other prominent aristocrats.<sup>186</sup> Oates and others testified that Roman Catholics had plotted to murder Charles II to make way for the succession of the Duke of York, a Catholic.<sup>187</sup> The lies told by Oates led to the execution of more than a dozen Catholics,<sup>188</sup> and once those lies were exposed, Oates was called “the Blackest of Villains that ever lived upon the face of the Earth.”<sup>189</sup> At one point, Oates had denounced the then–Duke of York as “a traitor,” leading the Duke to sue Oates for libel in 1684. Oates was fined £100,000 in that libel suit and then imprisoned in the King’s Bench prison for his inability to pay that princely sum.<sup>190</sup>

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<sup>183</sup> Eveline Cruickshanks et al., *Divisions in the House of Lords on the Transfer of the Crown and Other Issues, 1689–94: Ten New Lists*, in PEERS, POLITICS AND POWER: THE HOUSE OF LORDS 1603–1911, at 89 (Clyve Jones & David Lewis Jones eds., 1986). *See also id.* at 88 (“The case of Titus Oates took up a great deal of time in the first session of the Convention, delayed the bill of rights and other more important matters, produced a deadlock between the Houses and raised issues of constitutional importance.”).

<sup>184</sup> Ryan, *supra* note 3, at 577.

<sup>185</sup> *Proceedings on a Writ of Inquiry of Damages between his Royal Highness James Duke of York, in an Action upon the Statute de Scandalis Magnatum, and Titus Oates, in the King’s Bench: 36 Charles II A.s. 1984*, reprinted in 10 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 126–48 (T.B. Howell ed., 1816); AN HISTORICAL NARRATIVE OF THE HORRID PLOT AND CONSPIRACY OF TITUS OATES, CALLED THE POPISH PLOT, IN ITS VARIOUS BRANCHES AND PROGRESS, SELECTED FROM THE MOST AUTHENTIC PROTESTANT HISTORIANS, TO WHICH ARE ADDED SOME CURSORY OBSERVATIONS ON THE TEST ACT 60–61 (London, W.E. Andrews 1816); 1 THE PAPERS OF WILLIAM PENN (1644–1679) 558 n.2 (Mary Maples Dunn & Richard S. Dunn eds., 1981); Reginald Talbot, *Judge Jeffreys*, 23 L. MAG. & REV. 336, 345 (1898). *See generally* JOHN POLLOCK, THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II (Duckworth 1903).

<sup>186</sup> *See generally* 8 JOHN RICHARD GREEN, A HISTORY OF THE ENGLISH PEOPLE 139–221 (New York & London, Funk & Wagnalls Co. 1903) (discussing the “Popish Plot”).

<sup>187</sup> CAROLINE JOWETT, THE HISTORY OF NEWGATE PRISON 54–55 (2017); Davies, *supra* note 107, at 61.

<sup>188</sup> *See* POLLOCK, *supra* note 185, at xxi, 196, 332 (taking note of the executions).

<sup>189</sup> 9 A COLLECTION OF SCARCE AND VALUABLE OF THE MOST INTERESTING AND ENTERTAINING SUBJECTS: BUT CHIEFLY SUCH AS RELATE TO THE HISTORY AND CONSTITUTION OF THESE KINGDOMS 240 (Walter Scott ed., 2d. ed 1813).

<sup>190</sup> 2 THOMAS COVENTRY & SAMUEL HUGHES, AN ANALYTICAL DIGESTED INDEX TO THE COMMON LAW REPORTS FROM THE TIME OF HENRY III TO THE COMMENCEMENT OF THE REIGN OF GEORGE III, at 1226 (1832); 5 THE NEW CAMBRIDGE MODERN HISTORY: THE ASCENDANCY OF FRANCE, 1648–88, at 317 (F.L. Carsten ed., 1961).

After the Duke of York was elevated to His Majesty James II, the lies spread by Titus Oates came back to haunt him even more as Oates was brought from the prison to face criminal charges for perjury.<sup>191</sup> The first trial took place on May 8, 1685, with Oates representing himself.<sup>192</sup> And in those days of swift and rough justice, the second trial took place the very next day.<sup>193</sup> Oates was convicted on both counts, with George Jeffreys, the presiding judge, publicly excoriating Oates for his “Villainy” and calling his crime “a very heinous one.”<sup>194</sup> “That men should take away the lives of their fellow-creatures, by perjury and false accusations,” Jeffreys had instructed the jury at the first trial, making clear his own views and urging jurors to respect their consciences, “is of such dreadful consequences, that if the justice of the nation shall be afraid to have such matters detected, there would be an end of all the security we have of our lives, liberties, and whatsoever is dear to us.”<sup>195</sup>

Judge George Jeffreys—the mean-spirited, hard-drinking stooge of James II—was clearly out to get Titus Oates, one of the many targets of Jeffreys’ ire. “I cannot but say,” Jeffreys told the jurors after all the evidence at that trial was presented, “my blood does curdle, and my spirits are raised,” by “the discoveries” made during the trial, with Jeffreys calling Oates a “monstrous villain.”<sup>196</sup> “[T]he blackness of his soul, the baseness of his actions,” Jeffreys said of Oates at the first trial, “ought to be looked upon with such horror and detestation, as to think him unworthy any longer to tread upon the face of God’s earth.”<sup>197</sup> “[T]he destruction of poor innocent persons, by false accusations, by the pernicious evidence of perjured witnesses,” Jeffreys instructed the jurors at the second trial, “makes their crime infinitely more odious, than common murder.”<sup>198</sup>

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<sup>191</sup> *The Trial of Titus Oates, D.D. at the King’s Bench, for Perjury: 1 James II A.D. 1685*, reprinted in 10 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 1079–80 (T.B. Howell ed., 1816) [hereinafter Howell’s Edition of *The Trial of Titus Oates*].

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1227.

<sup>194</sup> *Id.* at 1313.

<sup>195</sup> *Id.* at 1212. See also *The Trial of Titus Oates D.D. at the King’s-Bench, for Perjury, May 8, 1685: 1 Jac. II*, reprinted in 4 A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS UPON HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS FROM THE REIGN OF KING RICHARD II TO THE END OF THE REIGN OF KING GEORGE I, at 59–60 (Thomas Salmon & Sollom Emlyn eds., 2d ed. 1730) [hereinafter Salmon & Emlyn’s Edition of *The Trial of Titus Oates*].

<sup>196</sup> Salmon & Emlyn’s Edition of *The Trial of Titus Oates*, *supra* note 195, at 59.

<sup>197</sup> *Id.*

<sup>198</sup> Howell’s Edition of *The Trial of Titus Oates*, *supra* note 191, at 1300. See also BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 174–75; GILBERT BURNET, BISHOP BURNET’S HISTORY OF HIS OWN TIME: FROM THE RESTORATION OF KING CHARLES THE SECOND TO THE TREATY OF PEACE AT UTRECHT, IN THE REIGN OF QUEEN ANNE 383 (London, Henry G. Bohn, new ed. 1857); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 236 (2001); CHARLES E. LITTLE, CYCLOPEDIA OF CLASSIFIED DATES WITH AN EXHAUSTIVE INDEX 897 (1900); OATES’S

It took the first jury only about a quarter of an hour to deliberate before it reached its guilty verdict on the first perjury charge.<sup>199</sup> “I am satisfied in my conscience you have given a good and a just verdict,” Jeffrey explained.<sup>200</sup> And at the second trial, it took the jury just a half an hour to find the defendant guilty on the second perjury charge.<sup>201</sup> “I must tell you, you have given a verdict that becomes your honesty, integrity, and loyalty,” a pleased Jeffrey praised the second jury, adding: “And I declare, in the presence of Almighty God, the Searcher of Hearts, that had I been of the Jury, I must have given the same verdict.”<sup>202</sup> Before Oates was sentenced, Jeffrey observed that “the Old Laws of *England*” had punished perjury with death, but that those laws had been changed so that a perjurer would “be punished according to the discretion of this Court, so far as that the Judgment extend not to Life or Member.”<sup>203</sup>

The law had grown “more moderate,” Jeffrey declared, noting that the law had once allowed “cutting out of the Tongue” to punish “that impious Crime of Perjury.”<sup>204</sup> The “foul and malicious Perjury” that had brought “so many horrid and dreadful Consequences,” Jeffrey announced, warranted “an exemplary Punishment upon this villainous perjurer, to Terrify others for the future.”<sup>205</sup> The words uttered by Jeffrey, known as the “hanging judge” for his role in the Bloody Assizes, must have been especially ominous for Oates to hear even though Jeffrey—the powerful judge—had just conceded that the King’s Bench didn’t possess the power to impose a death sentence upon Oates, an ordained priest of the Church of England.<sup>206</sup> Although Jeffrey expressed regret that Oates could not be hanged for perjury, the harsh punishment that was inflicted on Oates has been described as the impetus for the later-enacted English prohibition against “cruel and unusual punishments.”<sup>207</sup>

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MANIFESTO; OR, THE COMPLAINT OF TITUS OATES AGAINST THE DOCTOR OF SALAMANCA; AND, THE SAME DOCTOR AGAINST TITUS OATES: COMPRIZED IN A DIALOGUE BETWEEN THE SAID PARTIES, ON OCCASION OF SOME INCONSISTENT EVIDENCE GIVEN ABOUT THE HORRID AND DAMNABLE POPISH PLOT (London, R.L. 1683); 1 NUGENT ROBINSON, A HISTORY OF THE WORLD WITH ALL ITS GREAT SENSATIONS TOGETHER WITH ITS MIGHTY AND DECISIVE BATTLES AND THE RISE AND FALL OF ITS NATIONS FROM THE EARLIEST TIMES TO THE PRESENT DAY 332 (New York, P.F. Collier 1887); THE TRYALS, CONVICTIONS & SENTENCE OF TITUS OATES 56–58 (London, R. Sare 1685); Titus Oates, *Preface* to THE MEMOIRES OF TITUS OATES, at A3 (1685).

<sup>199</sup> Howell’s Edition of *The Trial of Titus Oates*, *supra* note 191, at 1227.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1309.

<sup>202</sup> *Id.* at 1227, 1310.

<sup>203</sup> Salmon & Emlyn’s Edition of *The Trial of Titus Oates*, *supra* note 195, at 103–04.

<sup>204</sup> *Id.* at 103.

<sup>205</sup> *Id.* at 104; HISTORICAL DICTIONARY OF STUART ENGLAND, *supra* note 102, at 48; THE MEMOIRES OF TITUS OATES, *supra* note 198, at A3. *See also* Salmon & Emlyn’s Edition of *The Trial of Titus Oates*, *supra* note 195, at 59.

<sup>206</sup> *See, e.g.*, RICHARD WEST, THE LIFE & STRANGE SURPRISING ADVENTURES OF DANIEL DEFOE 24 (1997) (“The suffering of Oates must have shocked Defoe, who always believed at least part of the story about a Popish plot.”).

<sup>207</sup> LEVY, *supra* note 198, at 236.



The actual sentence imposed on Titus Oates was pronounced by Francis Wythens, one of the Lord Chief Justice's fellow justices.<sup>208</sup> For each count of perjury, the King's Bench first ordered that Oates pay a fine of "1000 Marks."<sup>209</sup> The court then ordered that Oates "be stript of all [his] Canonical Habits."<sup>210</sup> As to Oates's first perjury conviction, the court further ordered that Oates "stand upon the Pillory, and in the Pillory, here before Westminster-hall gate" on the following Monday for an hour's time between 10:00 AM and noon with a paper over his head declaring his crime.<sup>211</sup> Before standing in the pillory for perjury, Oates was first to be paraded "round about to all the Courts in Westminster-hall" with that ignominious placard—the paper declaring his crime—over his head.<sup>212</sup> As for the second perjury conviction, the court ordered that Oates was, upon the following Tuesday, to be placed again in the pillory "at the Royal Exchange in London, for the space of an hour, between the hours of twelve and two; with the same inscription."<sup>213</sup> With Titus Oates standing before the bar of justice to receive his sentence, Wythens, as a transcript of the sentencing reveals, also pronounced this judgment of the King's Bench: "You shall upon the next Wednesday, be Whipt from Aldgate to Newgate."<sup>214</sup> "Upon Fryday, you shall be Whipt from Newgate to Tyburn, by the Hands of the Common Hangman."<sup>215</sup> The total distance from Aldgate to Newgate to Tyburn is a full three miles.<sup>216</sup>

But that was not all that the King's Bench, led by George Jeffreys, had in store for Titus Oates, the notorious perjurer.<sup>217</sup> Speaking for the King's Bench and to Oates himself, Wythens also had this to say to the man who became known as "Titus the Liar": "we cannot but remember, there was several particular Times you Swore false about; And therefore, as Annual Commemorations, that it may be known to all People, as long as you live; We have taken special Care of you, for an Annual Punishment."<sup>218</sup> That annual punishment, one that would shock the consciences of many Englishmen: "Upon the Twenty fourth of April, every Year, as long as you live, you are to Stand Upon the Pillory, and In the Pillory, at Tyburn, just opposite to the Gallows, for the space of an Hour, between the Hours of Ten and Twelve."<sup>219</sup> "You are to Stand Upon, and In the Pillory, here at Westminster-Hall-gate, every Nineth of August, in every

<sup>208</sup> See Howell's Edition of *The Trial of Titus Oates*, *supra* note 191, at 1315; WOOLRYCH, *supra* note 175, at 132–33.

<sup>209</sup> Howell's Edition of *The Trial of Titus Oates*, *supra* note 191, at 1316.

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

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> THE TRYALS, CONVICTIONS & SENTENCE OF TITUS OTES, *supra* note 198, at 60. See also WOOLRYCH, *supra* note 175, at 132.

<sup>216</sup> EDGAR SANDERSON, A HISTORY OF THE BRITISH EMPIRE 260 (London, Blackie & Son 1882).

<sup>217</sup> Salmon & Emlyn's Edition of *The Trial of Titus Oates*, *supra* note 195, at 104–05.

<sup>218</sup> *Id.* at 105.

<sup>219</sup> *Id.*

Year, so long as you live.”<sup>220</sup> “You are to Stand Upon, and In the Pillory, at Charing-Cross, on the Tenth of August, every Year, during your Life, for an *Hour, between Ten and Twelve*.”<sup>221</sup> “*The like, over against the Temple-gate, upon the Eleventh*.”<sup>222</sup> “*And upon the Second of September . . . you are to Stand Upon, and In the Pillory, for the space of one Hour, between Twelve and Two, at the Royal Exchange*.”<sup>223</sup> “*And all this you are to do every Year, during your Life; and to be Committed close Prisoner, as long as you live*.”<sup>224</sup> Wythens’ final words for Oates: “This I Pronounce to be the *Judgment of the Court* upon you, for your Offences. And I must tell you plainly, if it had been in my Power to have carry’d it further, I should not have been unwilling to have given Judgment of *Death* upon you: For, I am sure, you deserve it.”<sup>225</sup>

This draconian sentence, handed down in King James II’s reign,<sup>226</sup> became the subject of much public controversy, especially in Parliament after William and Mary rose to power.<sup>227</sup> Oates himself was a Protestant man of the cloth and no commoner; he had been a clergyman and had once been hailed as a hero for exposing the supposed Jesuit-driven “Popish Plot” to assassinate Charles II.<sup>228</sup> “[T]he literature of the time,” one historian emphasizes, “shows that part of the drama in this celebrated case involved Oates’s status.”<sup>229</sup> In broadsides, woodcuts depicted the humiliated Oates in the pillory in full clerical garb, with one captioned “The Doctor Degraded.”<sup>230</sup> It was accompanied by these lines of doggerel for the reading public: “And now must Oates stand in the Pillory?” / “There to be battered so with Rotten Eggs,” / “Both on the Face, the Body and the Legs.”<sup>231</sup> “O Cruel Fate!” the lines of verse began, with the woodcut including this inscription over Oates’s head: “Here stand I” / “For Perjury.”<sup>232</sup> In those days, harsh corporal punishments were all too common.<sup>233</sup>

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> THE TRYALS, CONVICTIONS & SENTENCE OF TITUS OTES, *supra* note 198, at 60. See also JOWETT, *supra* note 187, at 54; Salmon & Emlyn’s Edition of *The Trial of Titus Oates*, *supra* note 195, at 105.

<sup>226</sup> See Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 670 n.66 (2004); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 575–77 (2010).

<sup>227</sup> See Schwoerer, *supra* note 58, at 107–27 (discussing the coronation of William and Mary).

<sup>228</sup> See JAMES Q. WHITMAN, *HARSH JUSTICE, CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 156 (2003).

<sup>229</sup> *Id.* at 157.

<sup>230</sup> *Id.* at 156.

<sup>231</sup> *Id.*

<sup>232</sup> 1 CATALOGUE OF PRINTS AND DRAWINGS IN THE BRITISH MUSEUM: DIVISION I. POLITICAL AND PERSONAL SATIRES (No. 1 to No. 1235) 698–99 (London, Chriswick Press 1870).

<sup>233</sup> See, e.g., CYNDI BANKS, *PUNISHMENT IN AMERICA* 10–11 (2005):

In England, branding was extensively used, and as late as 1699 the law

*E. The Use of Excessive Bail, Excessive Fines, and Cruel and Unusual Punishments*

The Glorious Revolution produced a new king and queen, just as it prompted Parliament carefully to scrutinize the penalties and punishments, as well as bail impositions,<sup>234</sup> meted out in the past.<sup>235</sup> For example, the Earl of Devonshire had been fined £30,000 by the King's Bench for striking a man with a cane,<sup>236</sup> and Samuel

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required that criminals be branded on the face with a letter designating the crime committed. Thus a murderer would be branded with the letter *M*, thieves with the letter *T*, and fighters and brawlers with the letter *F*. Branding was also commonly in use as a form of punishment in colonial America.

<sup>234</sup> See 9 DANBY PICKERING, *THE STATUTES AT LARGE, FROM THE FIRST YEAR OF K. WILLIAM AND Q. MARY, TO THE EIGHTH YEAR OF K. WILLIAM III*, at 68 (Cambridge, Joseph Bentham 1764) (noting in the English Declaration of Rights of 1688 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 subjects*”).

<sup>235</sup> See Rumann, *supra* note 226, at 670–71, n.59.

<sup>236</sup> 3 RAPIN DE THOYRAS, *THE HISTORY OF ENGLAND* 92 n.1 (1744). The Earl of Devonshire had been committed to the King's Bench prison until such time as he could pay the fine. *Id.* A bond was ultimately posted for the full sum of 30,000 pounds, which was later “found among the papers of King *James* after his abdication,” whereupon “it was given up to the Earl by King *William*.” *Id.* at 93 n.1. It was contended in 1689 that the fine that had been imposed upon the Earl of Devonshire was excessive and “a great violation of the privileges of the peers of this realm.” *Id.* at 93. After a “committee of privileges” was appointed by the House of Lords to examine the harsh sentence, it was demanded that the judges who had rendered the judgment in the Earl of Devonshire's case “should be required to attend at the bar of this House, to answer for the great offence, which they have committed thereby.” *Id.* at 92–93.

Each of the judges “were severally asked what they had to say for themselves in this business,” with Mr. Justice Powell offering this explanation and response:

That it was his great misfortune, that he was misguided by some books, which he looked on as authorities, which he found by their Lordships judgment were not so: And he humbly begged their Lordships and the Earl of *Devonshire*'s pardon. As to the fine, he looked upon three thousand pounds to be a fine enough; and that his silence in that business was his greatest fault, for which he also begged pardon.

*Id.* at 93. Sir Robert Wright, another of the judges, also contended:

[A]s to the breach of privilege, they were misguided by precedents. As to the fine, which is usually set according to the quality and estate of the person fined, it came from the puny judge thirty thousand pounds, and so to him last, according to the course of the court; and if he was mistaken, he begged pardon, for he never had the least disrespect to the Earl of *Devonshire*.

*Id.* The final judge, Sir Richard Holloway, had this to say, as it was later reported in *The History of England*:

[T]hat he as second Judge pronounced the fine thirty thousand pounds, which was set *nemine contradicente*; and if a lesser fine had been proposed, he should have accepted it, and did not justify the proceedings,

Johnson, a clergyman, had not only been fined, but also ordered to be whipped severely for writing and publishing two seditious libels.<sup>237</sup> The Earl of Devonshire had struck Colonel Culpepper at Whitehall on April 24, 1687, for an affront to his honor for which the Earl felt he had not received any satisfaction, and it was for that conduct that the King's Bench had imposed the hefty fine.<sup>238</sup> Samuel Johnson, arraigned on an information for publishing "two pernicious, scandalous and seditious libels," had also been ordered "to stand thrice in the pillory, pay a fine of 500 marks, and to be whipped from Newgate to Tyburn."<sup>239</sup>

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but looked on it as an excessive fine, and begged my Lord *Devonshire's* pardon, and submitted all to their Lordships.

*Id.*

When the Lords asked the three judges if they had discussed the fine before handing it out, Wright denied that had happened, and Holloway declared he "had no direction from either the King or Lord Chancellor concerning the said fine," while Powell "appealed to the memory of Sir *Richard Holloway*, that there was a discourse of the fine, five or six days before at the Lord Chancellor's" but Holloway "pretended he did not remember" and Wright "denied that they were there purposely about the said fine." *Id.* Powell specifically recalled that the Lord Chancellor had "first proposed twenty thousand pounds and afterwards said, it would be better, if thirty thousand pounds, and then the King might abate ten thousand pounds." *Id.* On May 15, 1689, "the Lords Spiritual and Temporal, upon a full consideration of the several cases and precedents, wherein the privileges of Peers had been concerned," declared:

[t]hat the court of King's bench, in over-ruling the Earl of *Devonshire's* plea of privilege of Parliament, and forcing him to plead over in chief, it being within the usual time of privilege, did thereby commit a manifest breach of privilege; and that the fine of thirty thousand pounds imposed by the court of King's Bench upon the said Earl was excessive and exorbitant, and against *Magna Charta*, the common right of the subject, and the law of the land; and that no peer of this realm, at any time, ought to be committed for non-payment of a fine to the king.

*Id.*

<sup>237</sup> *Id.* at 93, 93 n.1. Samuel Johnson, a chaplain and the "author of several tracts which had given offence to the courts of King *Charles II.* and *James II.*," had been charged and brought before the King's Bench "for making, printing, and publishing a scandalous and seditious libel, intituled, *An humble and hearty address to all the Protestants in King James's army.*" *Id.* After being forced to plead, a jury found him guilty of the offense, and the very same justice who had announced Titus Oates's draconian sentence had ordered Mr. Johnson:

(1) To pay five hundred marks to the King, and to lie in the prison of the *King's Bench* till it be paid. (2) To stand in the pillory three days, in three several places, viz., the *Palace-Yard Westminster*, *Temple-Bar*, and the *Old-Change*. (3) To be whipt by the common hangman from *Newgate* to *Tyburn*.

*Id.* Mr. Johnson's sentence, carried out in November 1686, was reportedly "executed with rigour and cruelty, the whipping, being with a whip of nine cords." *Id.* at 94 n.1.

<sup>238</sup> Woodruff, *supra* note 56, at 289–90.

<sup>239</sup> *The Proceedings Against Mr. Samuel Johnson: 2 James II. A.D. 1686*, reprinted in 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND

At the urging of the House of Commons, William III granted relief to both the Earl of Devonshire and Mr. Johnson,<sup>240</sup> with Parliament resolving on June 11, 1689, that the judgment against Mr. Johnson was “cruel and illegal.”<sup>241</sup> At the outset of William and Mary’s reign, Titus Oates himself appealed directly to Parliament for relief from the judgment of the King’s Bench, alleging that he was unjustly convicted,<sup>242</sup> and that his sentence should be remitted.<sup>243</sup> *The History of England* (1744) observes that “*Titus Oates* . . . took the opportunity now of the indignation of the Parliament, against the illegal proceedings of the late reign, to apply to the Lords, for a reversal of the two judgments against him on the point of perjury.”<sup>244</sup>

In truth, the case of Titus Oates had long been on the public’s mind.<sup>245</sup> After the imposition of his 1685 sentence, Oates, the defrocked Anglican minister, had been languishing in Newgate Prison, and scourged and humiliated multiple times in the pillory on the anniversaries of his own perjuries.<sup>246</sup> But he was set free in 1688 after James II was forced from the throne in the Glorious Revolution, with Oates seeking complete absolution—as well as financial compensation—from the newly installed Protestant King.<sup>247</sup> In an appeal to the House of Lords, Oates filed a writ of error, but that body rejected it, labeling Oates “so ill a Man” for what he had done.<sup>248</sup> But in the

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OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO PRESENT TIME 1339–40 (T.B. Howell ed., 1811) [hereinafter *The Proceedings Against Mr. Samuel Johnson*].

<sup>240</sup> See 3 THOMAS B. MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND* 356 (1899) (“Some living Whigs obtained without difficulty redress for injuries which they had suffered in the late reign. The sentence of Samuel Johnson was taken into consideration by the House of Commons. It was resolved that the scourging which he had undergone was cruel, and that his degradation was of no legal effect.”); *id.* at 357 (noting that William III compensated Mr. Johnson “for the wrongs which the Commons had brought to his notice” by conferring the sum of one thousand pounds along with “a pension of three hundred [pounds] a year for two lives”); *id.* (“While the Commons were considering the case of Johnson, the Lords were scrutinizing with severity the proceedings which had, in the late reign, been instituted against one of their own order, the Earl of Devonshire. The judges who had passed sentence on him were strictly interrogated; and a resolution was passed declaring that in his case the privileges of the peerage had been infringed, and that the Court of King’s Bench, in punishing a hasty blow by a fine of thirty thousand pounds, had violated common justice and the Great Charter.”).

<sup>241</sup> *The Proceedings Against Mr. Samuel Johnson*, *supra* note 239, at 1351.

<sup>242</sup> LUKE OWEN PIKE, *A HISTORY OF CRIME IN ENGLAND: ILLUSTRATING THE CHANGES OF THE LAWS IN THE PROGRESS OF CIVILISATION* 232 (1876).

<sup>243</sup> Associates of Oates were also fined, whipped, and subjected to the pillory. AN HISTORICAL NARRATIVE OF THE HORRID PLOT AND CONSPIRACY OF TITUS OATES, CALLED THE PLOISH PLOT, IN ITS VARIOUS BRANCHES AND PROGRESS, SELECTED FROM THE MOST AUTHENTIC PROTESTANT HISTORIANS, TO WHICH ARE ADDED SOME CURSORY OBSERVATIONS ON THE TEST ACT 281 (1816).

<sup>244</sup> 3 DE THOYRAS, *supra* note 236, at 94.

<sup>245</sup> See STEPHEN HALLIDAY, *NEWGATE: LONDON’S PROTOTYPE OF HELL* 99 (2007).

<sup>246</sup> See *id.*

<sup>247</sup> *Id.*

<sup>248</sup> See BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 175; see also HISTORICAL MANUSCRIPTS COMM’N, *THE MANUSCRIPTS OF THE HOUSE OF LORDS, 1689–1690*, at 78 (1889).



charged atmosphere that followed James II's abdication, opinion was divided. While thirty-five peers voted to affirm the judgment against Oates, twenty-three men voted to reverse it.<sup>249</sup> Those in the minority called Oates's punishment "barbarous, inhumane, and unchristian" and "contrary to" the English Declaration of Rights.<sup>250</sup> "[T]here is," they concluded, "no precedent[ ] to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him."<sup>251</sup> "[U]nless this judgment be reversed," they argued, "like cruel, barbarous, and illegal judgments" would be inflicted, with the dissenters highlighting language in the newly issued Declaration of Rights "whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."<sup>252</sup> Their view: Oates's sentence was "erroneous, and ought to be reversed" because it was "contrary to law and ancient practice."<sup>253</sup>

The dissenters had a lot to say, and they believed—and vociferously expressed the view—that Oates's rights had been violated.<sup>254</sup> Elsewhere, they opined "that the Judgments given in the Court of King's-Bench against *Titus Oates* are altogether illegal and cruel," "illegal and unjust," and "ought plainly to be declared positively against Law, Justice, and the undoubted Right of the Subject."<sup>255</sup> In the context of the parliamentary debate, the dissenters further stressed that the notion advanced by some of looking only to bar such punishments *prospectively*—that is, that "it shall not be lawful at any time hereafter to inflict the like excessive punishments again"—would not be "strong enough to deter a corrupt or partial Judge from practicing the same, because it is without a penalty upon such Judge."<sup>256</sup> In the Earl of Devonshire's case, it was adjudged in 1689 that the £30,000 fine that had been imposed upon him during James II's reign by the Court of King's Bench was "excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land."<sup>257</sup> In that case, the House of Lords had appointed a committee to examine the

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<sup>249</sup> Howell's Edition of *The Trial of Titus Oates*, *supra* note 191, at 1325–26. *See also* BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 175–76.

<sup>250</sup> Howell's Edition of *The Trial of Titus Oates*, *supra* note 191, at 1325. *See also* BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 175.

<sup>251</sup> Howell's Edition of *The Trial of Titus Oates*, *supra* note 191, at 1325. *See also* BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 175–76.

<sup>252</sup> Howell's Edition of *The Trial of Titus Oates*, *supra* note 191, at 1325–26. *See also* BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 175.

<sup>253</sup> Howell's Edition of *The Trial of Titus Oates*, *supra* note 191, at 1325–26. *See also* BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 175–76.

<sup>254</sup> 1 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS FROM THE RESTORATION IN 1660, TO THE PRESENT TIME 369 (1742).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 368–69.

<sup>257</sup> *Proceedings in the House of Lords on the Case of the Earl of Devonshire after the Revolution*, reprinted in 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO PRESENT TIME 1367–70 (T.B. Howell ed., 1811). *See also* 3 JOSEPH GROVE, THE HISTORY

draconian fine, with the judges who had imposed the fine ordered “to attend at the bar of this House, to answer for the great offence, which they have committed thereby.”<sup>258</sup> The judgment that the fine was excessive was made after various judicial officers, setting out their own views, testified before Parliament.<sup>259</sup>

Much more than money was at stake for Titus Oates. Whereas the Earl of Devonshire had to grapple with a draconian fine, Oates’s conviction and sentence had inflicted great infamy and stripped a man of his honor and dignity along with his clerical robes.<sup>260</sup> “[T]here is no doubt,” the dissenters declared in Oates’s high-profile case, “but all Judges will be hereafter cautious of setting great fines, since of late the subject, in that point, has been grievously oppressed, as does appear by several exorbitant fines annulled in this present Parliament.”<sup>261</sup> It was only after the House of Commons conducted its own review of Oates’s punishment, and after contentious debate in that body and in the House of Lords, that Oates received a pardon and a small pension from William III.<sup>262</sup> The House of Lords had advised William III:

[T]hat whereas Titus Oates . . . had already received a severe punishment for the perjury whereof he had been formerly convicted, and some of the said punishments would still be continued upon him, unless they should be remitted by his Majesty; his Majesty would be graciously pleased to grant his pardon to the said Oates.<sup>263</sup>

The House of Commons also specifically invoked the “cruel and unusual” punishments clause in the Declaration of Rights to justify the remission of Oates’s 1685 sentence, calling it “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.”<sup>264</sup>

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OF THE LIFE AND TIMES OF CARDINAL WOLSEY: PRIME MINISTER TO KING HENRY VIII 100 (1744) (referring to the “excessive and exorbitant” fine against the Earl of Devonshire).

<sup>258</sup> 3 DE THOYRAS, *supra* note 236, at 93.

<sup>259</sup> *Id.* at 92–93, 92–93 n.1.

<sup>260</sup> See BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 174–76; HALLIDAY, *supra* note 245, at 99.

<sup>261</sup> 1 JAMES E. THOROLD ROGERS, A COMPLETE COLLECTION OF THE PROTESTS OF THE LORDS 84 (1875).

<sup>262</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 175–76; THE LIFE OF WILLIAM III, LATE KING OF ENGLAND, AND PRINCE OF ORANGE 233 (3d ed. corr., 1705) [hereinafter THE LIFE OF WILLIAM III].

<sup>263</sup> 2 ARTHUR TREVOR, THE LIFE AND TIMES OF WILLIAM THE THIRD, KING OF ENGLAND, AND STADHOLDER OF HOLLAND 59 (1836).

<sup>264</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 175–76; 3 MACAULAY, *supra* note 240, at 364–65; 2 A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND, FROM THE YEAR M,DC,LXVIII TO THE PRESENT TIME 455–56, 459–63 (1741); 2 TREVOR, *supra* note 263, at 59. The House of Lords also recommended that William III grant Oates “a Pension of three Pounds a Week for his subsistence.” THE LIFE OF WILLIAM III, *supra* note 262, at 233.

*F. Corporal Punishments, the English Common-Law Tradition, and the  
“Reasons for the Disaffection of the Nation to the late Government”*

In seventeenth-century England, when the English Declaration of Rights and its corresponding Bill of Rights were promulgated, there was a general disgust for arbitrary and excessive punishments, though harsh corporal punishments and capital punishment were then still seen as a regular, and almost routine, part of English criminal justice.<sup>265</sup> For example, in proceedings before the Old Bailey, London’s central criminal court, there is an entry from 1674 that reflects that nine people were “ordered to receive Capital punishment,” while “there were nine others that got off by the benefit of the Clergy.”<sup>266</sup> Benefit of clergy, as originally conceived, exempted clergymen from execution, although it evolved, in time, to shield first-time offenders or those who simply could recite Psalm 51—colloquially known as the “neck verse”—from the gallows.<sup>267</sup> “Twelve,” the Old Bailey entry continued, “prayed and obtained the favour of Transportation, and four sentenced to Shove the Fumbler,<sup>268</sup> or receive the correction of the gentle Lash for several crimes respectively no less tedious, than impertinent here to be recited.”<sup>269</sup> Another entry, from 1677, also noted: “A man was likewise Condemned to die for a kind of unusual Crime, but such as the Law, by reason of its bad example and mischievous tendency, has thought fit to restrain with capital Punishment . . . . He begg’d heartily for Transportation, but it could not be granted.”<sup>270</sup>

The gallows at Tyburn—the London locale where so many criminals were put to death over many centuries—became a potent symbol of monarchical power, as did the pillory to which men such as Titus Oates were subjected.<sup>271</sup> In an “Ordinary’s Account” from March 4, 1685, one finds references in the Old Bailey’s records to “Condemned Criminals” in Newgate Prison and to executions that had recently taken place, including at Tyburn.<sup>272</sup> “IT is sad to Consider,” the account lamented,

<sup>265</sup> See Lizzie Seal, *A Brief History of Capital Punishment in Britain*, HIST. EXTRA (Mar. 27, 2018, 10:09 AM), <https://www.historyextra.com/period/20th-century/a-brief-history-of-capital-punishment-in-britain> [http://perma.cc/V8CC-6VNF].

<sup>266</sup> *Old Bailey Proceedings Punishment Summary, 12th December 1674*, OLD BAILEY PROCEEDINGS ONLINE, <https://www.oldbaileyonline.org/browse.jsp?id=s16741212-1&div=s16741212-1&terms=capitalpunishment#highlight> [http://perma.cc/3R72-X4LB] [hereinafter *December 12, 1674 Old Bailey Entry*].

<sup>267</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 268.

<sup>268</sup> “Shove the Fumbler” is a phrase used to mean to “[b]e whipped at the cart’s tail.” 1 EDWARD BULWER LYTTON, PAUL CLIFFORD 16 n.1 (1893).

<sup>269</sup> *December 12, 1674 Old Bailey Entry, supra* note 266.

<sup>270</sup> *Miscellaneous: Perverting Justice, 17th January 1677*, OLD BAILEY PROCEEDINGS ONLINE, <https://www.oldbaileyonline.org/browse.jsp?id=t16770117-3&div=t16770117-3&terms=capitalpunishment#highlight> [http://perma.cc/V9NS-ZB2L].

<sup>271</sup> ROBERT BARD, TYBURN: THE STORY OF LONDON’S GALLOWES (2012).

<sup>272</sup> *Ordinary’s Account, 4th March 1685*, OLD BAILEY PROCEEDINGS ONLINE, <https://www>

“that notwithstanding the frequent Examples of publick Justice on Capital Offenders, for the warning of all others, to Avoid the same Crimes,” that “in the short Intervale of time from the former sessions, there should be such a Confluence of persons now Condemned.”<sup>273</sup> Other seventeenth-century entries in the records of the Old Bailey reflect a woman sentenced to death for “murthering her Bastard child,”<sup>274</sup> with many others sentenced to be “hanged by [their] necks till [they] be dead.”<sup>275</sup> Although the punishment of transportation gradually became a popular alternative to bodily punishments and executions,<sup>276</sup> with George III abolishing branding in 1779,<sup>277</sup> the gallows at Tyburn continued to operate until 1783, when John Austin, a highwayman, was hanged there.<sup>278</sup> After that, executions were relocated to outside London’s Newgate Prison.<sup>279</sup>

The English Bill of Rights, restraining the king and queen’s power, established a constitutional monarchy, but it was the product of a particular, seventeenth-century historical context. Sir John Hawles (1645–1716), a lawyer who served in the House of Commons and who, in 1695, became England’s solicitor general,<sup>280</sup> later spoke of “[the] strange Revolution which hath of late happened in our Nation,” which, he added, “naturally leads one into the Consideration of the Causes of it.”<sup>281</sup> In discussing the Glorious Revolution, Hawles spoke of “the Subversion of the Established Religion” and about “Taxes in the Nation.”<sup>282</sup> But he also pointed to “some other Reasons for the Disaffection of the Nation to the late Government,” ranking those reasons under “six Heads.”<sup>283</sup> The first of those: “Exorbitant Fines; Cruel and Illegal Prosecutions;

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.oldbaileyonline.org/browse.jsp?id=OA16850304&div=OA16850304&terms=capitalpunishment#highlight [http://perma.cc/3G3F-6PUY].

<sup>273</sup> *Id.*

<sup>274</sup> *Killing: Infanticide, 16th January 1678*, OLD BAILEY PROCEEDINGS ONLINE, <https://www.oldbaileyonline.org/browse.jsp?id=t16780116-1&div=t16780116-1&terms=punishmentofdeath#highlight> [http://perma.cc/4XAG-385D].

<sup>275</sup> *Old Bailey Proceedings, 11th December 1678*, OLD BAILEY PROCEEDINGS ONLINE, <https://www.oldbaileyonline.org/browse.jsp?id=16781211&div=16781211&terms=punishmentofdeath#highlight> [http://perma.cc/363U-GM37].

<sup>276</sup> See Simon Devereaux, *Imposing the Royal Pardon: Execution, Transportation, and Convict Resistance in London, 1789*, 25 L. & HIST. REV. 101 (2007).

<sup>277</sup> HYPATIA BRADLAUGH BONNER, *THE GALLOWES AND THE LASH: AN ENQUIRY INTO THE NECESSITY FOR CAPITAL AND CORPORAL PUNISHMENTS* 7 (1897).

<sup>278</sup> GREGORY J. DURSTON, *WHORES AND HIGHWAYMEN: CRIME AND JUSTICE IN THE EIGHTEENTH-CENTURY METROPOLIS* 551 (2012).

<sup>279</sup> JOWETT, *supra* note 187, at 85.

<sup>280</sup> 2 STATE TRIALS: POLITICAL AND SOCIAL 122–23 (H.L. Stephen ed., 1899).

<sup>281</sup> *Remarks on Fitzharris’s Trial, by Sir John Hawles, Solicitor General to King William the Third*, reprinted in 8 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO PRESENT TIME 425 (1810).

<sup>282</sup> *Id.* at 425–26.

<sup>283</sup> *Id.* at 426; *Remarks Upon the Trials of Edward Fitzharris, reprinted in 1 A COMPLETE*

Outrageous Damages; . . . Dispensing with . . . Penal Laws; and undue Prosecutions in Criminal, but more especially in Capital Matters.”<sup>284</sup>

In 1680, the House of Commons had examined the matter of fines.<sup>285</sup> “[T]he highest Fine, at that time complain’d of,” Hawles stressed, “was but 1000 *l.*”<sup>286</sup> “[A]nd yet,” he observed, in just a few short years such fines “were heighten’d to 10,000 *l.* 20,000 *l.* 30,000 *l.* and 40,000 *l.*”<sup>287</sup> The second reason Hawles listed: “[T]he Punishment of *Oates*, *Dangerfield*, and Mr. *Johnson*; and the close Imprisonment of Mr. *Hamden*, Sir *Samuel Barnardiston*, and of several other Persons, as they were against the Law, so they were without Precedent.”<sup>288</sup> After the Rye House Plot of 1683 was

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COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS FROM THE REIGN OF KING GEORGE I, at 68 (1730).

<sup>284</sup> *Remarks Upon the Trials of Edward Fitzharris*, *supra* note 283.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Remarks upon the Trial of Edward Fitzharris, Stephen College, Count Coningsmark, the Lord Russel, Colonel Sidney, Henry Cornish and Charles Bateman*, reprinted in 2 A COLLECTION OF STATE TRACTS, *supra* note 157. After the death of Queen Mary II in 1694, in *A Defence of the Archbishop’s Sermon on the Death of her Late Majesty of Blessed Memory* (printed in 1695), the writer spoke of “Liberties that we enjoy as the direct Fruits of the Revolution.” *Id.* at 522, 525. “We are now deliver’d from excessive Bails and Fines, and cruel unusual Punishments,” the writer stressed, among other things. *Id.* at 526. *Accord* A COMPLETE HISTORY OF THE WHOLE PROCEEDINGS OF THE PARLIAMENT OF GREAT BRITAIN AGAINST DR. HENRY SACHEVERELL: WITH HIS TRYAL BEFORE THE HOUSE OF PEERS, FOR HIGH CRIMES AND MISDEMEANORS 162 (1710) (discussing the case of Sir Samuel Barnardiston and the finding that “the said Fine of ten Thousand Pounds was exorbitant, and excessive, and not warranted by Legal Precedent in former Ages; for all Fines ought to be with a *Salvo contentenemento suo*, and not to the Party’s Ruin”); *cf.* 3 DANIEL NEAL, THE HISTORY OF THE PURITANS; OR, PROTESTANT NONCONFORMISTS; FROM THE REFORMATION IN 1517, TO THE REVOLUTION IN 1688; COMPRISING AN ACCOUNT OF THEIR PRINCIPLES 248 (1837) (“This year the king, by the assistance of the tories and Roman Catholics, completed the ruin of the constitution, and assumed the whole government into his own hands. The whigs and Non-conformists were struck with terror, by the severe prosecutions of the heads of their party. Mr. Hampden was fined 40,000*l.* sir Samuel Barnardiston 10,000*l.* for defaming the evidence in the Ryehouse plot. Mr. Speke 2000*l.* and Mr. Braddon 1000*l.* for reporting that the earl of Essex had been murdered in the Tower. Mr. John Duttoncolt 100,000*l.* for *scandalum magnatum* against the Duke of York, who now ruled all at court. Oates was fined for the same crime 100,000*l.* and never released till after the Revolution. Thirty-two others were fined or pilloried for libelling the king or the duke of York.”). *Compare* *From the Philadelphia Gazette*, THE HILLSBOROUGH RECORDER (Hillsborough, N.C.), Mar. 29, 1820, at 1 (discussing “American merchants” indebted to “foreigners” who “tear from them every vestige of property the moment it is acquired,” noting that “[l]aws should remedy evils, not perpetuate them,” and commenting: “Excessive fines shall not be imposed. Is it not excessive to hold a man to the payment of debts, after he has given up to his creditors every thing he possessed in the world, and when these creditors are convinced that he never can pay them? . . . Cruel and unusual punishment



exposed, Sir Samuel Barnadiston, an English politician, was put on trial for seditious libel on the basis of letters he had written about George Jeffreys and the Rye House plotters.<sup>289</sup> After Jeffreys directed that the jury return a guilty verdict against Barnardiston, Jeffreys pronounced the sentence on April 19, 1684, imposing a fine of 10,000 *l.*<sup>290</sup> That sum was seen as excessive.<sup>291</sup>

It was thus a whole series of injustices that prompted Parliament to demand greater protection for British subjects—and to weigh in against “excessive” bail and fines and against “cruel and unusual punishments.”<sup>292</sup> Thomas Dangerfield, like

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shall not be inflicted? Is it not a cruel punishment to tear from a man the subsistence and comforts of his family as often as they are acquired? or compel him to demoralize himself by evading the law in order to protect them?”), *with A Case of Unparalleled Distress*, THE MORNING POST (London), Dec. 18, 1829, at 1 (“A highly respectable Man is now and long has been confined in the King’s Bench Prison for an alleged Debt, got up against him in a manner most extraordinary, by which he is deprived of every shilling as well as every article belonging to him. The costs of the proceedings, as cruel and unusual as they have been protracted, are enormous. In this his case of utter destitution, he humbly implores the AID of a BENEVOLENT PUBLIC, whom he refers to the indisputable proofs and documents in the hands of Mr. Goyder, 11, Dartmouth-street, Westminster, who will exhibit them, as well as give additional reference to one of the most eminent Solicitors in London, employed by this distressed Applicant, who has not had the comforts of bed or bedding during his imprisonment in this inclement season. Any donation paid into the hands of Mr. Goyder will be most thankfully and gratefully received.”).

<sup>289</sup> 3 DICTIONARY OF NATIONAL BIOGRAPHY 244–46 (Leslie Stephen ed., 1885).

<sup>290</sup> 1 DICTIONARY OF NATIONAL BIOGRAPHY 1166 (Stephen & Lee eds., 1908). *See also id.* (“Barnardiston resisted payment, and was imprisoned until June 1688, when he paid 6,000*l.*, and was released on giving a bond ‘for the residue.’ The whole case was debated in the House of Lords, 16 May 1689, and Jeffreys judgment reversed. It was stated at the time that during his long imprisonment Sir Samuel’s private affairs had become much disordered, and that he lost far more money than the amount of the fine.”).

<sup>291</sup> *See, e.g.*, ARCHER M. WHITE, *OUTLINES OF LEGAL HISTORY* 205 (1895) (“By 12 Charles II. c. 24, fines were regulated, and by the Bill of Rights (1 William and Mary, session 2, c. 2) excessive fines were forbidden. But they had previously been imposed in Hampden’s case and in Williams’ case. In the Earl of Devonshire’s case (11 St. Tr. 1353), the fine was £30,000, merely for striking within the king’s palace. The fines of the Star Chamber were most excessive, especially in James I.’s reign. In Barnardiston’s case the law was discussed; and now fines are regulated by the various statutes which deal with the different offences punishable by fine, based upon the principle of the Bill of Rights.”); *see also id.* at 197 (“The history of bail may be shortly summarised as follows. It was originally at the discretion of the sheriff. Then came the Statute of Bail (3 Edward I. c. 12); and various statutes from Edward III. to the seventeenth century; 4 Edward III. c. 1; 34 Edward III. c. 1; 23 Henry VI. c. 9; 1 Richard III. c. 3; 3 Henry VII. c. 3. The last two statutes gave justices of the peace the power to bail. The next step was the provision of the Bill of Rights, in 1689, against the requisition of excessive bail.”).

<sup>292</sup> *See, e.g.*, 2 THE SECRET HISTORY OF EUROPE 142–43 (1712) (“What then must the Cryes and the mangled Bodies of Mr. *Johnson*, Mr. *Dangerfield* and *Oates*, raise in every Humane Mind. The Invention of *Phalaris* of *Tiberius*, *Caligula*, *Nero* and *Domitian*, and all the Enemies of Mankind of Old, comes short of the Cruelty exercis’d of those Three *English* Men. And the Scene of Blood and Horror, that fill’d the Streets of *London* at that time, was such as must certainly give all that saw it, an inexpressible Dread of a Popish and Arbitrary Government. If those Horrid Punishments had been Legal, it must set every honest Heart

Titus Oates, had been fined and ordered to be whipped from Aldgate to Newgate and from Newgate to Tyburn for his own role in the fictitious Popish Plot—in his case, for libel.<sup>293</sup> During James II’s relatively short reign, Sir William Williams, the Speaker of the House of Commons, had himself been convicted of criminal libel and fined £10,000 (later reduced to £8,000) for ordering the printing in the House of Commons of Dangerfield’s libels against the Duke of York.<sup>294</sup> Notably, after Dangerfield’s initial flogging—said to have left him “[h]alf dead”—his life came to an abrupt end on June 22, 1685, after an English barrister, Robert Francis, got into a heated argument with Dangerfield while Dangerfield was on route, by coach, back to Newgate Prison after surviving the day’s horrendous flogging.<sup>295</sup>

Robert Francis, the “hot-headed” Tory barrister, had jeered at Dangerfield, with Dangerfield responding by spitting in his face.<sup>296</sup> That prompted Francis to strike Dangerfield in the face with a cane, hitting him in or near his eye.<sup>297</sup> The blow struck with such force that an already weakened Dangerfield died just hours later.<sup>298</sup> Francis himself was later put on trial for murder, convicted of the charge, and put to death.<sup>299</sup> “No doubt,” *A History of the Criminal Law of England* observes, “the floggings to

against him that cou’d inflict them. But they were all as Unjust as they were Barbarous. After this, why shou’d I make any mention of so slight a Matter as *Fines* or *Damages*, though adjudg’d with an *Exorbitancy* that never was heard of; as Mr. Duttoncolt 100000*l.* for speaking against the Duke of *Beaufort*; Mr. *Thomas Pilkington* 100000*l.* for saying K. *James* was a *Papist*; Sir *Samuel Barnardiston* 10000*l.* for writing some News to a Friend in the Country about the Plot. Why should I speak of the Duke of *Devonshire*’s Fine of 30000*l.* for giving *Culpeper* a Box on the Ear, and of many other Damages and Fines, of 10000*l.*, 20000*l.* 40000*l.* and 100000*l.* *The Truth of which*, says Sir *John Hawles*, *many Living Witnesses to their Sorrow can testify.”*)

<sup>293</sup> JOHN KENYON, *THE POPISH PLOT* 193–94, 199 (1972); 14 *DICTIONARY OF NATIONAL BIOGRAPHY* 16–18 (Leslie Stephen ed. 1888).

<sup>294</sup> JOSEPH MAINGOT, *PARLIAMENTARY PRIVILEGE IN CANADA* 79 (2d ed. 1997).

<sup>295</sup> KENYON, *supra* note 293, at 258.

<sup>296</sup> JOHN PAGET, *THE NEW “EXAMEN” OR AN INQUIRY INTO THE EVIDENCE RELATING TO CERTAIN PASSAGES IN LORD MACAULAY’S HISTORY* 370–71 (1861); 1 *THE BRITISH CHRONOLOGIST; COMPREHENDING EVERY MATERIAL OCCURRENCE, ECCLESIASTICAL, CIVIL, OR MILITARY, RELATIVE TO ENGLAND AND WALES* 338 (1789).

<sup>297</sup> REV. E. HALE, *THE FALL OF THE STUARTS AND WESTERN EUROPE FROM 1678 TO 1697*, at 87 (1889).

<sup>298</sup> *See id.* The punishments of Oates and Dangerfield have been described as “cruel” and torturous. *E.g.*, 2 J. FRANK BRIGHT, *A HISTORY OF ENGLAND* 763 (1879) (“Oates and Dangerfield had been tried and punished. Well as they deserved punishment, the manner in which the trial was conducted by Jeffreys and the inhuman tortures inflicted upon them are beyond excuse. Twice within forty-eight hours Oates was flogged from Newgate to Tyburn. On the last occasion no less than 1700 lashes were inflicted on him; it was certainly intended that he should die under the infliction of this terrible punishment, as his accomplice Dangerfield did.”).

<sup>299</sup> HALE, *supra* note 297, at 87; *The Trial of Robert Frances: 1 James III., reprinted in* 11 *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO PRESENT TIME* 503–10 (T.B. Howell ed., 1811); *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND* 332 (1849).

which Oates and some others were sentenced were the ‘cruel punishments’ which Parliament referred to” in the English Bill of Rights, with that source emphasizing that “the fine of £40,000 to which John Hampden (the grandson of the celebrated Hampden) was sentenced in 1684, would be one of the ‘excessive fines.’”<sup>300</sup>

The abuses of the Stuart kings were legion, and the punishments and penalties in that era drew the particular ire of the English people.<sup>301</sup> Sir Samuel Barnardiston, one of the other figures specifically referenced by Hawles, had been found to have breached the privileges of the House of Lords.<sup>302</sup> Barnardiston had then been fined three hundred pounds, and further ordered “to be kept in the custody of the usher of the black rod till the fine should be paid.”<sup>303</sup> There was “strong proof,” per a summation in *A Complete Collection of State Trials*, however, that the members of the House of Lords knew that their act “had exceeded their jurisdiction, and that they had no power to inflict this kind of punishment.”<sup>304</sup> The House of Commons had itself resolved that Sir Barnardiston had “acted as became a good subject and commoner of England” and, to make its point, had, in protest, “postponed all committees, and refused to enter upon any business till this question of jurisdiction should be settled.”<sup>305</sup> Indeed, it was these kind of gross and tyrannical abuses of power—carried out by Lord Chief Justice George Jeffreys and men of his ilk—that so incensed, and galvanized, the British people.<sup>306</sup> “[I]n the late eighteenth century,” Yale Law School professor Akhil Amar has observed, “every schoolboy in America knew that the English Bill of Rights’

<sup>300</sup> JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 490 (1883). *Cf. id.* (“The severest sentence for a common law misdemeanour that I am aware of since the Revolution, was passed upon one Hales for forging a promissory note in 1729. He was to stand twice in the pillory, to be fined fifty marks, be imprisoned for five years, and find security for his good behaviour for seven years.”).

<sup>301</sup> See, e.g., *The Whole Proceedings in the Case of Benjamin Flower: 39 George III. A.D. 1799*, reprinted in 27 *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 1040–41 (T.B. Howell & Thomas Jones Howell eds., 1820) [hereinafter *Case of Benjamin Flower*]. Such abuses would stay in the collective memory of the British people long after the adoption of the English Bill of Rights. E.g., *THE MORNING CHRONICLE* (London), Dec. 23, 1811, at 3 (“The Bill of Rights farther provided, ‘That excessive bail ought not to be required, nor excessive fees imposed, nor cruel and unusual punishments inflicted.’ This, no man could dispute, embraced rights and privileges of great price, and which any man must be supposed indifferent to his own interests, and to those of his posterity, if he stood by and patiently suffered them to be wrested from him. And, could any man look to the fine, in one instance, of 1000l. and to the imprisonments in distant jails, which had lately been inflicted in a variety of instances, merely for a candid avowal of an obnoxious opinion, and, laying his hand on his heart, honestly declare, that in those instances, ‘excessive fines had not been imposed, nor cruel and unusual punishments inflicted?’”).

<sup>302</sup> *Case of Benjamin Flower*, *supra* note 301, at 1040.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 1041.

<sup>305</sup> *Id.*

<sup>306</sup> See Bruce Fein, *Put Away Sword of Damocles*, 84 *A.B.A. J.* 112, 112 (Mar. 1998).

1689 ban on excessive bail, excessive fines, and cruel and unusual punishments—a ban repeated virtually verbatim in the Eighth Amendment—arose as a response to the gross misbehavior of the infamous Judge Jeffreys.<sup>307</sup>

The terminology of the U.S. Constitution’s Eighth Amendment may seem archaic to modern ears, but its terminology is rooted in the English common law and the use of English language from prior centuries.<sup>308</sup> The concept of *cruelty*, in fact, was specifically associated with tyrants and tyrannical behavior,<sup>309</sup> with early Anglo-American lawyers and legal commentators frequently calling punishments either “usual” or “unusual”—that is, as either consistent with English common law or as unlawful departures from custom or precedent.<sup>310</sup> For example, later editions of William Hawkins’s *A Treatise of the Pleas of the Crown* emphasized that *ducking*—plunging a person into a body of water with what was often called a *cucking stool* or *ducking stool*—was the “usual punishment” for “a *common scold*.”<sup>311</sup>

<sup>307</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 87 (1998).

<sup>308</sup> See, e.g., *Solem v. Helm*, 463 U.S. 277, 284–86 (1983) (“The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.”); Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 857–64 (2018); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 296–98, 319–22 (2014) (discussing the history of the Excessive Fines Clause); Massey, *supra* note 57, at 1240–64 (discussing the historical development of the Excessive Fines Clause and discussing excessive fines during Charles II’s and James II’s reign); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013) (discussing the history of the Excessive Fines Clause); Rumann, *supra* note 226, at 667–72 (discussing the origins of the Eighth Amendment’s prohibitions).

<sup>309</sup> NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE; EXHIBITING THE ORIGIN, ORTHOGRAPHY, PRONUNCIATION, AND DEFINITION OF WORDS* 865 (3d ed. 1830) (defining *tyrannic* and *tyrannical* as “[p]ertaining to a tyrant; suiting a tyrant; arbitrary; unjustly severe in government; imperious; despotic; cruel”); *id.* (defining *tyrannically* as “[w]ith unjust exercise of power; arbitrarily; oppressively”); *id.* (defining *tyranny* as “[a]rbitrary or despotic exercise of power; the exercise of power over subjects and others with a rigor not authorized by law or justice, or not requisite for the purposes of government. Hence, *tyranny* is often synonymous with *cruelty* and *oppression*”); *id.* (defining *tyrant* as “[a] monarch or other ruler or master, who uses power to oppress his subjects; a person who exercises unlawful authority, or lawful authority in an unlawful manner” and as “[a] despotic ruler; a cruel master; an oppressor”).

<sup>310</sup> See John D. Bessler, *The Concept of “Unusual Punishments” in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW. J. L. & SOC. POL’Y 307 (2018). Noah Webster defined *usual* as “[c]ustomary; common; frequent; such as occurs in ordinary practice, or in the ordinary course of events.” WEBSTER, *supra* note 309, at 896. In contrast, Webster defined *unusual* as “[n]ot usual; not common; rare.” *Id.* at 893.

<sup>311</sup> 1 WILLIAM HAWKINS & THOMAS LEACH, *A TREATISE OF THE PLEAS OF THE CROWN; OR A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS* (6th ed. 1777) (entry for “Cucking Stool” in unpaginated “A Table of Principal Matters”: “Sometimes called Ducking Stool, the usual punishment for a common scold.”). See also 1 WILLIAM HAWKINS & JOHN CURWOOD, *A TREATISE OF THE PLEAS OF THE CROWN; OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER*

Ducking was still in use in seventeenth-century England, though it was later characterized as a “cruel and unusual” punishment in the United States.<sup>312</sup> In *A Law Grammar; or, An Introduction to the Theory and Practice of English Jurisprudence* (1791), the term “castigatory” was, itself, described as “the name of the instrument by which a woman is punished when convicted of being a common scold.”<sup>313</sup> “It is

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HEADS 770 (8th ed. 1824) (same); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 200 (1716) (“[A] common Scold is punishable by being put into the Ducking-Stool”); *compare* James v. Commonwealth, 12 Serg. & Raw. 222 (1825). The opinion in *James* describes James’s counsel’s efforts as follows:

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

. . . .

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

*Id.*

<sup>312</sup> *Ducking*, WESTERN CAROLINIAN (Nov. 30, 1824), at 3 (“A woman has been lately tried, and convicted in Philadelphia, for being a *common scold*. She has been sentenced, by the Judge, to be placed on a machine . . . and ducked in the Delaware. This punishment has never been before inflicted in the United States—and the English law, from whence it is derived, has been thought obsolete, both in England and this country. The Constitution of the United States forbids cruel and unusual punishments. This is certainly *unusual*; and when we consider the humiliation of the unfortunate victim, and the insults to which she will be subjected by an unfeeling mob, the punishment is certainly *cruel*, and by no means graduated to the offence. And although we pretend not to defend those unfortunate females, who have no controul over that most unruly member, the tongue—yet we desire to see justice, however rigid, tempered with *decorum*, as well as *mercy*.”).

<sup>313</sup> A LAW GRAMMAR: OR, AN INTRODUCTION TO THE THEORY AND PRACTICE OF ENGLISH JURISPRUDENCE 535 (1791).



also,” that source added in its section on terms of law, “called *the trebucket* or *cucking-stool*, which is frequently corrupted into *ducking-stool*, because part of the judgment is, that when the offender is placed in it, she shall be plunged into water.”<sup>314</sup> That law grammar pointed out that “this mode of punishment has been long disused . . . .”<sup>315</sup> As evidence, it cited to a “Mr. Morgan,”<sup>316</sup> the editor of a popular law dictionary originally compiled by Giles Jacob, in which it was stated in the revised entry for “Castigatory for *scolds*” by Mr. Morgan:

Though this punishment is now disused, the editor (*J. M.*) remembers to have seen the remains of one, on the estate of a relation of his in *Warwickshire*, consisting of a long 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.<sup>317</sup>

Tradition, sometimes called “long usage” or “immemorial usage,” was part and parcel of the English common law.<sup>318</sup> Guy Miège (1644–c.1718), a Swiss writer from Lausanne who taught English as a foreign language,<sup>319</sup> published his own book in 1691—shortly after the enactment of the English Bill of Rights—titled *The New State of England Under Their Majesties K. William and Q. Mary*.<sup>320</sup> In it, Miège described the “the publick Justice administered at four times of the Year in Westminster” and by “Twelve Judges,” of the courts known as Assizes,<sup>321</sup> “twice a Year . . . in the Country . . . in the several Counties the King is pleased to appoint them for.”<sup>322</sup> Observing that England’s judicial system had been “divided into Six Parts, called

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

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

<sup>316</sup> *Id.*

<sup>317</sup> GILES JACOB, A NEW LAW-DICTIONARY: CONTAINING THE INTERPRETATION AND DEFINITION OF WORDS AND TERMS USED IN THE LAW; AS ALSO THE LAW AND PRACTICE, UNDER THE PROPER HEADS AND TITLES (J. Morgan ed., 10th ed. 1782) (unpaginated entry for “Castigatory for *scolds*” and the editor’s notation about the disuse of the punishment). Compare GILES JACOB, A NEW LAW-DICTIONARY: CONTAINING, THE INTERPRETATION AND DEFINITION OF WORDS AND TERMS USED IN THE LAW; AND ALSO THE WHOLE LAW, AND THE PRACTICE THEREOF, UNDER ALL THE HEADS AND TITLES OF THE SAME (6th ed. 1750) (the unpaginated entry for “Cucking-stool” describes it as “an Engine invented for the Punishment of *Scolds*, and unquiet Women, by Ducking them in Water, called in ancient Time a *Tumbrel*; and sometimes a *Trebucket*”; “it was in Use even in our *Saxons* Time, by whom it was described to be *Cathedra*”; “[s]ome think it is a Corruption from *Duckingstool*”), with JACOB, A NEW LAW-DICTIONARY, *supra* (containing unpaginated entries for “Cuckingstool” and “Castigatory for *scolds*”).

<sup>318</sup> See Stinneford, *The Original Meaning of “Unusual,” supra* note 18, at 1745.

<sup>319</sup> See A. P. R. HOWATT & H. G. WIDDOWSON, A HISTORY OF ENGLISH LANGUAGE TEACHING 56–59 (2d ed. 2004).

<sup>320</sup> GUY MIÈGE, THE NEW STATE OF ENGLAND UNDER THEIR MAJESTIES K. WILLIAM AND Q. MARY (1691).

<sup>321</sup> *Id.* at 80.

<sup>322</sup> *Id.*

Circuits,”<sup>323</sup> Miège wrote in a chapter titled “Of the Punishments inflicted on Malefactors” that hanging “is the usual Punishment of Death in England, either for High Treason, Petty Treason, or Felony.”<sup>324</sup> Royals and nobles, in that time, were often given “special” treatment, with such persons typically put to death with different methods of executions.<sup>325</sup> “As to Persons of great Birth and Quality, convicted of High Treason, Petty Treason, or Felony, tho the Judgment be the same with that of common Persons,” Miège qualified, “yet by the Kings Favour they are usually *Beheaded*.”<sup>326</sup>

In the entry for *law* in *An American Dictionary of the English Language*, Noah Webster described “[u]nwritten or common law” as “a rule of action which derives its authority from long usage, or established custom.”<sup>327</sup> It is thus clear that, over the centuries, various modes of punishments came to be considered *usual*—or standard—ones, depending on the nature of the case and the status, lowly or high, of the offender. Indeed, in his popular *Commentaries on the Laws of England*, Sir William Blackstone, the prominent English jurist, used the specific phrase “usual punishment” in writing about the punishment of “petit treason” committed “by those of the female sex.”<sup>328</sup>

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 125. A later edition of Miegé’s book said much the same thing. GUY MIEGE, THE PRESENT STATE OF GREAT-BRITAIN AND IRELAND, IN THREE PARTS 295 (4th ed. 1718) (“The most usual Punishment in *England* for capital Crimes, is *Hanging*.”).

<sup>325</sup> MIEGE, *supra* note 320, at 127.

<sup>326</sup> *Id.* Cf. *id.* at 128 (“*Burning alive* is sometimes used, but only for Witches, and Women convicted of High Treason, or Petty Treason.”); *id.* (“*Pressing to Death* . . . is a Punishment for those only that being Arraigned either of Petty Treason or Felony, refuse to Answer, or to put themselves upon the ordinary Trial of God and the Country.”); *id.* at 129 (“For *Petty Larceny*, or small Theft, that is under the ancient value of 12 d. the Punishment since Edward III. is by *Whipping*, and in the late Reigns has been often by Transportation into the West-Indies, where they live for some Years a slavish Life.”); *id.* at 130 (“*Perjury*, whereby Mens Estates, Reputation, and Lives ly at stake, is commonly punished only with the *Pillory*; never with Death, though it has cost the Lives of many.”); *id.* (“*Forgery, Blasphemy, Cheating, Libelling, False Weights and Measures, Forestalling the Market, Offences in Baking and Brewing*, are also punished with standing in the *Pillory*. But sometimes the Offender is Sentenced besides to have one or both Ears nailed to the *Pillory* and cut off, or his Tongue there bored through with a hot Iron.”); *id.* at 131 (“*Vagabounds*, and the like, who can give no good account of themselves, are punished by setting their Legs in the Stocks for certain hours. And *Scolding Women* (that are always teasing their Neighbors) by being set in a *Cucking Stool* placed over some deep Water and duck’d there in three several times, to cool their heat . . . .”); *id.* (“Other *Misdemeanours* are commonly punished with *Imprisonment* or *Fines*, and sometimes with both.”); *id.* (“Those are the *Corporal Punishments* commonly used in *England* for Criminals that happen to fall into the hands of Justice.”).

<sup>327</sup> WEBSTER, *supra* note 309, at 488.

<sup>328</sup> The passage in Blackstone’s *Commentaries* reads as follows:

The punishment of petit treason, in a man, is to be drawn and hanged, and, in a woman, to be drawn and burned: the idea of which latter punishment seems to have been handed down to us from the laws of the antient Druids, which condemned a woman to be burned for murdering

“Where the wife killeth her husband, it is petit treason,” another English jurist, Francis Bacon, had previously defined that offense, noting that the offending woman would be burned to death.<sup>329</sup>

In volume four of his *Commentaries*, published in 1769, Blackstone explicitly referenced what, by then, had been the long-standing English prohibition on “cruel and unusual punishments.”<sup>330</sup> As to fines and prison sentences, Blackstone wrote that “the duration and quantity” of such fines or terms of incarceration were properly left to judges.<sup>331</sup> “[H]owever unlimited the power of the court may seem,” Blackstone emphasized of such judgments, if not specifically guided by acts of Parliament, “it is far from being wholly arbitrary,” for the judge’s “discretion is regulated by law.”<sup>332</sup> “For the bill of rights has particularly declared,” Blackstone wrote, “that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted.”<sup>333</sup> Although the English prohibitions were framed with the hortatory “ought not,” they were seen, as the English Bill of Rights expressly put it, as “*utterly and directly contrary to the known laws and statutes, and freedom of this realm.*”<sup>334</sup>

The “excessive fines” and “cruel and unusual punishments” prohibitions in the English Bill of Rights were, consequently, seen from a very early date—as Blackstone made clear—as restricting the *arbitrary* or *discretionary* sentencing authority of abusive judges.<sup>335</sup> As to Article 10 of the English Bill of Rights, Blackstone specifically pointed to “some unprecedented proceedings in the court of king’s bench, in the reign of king James the second.”<sup>336</sup> In *On the Powers and Duties of Juries, and on the Criminal Laws of England*, Sir Richard Phillips, the former sheriff of London and Middlesex, concurred, writing of lower-level offenses: “The practice of banishing persons convicted of misdemeanors to distant prisons, is evidently contrary to the tenth clause of the Bill of Rights, which prohibits the infliction of cruel and *unusual* punishments.”<sup>337</sup> As Phillips explained:

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her husband; and it is now the usual punishment for all sorts of treasons committed by those of the female sex.

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

<sup>329</sup> 4 THE WORKS OF FRANCIS BACON, BARON OF VERULAM, VISCOUNT ST. ALBAN, AND LORD HIGH CHANCELLOR OF ENGLAND 294 (2d ed. 1826).

<sup>330</sup> 4 BLACKSTONE, *supra* note 328, at 372.

<sup>331</sup> *Id.* at 371.

<sup>332</sup> 4 BLACKSTONE, *supra* note 328, at 378.

<sup>333</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 173.

<sup>334</sup> 9 DANBY PICKERING, THE STATUTES AT LARGE, FROM THE FIRST YEAR OF K. WILLIAM AND Q. MARY, TO THE EIGHTH YEAR OF K. WILLIAM III, at 68 (1764).

<sup>335</sup> Rumann, *supra* note 226, at 667.

<sup>336</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 173.

<sup>337</sup> RICHARD PHILLIPS, ON THE POWERS AND DUTIES OF JURIES, AND ON THE CRIMINAL LAWS OF ENGLAND 298 (2d ed. 1813). Exile, banishment, and transportation were once usual punishments in various locales. *E.g.*, 1 THE OXFORD ENCYCLOPEDIA OF ANCIENT GREECE AND ROME 145 (2010) (“Exile was the usual punishment for murder.”); 6 POLYTECHNIC J.

[T]his clause had reference only to *discretionary* punishments, and not to those defined by law, and consequently applies particularly to punishments inflicted for misdemeanors, and still more particularly to discretionary punishments in regard to liberty, the only punishments in which a sound discretion would ever be likely to be abused.<sup>338</sup>

G. *Lex Scripta vs. Lex non Scripta and Arbitrary and Excessive Penalties*

The British people had no written constitution, and leading English jurists, as well as prominent commentators, saw a difference between punishments authorized by

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106 (1842) (“Capital punishment has become exceedingly rare, exile to Siberia being now the usual punishment.”); THE SECRET HISTORY OF THE COURT AND CABINET OF ST. CLOUD 112 (4th Am. ed. 1805) (“[T]ransportation was an usual punishment.”); 1 CHARLES PETER THUNBERG, TRAVELS IN EUROPE, AFRICA, AND ASIA, MADE BETWEEN THE YEARS 1770 AND 1779, at 138 (1795) (“[T]he usual punishment, which is transportation to Batavia.”). Those punishments are no longer used. *See, e.g.*, United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926) (“However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.”). *See also* Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758 (1963) (arguing that banishment is a cruel and unusual punishment); Saad Gul, *Return of the Native? An Assessment of the Citizenship Renunciation Clause in Hamdi’s Settlement Agreement in the Light of Citizenship Jurisprudence*, 27 N. ILL. U. L. REV. 131, 145 (2007) (“[F]ederal courts have held that banishment is prohibited as cruel and unusual punishment.”).

<sup>338</sup> PHILLIPS, *supra* note 337, at 298–99. In an “Address to the People of Great Britain and Ireland” delivered to the London Corresponding Society on January 20, 1794, “at the Globe Tavern, Strand,” and reportedly “read and agreed to,” one finds these words:

When we ask, how we enjoy these transcendent privileges; we are referred to Magna Charta, and the Bill of Rights? and the glorious Revolution in the year 1688 is held out to us as the bulwark of British liberty.

Citizens;—We have referred to Magna Charta, to the Bill of Rights, and to the Revolution, and we certainly do find that our ancestors did establish wise and wholesome laws: but we as certainly find, that of the venerable constitution of our ancestors, hardly a vestige remains.

.....

A man accused of felony (for which, by the common law of England, his life and goods are forfeited,) may be bailed on finding two sureties for forty pounds each; but upon a charge of misdemeanor by words only, bail to the amount of one thousand pounds has been demanded.

Upon conviction, also, for such misdemeanor, enormous fines, long and cruel imprisonments unknown to our ancient laws, and unsanctioned by any new statutes, have of late (and but of late) been too frequently and too oppressively inflicted. And all this, although by this bill of rights it is declared, that “excessive bail shall not be demanded, nor ‘cruel and unusual punishments inflicted.’”

31 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 481 (1818).

Parliament (i.e., “*Lex Scripta*, the written Law”) versus excessive or sanguinary punishments imposed by the whim or caprice of judges that had no grounding in custom or tradition (i.e., “*Lex non Scripta*, the unwritten Law”).<sup>339</sup> “I contend then,” Phillips argued, “that the sending or banishing a man to a prison distant from the place where he committed the crime, is contrary to law, simply because it is *unusual*.”<sup>340</sup> “Those who contend, that the King’s Bench has a universal jurisdiction,” he added, “are right—but they forget that this jurisdiction is universal only for lawful purposes . . . but not universal for imposing the novel punishment of banishment for a misdemeanor, which is *unusual*—therefore contrary to *the Bill of Rights*—therefore contrary to *law*.”<sup>341</sup> “[T]he Executive,” Phillips continued, “it is bound by the Bill of Rights, in executing the judgments of the Courts, to conform to immemorial *usage*, and to inflict no punishment in a *cruel* or *unusual* manner; and consequently to inflict imprisonment in the common gaol, except in cases in which the law has specially conferred a discretionary power on the Judges, and these have thought it necessary and proper to exercise that discretion.”<sup>342</sup>

Among Englishmen, there was a great reverence for the English common law, one rooted in tradition—what Sir Matthew Hale (1609–1676), a Lord Chief Justice of the Court of King’s Bench, called the unwritten laws which had “acquired their

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<sup>339</sup> See MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 1 (2d ed. 1716); see also *id.* at 1–2 (“[A]lthough . . . all the Laws of this Kingdom have some Monuments or Memorials thereof in Writing, yet all of them have not their Original in Writing; for some of those Laws have obtain’d their Force by immemorial Usage or Custom, and such Laws are properly call’d *Leges non Scriptae*, or unwritten Laws or Customs.”); *id.* at 22 (distinguishing “Statutes or Acts of Parliament, which in their original Formation are reduced into Writing, and are so preserv’d in their Original Form,” from “*Lex non Scripta*,” under which were listed “General Customs,” “the Common Law,” and “even those more particular Laws and Customs applicable to certain Courts and Persons”); *id.* at 23 (referring to *Leges non Scriptae* as “those Parts of the Law” as those “grown into Use” and as having “acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the strength of Custom and Reception in this Kingdom”).

<sup>340</sup> RICHARD PHILLIPS, ON THE POWERS AND DUTIES OF JURIES AND ON THE CRIMINAL LAWS OF ENGLAND 299 (1st ed. 1811).

<sup>341</sup> *Id.* at 299–300. See also *id.* (showing an unpaginated index entry which reads: “Banishment for misdemeanours an unusual punishment”).

<sup>342</sup> *Id.* at 302. Phillips, the ex-sheriff, added:

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

*Id.* at 302–03.



binding Power and the Force of Laws by a long and immemorial Usage, and by the strength of Custom and Reception in this Kingdom.”<sup>343</sup> That the English prohibition against excessive fines and cruel and unusual punishments<sup>344</sup> was part of that centuries-old legal tradition—one dating all the way back to Magna Carta (1215) and intended as a legal constraint on disproportionate penalties, arbitrary power, and otherwise boundless judicial discretion—is clear.<sup>345</sup>

Arbitrariness and abuses of power—in particular, judicial abuses of discretion—were thus seen as clear violations of the English Bill of Rights.<sup>346</sup> For example, in a preface, one originally written in 1730 and reprinted in *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783* (1816), the Irish legal writer Sollom Emlyn (1697–1754)<sup>347</sup> observed:

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<sup>343</sup> HALE, *supra* note 339, at 23. See also 1 THE NAVAL AND MILITARY MAGAZINE 574 (2d ed. 1827) (“[C]orporal punishments in the army clearly rested on immemorial usage and custom, and bearing in mind that various punishments known to the common law of the land rested on precisely the same basis, that the former might for that reason be considered and denominated as the common law punishments of the army.”).

<sup>344</sup> Sometimes the prohibition was expressed as one against “unusual and cruel punishments.” *E.g.*, WILLIAM SULLIVAN, SEA LIFE; OR, WHAT MAY OR MAY NOT BE DONE, AND WHAT OUGHT TO BE DONE BY SHIP-OWNERS, SHIP-MASTERS, MATES AND SEAMEN 75 (1837) (“Unusual and cruel punishments are forbidden; nor could any law of congress make them lawful.”); A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS: FROM THE REIGN OF KING GEORGE II, at xi (3d ed. 1742) (referring to “the Illegality of unusual and cruel Punishments”); THE PROCEEDINGS AND SPEECHES, AT THE MEETING THE SEVENTEENTH NOVEMBER, 1795, AT ST. ANDREW’S HALL, NORWICH, TO PETITION PARLIAMENT AGAINST LORD GRENVILLE’S AND MR. PITT’S TREASON AND SEDITION BILLS 13 (1795) (“The 10th clause of the Bill of Rights declares, that unusual and cruel punishments shall not be inflicted . . .”); 30 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 1342 (Thomas Jones Howell ed., 1822) (“He quoted the declaration of the Bill of Rights against excessive bail, and unusual and cruel punishments . . .”); 38 THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME 1128 (1818) (“[T]hough the bill declared against all unusual and cruel punishments . . . no provisions were made to carry these declarations into effect.”).

<sup>345</sup> *E.g.*, 1 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at xxxv (Thomas Jones Howell ed., 1816).

<sup>346</sup> See THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 13 (Patrick T. Conley & John P. Kaminski eds., 1992).

<sup>347</sup> *Mr. Emlyn’s Preface to the Second Edition of the State Trials*, 1 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO PRESENT TIME, at xxii, xxv (1809) [hereinafter *Mr. Emlyn’s Preface*] (reprinting “Mr. Emlyn’s Preface to the Second Edition of the State Trials, in Six Volumes Folio: Printed in the Year 1730”); FRANCIS HARGRAVE, A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS, at xi–xii (4th ed. 1776) (reprinting the preface to the second edition). Sollom Emlyn (1697–1754) was an Irish legal writer who became a member of Lincoln’s Inn,

As to smaller Crimes and Misdemeanors, they are differenced with such a variety of extenuating or aggravating circumstances, that the law has not, nor indeed could affix to each a certain and determinate Penalty, this is left to the discretion and prudence of the Judge, who may punish it either with Fine or Imprisonment, Pillory or Whipping, as he shall think the nature of the crime deserves . . .<sup>348</sup>

“[B]ut though he be intrusted with so great power,” Emlyn emphasized, “yet he is not at liberty to do as he lists, and inflict what arbitrary punishments he pleases; due regard is to be had to quality and degree, to the estate and circumstances of the offender, and to the greatness or smallness of the offence . . .”<sup>349</sup> A principle of proportionality, one traced back to King John at Runnymede but that got renewed attention in the Enlightenment in the writings of Montesquieu, Beccaria, and others, was thus built into the common-law tradition.<sup>350</sup>

Another important principle of early English law in the context of the imposition of fines was known as *salvo contenmento suo*, which translates as “saving his contenment,” or livelihood.<sup>351</sup> Explaining that a fine “which would be a mere trifle

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was the compiler of the six-volume second edition of STATE TRIALS, and contributed “a lengthy preface critically surveying the condition of English law at the time.” 25 THE ENCYCLOPAEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION 806 (11th ed. 1911). See also LOUIS HYMAN, THE JEWS OF IRELAND: FROM EARLIEST TIMES TO THE YEAR 1910, at 16 (1972); BASIL MONTAGU, THE OPINIONS OF DIFFERENT AUTHORS UPON THE PUNISHMENT OF DEATH, at ix (1812); *Emlyn, Sollom (DNB00)*, WIKISOURCE, [https://en.wikisource.org/wiki/Emlyn,\\_Sollom\\_\(DNB00\)](https://en.wikisource.org/wiki/Emlyn,_Sollom_(DNB00)) [<http://perma.cc/C5PK-QQQP>]; THE NEW OXFORD COMPANION TO LAW 1123 (Peter Cane & Joanne Conaghan eds., 2008).

<sup>348</sup> *Mr. Emlyn’s Preface*, *supra* note 347, at xxxv.

<sup>349</sup> *Id.*

<sup>350</sup> MAGNA CARTA AND ITS MODERN LEGACY 148 (Robert Hazell & James Melton eds., 2015). The concept of proportionality was one that was argued over or put to use by Anglo-American lawmakers as they grappled with the meaning of “cruel and unusual punishments.” BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 46, at 37–39; *Imperial Parliament—House of Lords—May 18*, CALEDONIAN MERCURY (Edinburgh, Scotland), May 22, 1809, at 2 (“Counsel were then called to the bar, in the case of Messrs White and Hart, proprietor and printer of the Independent Whig. . . . Lord Stanhope rose and expressed his regret that the Counsel had on either side indulged in personalities. He would decline voting upon the question before the House, but he would suggest some comparative inquiry into the nature of offences and punishments, for without that it would be impossible to ascertain whether in this case the bill of rights had been violated by the infliction of a cruel and unusual punishment.”).

<sup>351</sup> McLean, *supra* note 308, at 835. See also HERBERT BROOM & GEORGE DENMAN, CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW, AND EXEMPLIFIED BY CASES 399–401 (2d ed. 1885) (citations omitted):

The king, by virtue of his prerogative, was entitled to all fines and amercements and penalties, either wholly or in part, and, to prevent the undue exercise of this prerogative, various statutory restrictions were imposed. Thus, the fourteenth chapter of Henry III.’s Magna Carta declares that “a freeman shall not be amerced for a small fault, but after the

to one man, may be the utter ruin and undoing of another,” Emlyn, in his preface, further observed that “[f]ines ought to be moderate and within bounds.”<sup>352</sup> A judge, he wrote, must not abuse power. A judge, he explained, who uses

[d]iscretionary power to gratify a private revenge, or the rage of a party, by inflicting indefinite and perpetual Imprisonment, excessive and exorbitant Fines, unusual and cruel Punishments, is equally guilty of perverting justice and acting against law, as he, who in a case, where the law has ascertained the penalty, willfully and knowingly varies from it.<sup>353</sup>

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manner of the fault—and for a great fault after the greatness thereof—saving to him his ‘contentment,’ and a merchant likewise—saving to him his merchandize.” We must understand this word “contentment” to signify that which is necessary for the support and maintenance of a man in his state or condition of life. And, thus, this well-known chapter of Magna Carta forbids the setting upon any man of an amercement heavier than his circumstances or estate would bear—saving, as Lord Coke says, in his commentary on this passage, to the soldier his armour, to the scholar his books, and to the villein the cart or wainage with which his ignoble service was performed. . . .

Magna Carta, as remarked by Lord Coke, “extends to amercements, and not to fines imposed by any Court of Justice.” Within the spirit and equity, however, of this enactment, fines imposed judicially must certainly be brought; such fines ought to be moderate and “within bounds”, for “where a court has a power of setting fines, that must be understood of setting reasonable fines”: an excessive fine “is against law, and shall not bind, for *excessus in re quâlibet jure reprobatur communi*”. And accordingly the counsel for Mr. Hampden, who was convicted of a misdemeanor *anno* 36 Car. II., urges upon the court in mitigation of punishment, that his client was possessed but of a moderate estate, and that according to Magna Carta, “there should be a *salvo contentamento* in all fines.” So in *O’Connell v. Reg.*, Lord Campbell refers to Magna Carta as providing that “no fine shall be imposed beyond what the party is able to pay.”

On many occasions which the reader of history will call to mind—especially during the seventeenth century—were ruinous fines inflicted in violation of law, as well by the Star Chamber as by the Superior Courts; and hence the declaration in the Bill of Rights that “excessive fines ought not to be imposed,” grounded on the averment that such had been the practice in the reign of King James II., who in this and other ways, “by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the laws and liberties of this kingdom.

<sup>352</sup> 1 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at xxxv (Thomas Jones Howell ed., 1816).

<sup>353</sup> *Id.*

“If no measures were to be observed in these discretionary Punishments,” he wrote, “a man who is guilty of a Misdemeanor might be in a worse condition than if he had committed a capital crime; he might be exposed to an indefinite and perpetual Imprisonment, a punishment not at all favoured by law, as being worse than death itself . . . .”<sup>354</sup> He added:

Nor does an extravagant Fine, which is beyond the power of the offender ever to pay or raise, differ much from it; for if his Imprisonment depend upon a condition, which will never be in his power to perform, it is the same as if it were absolute and unconditional; if the offender be not able to pay such a Fine as his offence deserves, he must then submit to a corporal punishment in lieu of it, according to the old Rule, *Qui non habet in crumena, luat in cute*.<sup>355</sup>

That now-obscure Latin maxim, one put to use when corporal punishments were still being utilized, translates as “[h]e who has nothing in his purse must pay the penalty with his body.”<sup>356</sup>

In other words, the English Bill of Rights’ prohibition on excessive fines, like its prohibition on cruel and unusual punishments, operated in the seventeenth and eighteenth centuries as a constraint on arbitrary and unreasonable penalties.<sup>357</sup> “It is true,” Emlyn proclaimed in his preface, “that Clause of Magna Charta which requires the saving every man’s contenment (viz. his means of livelihood), extends only to Amerciaments, which are ascertained by a Jury, and not to Fines, which are imposed by the Court . . . .”<sup>358</sup> An *amercement* was understood to be “[a] pecuniary penalty imposed

<sup>354</sup> *Id.*

<sup>355</sup> 1 FRANCIS HARGRAVE, A COMPLETE COLLECTION OF STATE TRIALS, AND PROCEEDINGS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANORS, at xi–xii (5th ed. 1793).

<sup>356</sup> See JAMES A. BALLENTINE, A LAW DICTIONARY OF WORDS, TERMS, ABBREVIATIONS AND PHRASES WHICH ARE PECULIAR TO THE LAW AND OF THOSE WHICH HAVE A PECULIAR MEANING IN THE LAW 410 (1916); ALEXANDER M. BURRILL, A NEW LAW DICTIONARY AND GLOSSARY: CONTAINING FULL DEFINITIONS OF THE PRINCIPAL TERMS OF THE COMMON AND CIVIL LAW, TOGETHER WITH TRANSLATIONS AND EXPLANATIONS OF THE VARIOUS TECHNICAL PHRASES IN DIFFERENT LANGUAGES, OCCURRING IN THE ANCIENT AND MODERN REPORTS, AND STANDARD TREATISES; EMBRACING ALSO ALL THE PRINCIPAL COMMON AND CIVIL LAW MAXIMS 854 (1850) (defining “*Qui non habet in crumena, luat in corpore*” as “He who has not [the means of satisfaction] in his purse, must pay in his body. If a man cannot pay his fine, he must go to prison”).

<sup>357</sup> THOMAS JONES HOWELL, A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANOURS 424 (1816).

<sup>358</sup> *Id.* at 420. Amercements were a common criminal sanction in medieval England. See *United States v. Bajakajian*, 524 U.S. 321, 335 (1998); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 270–71 (1989); see also Massey, *supra* note 57, at 1259–64 (discussing the difference between fines and amercements).

upon an offender by a judicial tribunal.”<sup>359</sup> As one eighteenth-century law dictionary defined it: “AMERCEMENT is, to be at the king’s mercy with regard to the *quantum* of a fine imposed.”<sup>360</sup> “By *magna charta*,” it explained, “no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear, saving to the landowner his land, to the trader his merchandize, and to the husbandman his team and instruments of husbandry . . . .”<sup>361</sup> “[T]he ancient practice,” it was noted, was “to inquire by a jury, when a fine was imposed,” how much an offender “was able to pay by the year, saving the maintenance of himself, his wife, and children.”<sup>362</sup> It was acknowledged:

And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood, but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life, and by the bill of rights it is particularly declared, that excessive fines ought not to be imposed.<sup>363</sup>

But “where a court has a power of setting Fines,” Emlyn made clear in his preface, “that must be understood of setting reasonable Fines: ‘an excessive Fine,’ says lord Coke, ‘is against law,’ and so it is declared to be by the Act ‘for declaring the Rights and Liberties of the Subject.’”<sup>364</sup> “The same Statute,” Emlyn stressed, “declares the Illegality of unusual and cruel Punishments.”<sup>365</sup> Sir Edward Coke (1552–1634), a jurist known for his four-volume *Institutes of the Lawes of England*, had himself written in a common-law decision even before the English Bill of Rights came into force that if a fine appears “to be excessive, it is against Law, and shall not binde . . . as excessive distress is forbidden by the Common Law.”<sup>366</sup> In *Richard Godfrey’s Case* (1615), “the reasonableness of the Fine shall be judged by the Justices,” he wrote, adding that “[e]xcessive Amercement is against Law” and “[a]n excessive Fine at the Will of

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<sup>359</sup> 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION: WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 155 (1886). *See also id.* (“As distinguished from a fine, at the old law an *amercement* was for a lesser offence, might be imposed by a court not of record, and was for an uncertain amount . . . .”).

<sup>360</sup> 1 RICHARD BURN & JOHN BURN, NEW LAW DICTIONARY: INTENDED FOR GENERAL USE AS WELL AS FOR GENTLEMEN OF THE PROFESSION 30 (1792).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Mr. Emlyn’s Preface, supra* note 347, at xxxv.

<sup>365</sup> *Id.*

<sup>366</sup> EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, LATE LORD CHIEF JUSTICE OF ENGLAND 838 (1738).



the Lord, shall be said oppression of the people.”<sup>367</sup> “[T]he Lord cannot demand, or exact excessive and unreasonable Fines,” Coke tellingly wrote in another case.<sup>368</sup>

## II. THE AMERICAN REVOLUTION AND EARLY AMERICAN CONSTITUTIONS

### A. *The Enlightenment in America*

The American Revolution and eighteenth-century European and American penal-reform efforts were products of the Enlightenment.<sup>369</sup> American colonists felt grossly abused and oppressed by George III and the British Parliament.<sup>370</sup> Following Parliament’s Stamp Act (1765),<sup>371</sup> Tea Act (1773),<sup>372</sup> and the five so-called “Intolerable Acts,”<sup>373</sup> which included the Boston Port Act (1774) that imposed a blockade,<sup>374</sup> American colonists protested and ultimately rebelled, leading to the Boston Tea Party (1773),<sup>375</sup> the onset of the hard-fought Revolutionary War (1775–1783),<sup>376</sup> and the Declaration of Independence (1776).<sup>377</sup> The motto of the colonists, “No taxation without representation,”<sup>378</sup> was itself emblematic of what the colonists saw as a contest between tyranny and liberty, and over the ideas of freedom and equality.<sup>379</sup> In addition to seeking economic liberty, early Americans sought to reform—indeed, to transform—the law, including the criminal law, by jettisoning monarchical rule and the English “Bloody Code.”<sup>380</sup> Having read and studied a host of Enlightenment

<sup>367</sup> *Id.* at 838–39.

<sup>368</sup> *Id.* at 839; *Godfrey’s Case*, 11 CO. REP. 42a, 77 Eng. Rep. 1199 (1861). The right to freedom from excessive fines has deep historical roots and has long been recognized as a fundamental right. Brief Amici Curiae of Eighth Amendment Scholars in Support of Neither Party, *Timbs v. State of Indiana*, No. 17-1091 (U.S. Feb. 20, 2019) (submitted Sept. 10, 2018).

<sup>369</sup> See BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 46; John D. Bessler, *The American Enlightenment: Eliminating Capital Punishment in the United States*, in *CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM?* 93–101 (Lill Scherdin ed., 2014).

<sup>370</sup> See DAVID MCCULLOUGH, *1776* (2005).

<sup>371</sup> THE STAMP ACT OF 1765 (Jonathan Mercantini ed., 2018).

<sup>372</sup> PAUL S. BOYER ET AL., *THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE* 110 (6th ed. 2010).

<sup>373</sup> TOM HEAD & DAVID WOLCOTT, *CRIME AND PUNISHMENT IN AMERICA* 32–33 (2010).

<sup>374</sup> NANCY RUBIN STUART, *THE MUSE OF THE REVOLUTION: THE SECRET PEN OF MERCY OTIS WARREN AND THE FOUNDING OF A NATION* 60–61 (2008).

<sup>375</sup> See BENJAMIN L. CARP, *DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY & THE MAKING OF AMERICA* (2010).

<sup>376</sup> See PIERS MACKESY, *THE WAR FOR AMERICA: 1775–1783* (1993).

<sup>377</sup> See BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 97.

<sup>378</sup> JOHN ANTAL, *7 LEADERSHIP LESSONS OF THE AMERICAN REVOLUTION: THE FOUNDING FATHERS, LIBERTY, AND THE STRUGGLE FOR INDEPENDENCE* 21 (2013).

<sup>379</sup> *No Taxation without Representation*, US HIST., <https://www.u-s-history.com/pages/h640.html> [<http://perma.cc/6MLD-NSNX>].

<sup>380</sup> Erin E. Braatz, *The Eighth Amendment’s Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 434–35 (2016).

writers, and having personally experienced British oppression, Americans sought structural checks and limitations on power and they sought both procedural protections and substantive safeguards to protect their rights and liberties.<sup>381</sup>

In early state constitutions and the U.S. Constitution, America's founders, looking to Montesquieu's *The Spirit of the Laws* for guidance, put in place a system of checks and balances.<sup>382</sup> They divided power between the federal government and the states, and they divided power in each of those jurisdictional spheres between the three branches of government—the executive, the legislative, and the courts.<sup>383</sup> Forthrightly rejecting England's "Bloody Code"—the set of British laws that at one time made more than two hundred crimes punishable by death—early American political leaders not only

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<sup>381</sup> *Id.* at 429–36. The Revolutionary War was seen as arising out of the same spirit which produced England's Glorious Revolution against the Stuart dynasty, with the Glorious Revolution producing the English Declaration of Rights. *London, July 5*, VA. GAZETTE, Oct. 6, 1775, at 1 ("If the Americans who lately fought in their own defence, in the defence of their chartered liberties, in defence of their undoubted properties, in defence of their wives and their little ones, nay more, in defence of the constitutions; if those men were rebels, then every man who joined in the glorious revolution, every man who drew his sword in this kingdom to oppose an arbitrary Stuart, was an arrant rebel."). See also *To the People of Great Britain*, PUB. ADVERTISER (London), Jan. 24, 1775, at 1 ("Every late Act against our Brethren in America has been a wanton, cruel, iniquitous Exertion of unjustifiable Measures, contrary to every Thing granted by the Constitution, and the glorious Revolution.").

<sup>382</sup> See Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 7–9 (1990).

<sup>383</sup> *Separation of Powers—An Overview*, NCSL, <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> [<http://perma.cc/A5S7-Q7VE>]. Some political leaders, such as Virginia's governor, Edmund Randolph, felt that no constitutional protection against cruel and unusual punishments—or against excessive bail and fines—was needed. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 928 (Neil H. Cogan ed., 2d ed. 2015) [hereinafter THE COMPLETE BILL OF RIGHTS]. As Governor Randolph observed in mid-June 1788:

As to the exclusion of excessive bail and fines, and cruel and unusual punishments, this would follow of itself, without a bill of rights. Observations have been made about watchfulness over those in power which deserve our attention. There must be a combination; we must presume corruption in the House of Representatives, Senate, and President, before we can suppose that excessive fines can be imposed or cruel punishments inflicted. Their number is the highest security. Numbers are the highest security in our own Constitution, which has attracted so many eulogiums from the gentlemen. Here we have launched into a sea of suspicions. How shall we check power? By their numbers. Before these cruel punishments can be inflicted, laws must be passed, and judges must judge contrary to justice. This would excite universal discontent and detestation of the members of the government. They might involve their friends in the calamities resulting from it, and could be removed from office. I never desire a greater security than this, which I believe to be absolutely sufficient.

*Id.*

adopted constitutions that prohibited excessive bail, excessive fines, and cruel and unusual punishments, but they also passed statutes restricting the use of the death penalty and corporal punishments.<sup>384</sup> Both Montesquieu and one of his most prominent disciples, the Italian penal reformer Cesare Beccaria, had articulated the idea that only *proportionate* and *necessary* punishments should be imposed, with Montesquieu and Beccaria concluding that any punishment that goes beyond necessity is “tyrannical.”<sup>385</sup>

Early American lawyers, such as James Madison’s close friend, William Bradford Jr., embraced the necessity-for-punishment maxim.<sup>386</sup> A Pennsylvania jurist, Bradford wrote *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania* (1793), invoking both Montesquieu’s and Beccaria’s ideas, with Bradford becoming the second Attorney General of the United States.<sup>387</sup> In June of 1789, before William Bradford penned that influential essay, Madison himself proposed adding to the U.S. Constitution the prohibitions against excessive bail, excessive fines, and cruel and unusual punishments.<sup>388</sup> Madison’s proposal, echoed by a House Committee of Eleven Report from July 1789, was taken up by the U.S. House of Representatives in August 1789, and “was agreed to by a considerable majority.”<sup>389</sup> The U.S. Senate concurred with the House’s resolution that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>390</sup> From 1787 to 1790, delegates from various state conventions (e.g., in New York, North Carolina, Pennsylvania, Rhode Island, and Virginia) also sought prohibitions against excessive bail, excessive fines, and against either “cruel and unusual punishments” or “cruel or unusual punishments.”<sup>391</sup>

Many Americans felt strongly that such protections were needed not just at the state level, but at the national level, too. As “Brutus” wrote in the *New York Journal* on November 1, 1787: “For the security of liberty it has been declared, ‘that excessive

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<sup>384</sup> See Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1198–99 (2005).

<sup>385</sup> See John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria’s Forgotten Influence on American Law*, 37 MITCHELL-HAMLINE L.J. PUB. POL’Y & PRAC. 1, 83–84 (2016). Cesare Beccaria’s *On Crimes and Punishments* had a profound influence on America’s founders and throughout the world. BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 46; JOHN D. BESSLER, *THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD* (2018); BESSLER, *supra* note 49; John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty and the Abolition Movement*, 4 NW. J. L. & SOC. POL’Y 195 (2009); John D. Bessler, *The Economist and the Enlightenment: How Cesare Beccaria Changed Western Civilization*, 42 EUR. J. L. & ECON. 275 (2016).

<sup>386</sup> See William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania*, 12 AM. J. LEGAL HIST. 122 (1968).

<sup>387</sup> *See id.*

<sup>388</sup> THE COMPLETE BILL OF RIGHTS, *supra* note 383, at 913.

<sup>389</sup> *Id.* at 914.

<sup>390</sup> *Id.* at 915.

<sup>391</sup> *Id.* at 921.

bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted . . . .”<sup>392</sup> “These provisions,” Brutus argued, “are as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments . . . in certain cases, as the other.”<sup>393</sup> On November 7, 1787, in Philadelphia’s *Independent Gazetteer*, one “Philadelphiensis” wrote of the lack of protections in the original Constitution as drafted in Philadelphia:

To such lengths have these bold conspirators carried their scheme of despotism, that your most sacred rights and privileges are surrendered at discretion. When government thinks proper, under the pretense of writing a libel, &c. it may imprison, inflict the most cruel and unusual punishment, seize property, carry on prosecutions, &c. and the unfortunate citizen has no *magna charta*, no *bill of rights*, to protect him; nay, the prosecution may be carried on in such a manner that even a *jury* will not be allowed him.<sup>394</sup>

In the United States, the English Bill of Rights was still well known, and much lauded for the legal protections it articulated, in the era of America’s founding generation.<sup>395</sup> Indeed, when George Mason, of Fairfax County, drafted the Virginia Declaration of Rights (1776), he relied upon the English Bill of Rights in articulating the rights of Americans.<sup>396</sup> Thus, Section 9 of Virginia’s Declaration—exactly tracking Article 10 of the English Bill of Rights—reads: “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>397</sup> American political scientist Joseph Melusky and U.S. Magistrate Judge Keith Alan Pesto recently wrote that “[t]he Stuart Kings, Judge Jeffreys, the Bloody Assizes, and Titus Oates remained in public memory through the eighteenth century.”<sup>398</sup> “To many Americans in 1776,” Melusky and Pesto explain, “the reason for independence from England was their perception that the abuses of the Stuart kings were being replicated by King George’s ministers.”<sup>399</sup> “As a result,” they emphasized, American revolutionaries, fully aware of that history, “imitated the English Bill of Rights’s guarantee against cruel and unusual punishment as cheap insurance against would-be Jeffreys.”<sup>400</sup> In the late eighteenth century, just as Titus Oates, the perjurer,

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<sup>392</sup> *Id.* at 929.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> Rumann, *supra* note 226, at 669–73.

<sup>396</sup> *Id.* at 673–74. *See also* Granucci, *supra* note 18, at 840.

<sup>397</sup> VIRGINIA DECLARATION OF RIGHTS (1776).

<sup>398</sup> JOSEPH A. MELUSKY & KEITH ALAN PESTO, CAPITAL PUNISHMENT 24 (2011).

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

was still portrayed as a notorious figure,<sup>401</sup> so too was George Jeffreys for his judicial abuses.<sup>402</sup>

The early American constitutions and declarations of rights borrowed from the text of the English Bill of Rights but were informed by the Enlightenment—not by the same set of unique circumstances that drove the Glorious Revolution.<sup>403</sup> After the Virginia Declaration of Rights was adopted by Virginia’s constitutional convention on June 12, 1776,<sup>404</sup> other states quickly followed suit in the post–Declaration of Independence period, albeit with variations in wording, some rather minor, from section 10 of the English Bill of Rights.<sup>405</sup> On August 14, 1776, for example, the State of Maryland chose to address cruel acts and excessive punishments in two separate clauses.<sup>406</sup> Clause 14 read: “That sanguinary laws ought to be avoided, so far as is consistent with the safety of the State; and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter.”<sup>407</sup> Clause 22 provided: “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law.”<sup>408</sup> On September 11, 1776, Delaware also adopted the following provision, more closely tracking, though not exactly, the English version: “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments

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<sup>401</sup> 4 J. GRANGER, A BIOGRAPHICAL HISTORY OF ENGLAND, FROM EGBERT THE GREAT TO THE REVOLUTION 348 (3d ed. 1779) (“The notorious Titus Oates was, soon after the accession of James, convicted of perjury, upon the evidence of above sixty reputable witnesses, of whom nine were protestants.”).

<sup>402</sup> AN EXTINCT PEERAGE OF ENGLAND; CONTAINING AN ACCOUNT OF ALL THOSE NOBLE FAMILIES WHOSE TITLES ARE EXTINCT FROM THE EARLIEST ACCOUNTS TO THE PRESENT TIME 219 (1769) (containing an entry pertaining to “George Jeffries” which notes that “his character is too well known to need any recital”); THE BIOGRAPHICAL DICTIONARY; OR, COMPLETE HISTORICAL LIBRARY 409 (1780) (containing an entry written by “A SOCIETY OF GENTLEMEN” for “JEFFREYS, or JEFFERIES (George)” which notes that “[h]e was one of the greatest advisers and promoters of all the oppressive and arbitrary measures carried on in th[e] reign” of James II, and that “his sanguinary and inhuman proceedings against the duke of Monmouth’s unfortunate adherents in the West, will ever render his name infamous”); 6 A NEW AND GENERAL BIOGRAPHICAL DICTIONARY; CONTAINING AN HISTORICAL, CRITICAL, AND IMPARTIAL ACCOUNT OF THE LIVES AND WRITINGS OF THE MOST EMINENT PERSONS IN EVERY NATION IN THE WORLD 339 (1795) (noting that, in James II’s reign, Jeffreys was “was one of the greatest advisers and promoters of all the oppressive and arbitrary measures of that unhappy tyrannical reign: and his sanguinary and inhuman proceedings against Monmouth’s miserable adherents in the West will ever render his name infamous”).

<sup>403</sup> See *Foundations of American Government*, US HIST., <http://www.ushistory.org/gov/2.asp> [<http://perma.cc/F5FK-S98E>].

<sup>404</sup> VIRGINIA DECLARATION OF RIGHTS (June 12, 1776).

<sup>405</sup> See Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMINOLOGY 231, 232–35 (1995).

<sup>406</sup> MARYLAND CONST. cl. 14 (1776).

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* cl. 22.



inflicted.”<sup>409</sup> Additional states adopted similar variations on the theme, with Pennsylvania’s 1776 constitution forbidding “[e]xcessive bail,” providing that “all fines shall be moderate,” and stating that the penal laws “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.”<sup>410</sup> By 1790, the year before the ratification of the U.S. Bill of Rights, nine states had constitutional provisions barring “cruel and unusual,” “cruel or unusual,” or “cruel” punishments.<sup>411</sup>

The prohibitions against “cruel and unusual” or “cruel or unusual” punishments in the early American revolutionary constitutions<sup>412</sup> was explained, in part, by James Iredell, a future U.S. Supreme Court Justice, in 1788.<sup>413</sup> Iredell was appointed to the U.S. Supreme Court by President George Washington, and he served in that position from 1790 until his death in 1799.<sup>414</sup> But before that appointment, Iredell, as the Attorney General of North Carolina from 1779 to 1782, offered an explanation for why such prohibitions ended up in early American constitutions in his answers to George Mason’s objections to the lack of a federal bill of rights in the originally proposed U.S. Constitution.<sup>415</sup> Mason had begun his objections: “There is no declaration of rights, and the laws of the general government being paramount to the laws and constitutions of the several States, the declarations of rights, in the separate States, are no security.”<sup>416</sup> In 1788, Iredell opposed the inclusion of a prohibition against cruel

<sup>409</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 178.

<sup>410</sup> *Id.* at 179.

<sup>411</sup> *Id.* at 177–81.

<sup>412</sup> THE COMPLETE BILL OF RIGHTS, *supra* note 383, at 922–25 (excerpting provisions from the Delaware Declaration of Rights (1776), the Maryland Declaration of Rights (1776), and the Virginia Declaration of Rights (1776)); ROLAND ADICKES, THE UNITED STATES CONSTITUTION AND CITIZENS’ RIGHTS: THE INTERPRETATION AND MIS-INTERPRETATION OF THE AMERICAN CONTRACT FOR GOVERNANCE 132–33 (2001).

<sup>413</sup> Such prohibitions became a standard feature of American constitutions. *E.g.*, STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 231–32 (2002) (“By 1791, when the Eighth Amendment to the United States Constitution was ratified, the phrase *cruel and unusual punishments* was already a stock verbal formula. It originally appeared in the English Bill of Rights of 1689, which declared that ‘excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ That sentence was copied into Virginia’s Declaration of Rights of 1776, and versions of it were included in several more state constitutions in the next few years. . . . By the time the Constitution was up for ratification, the prohibition of cruel and unusual punishments was such a standard element in documents of the sort that its absence was a common source of complaint among the Constitution’s opponents. There was accordingly almost no debate over the constitutional amendment that became number eight.”).

<sup>414</sup> *George Washington and the Supreme Court*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/george-washington/the-first-president/george-washington-and-the-supreme-court> [http://perma.cc/K8NK-N2NH].

<sup>415</sup> *James Iredell*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/James-Iredell> [http://perma.cc/JVG2-BLKV].

<sup>416</sup> *James Iredell, Marcus, Answers to Mr. Mason’s Objections to the New Constitution*,

and unusual punishments in the U.S. Constitution—a document debated one hundred years after the Glorious Revolution.<sup>417</sup> He did so—albeit unsuccessfully, as others rightfully insisted on the Eighth Amendment’s written protections—because of his belief that Congress should have the legislative prerogative to decide upon the punishments for those crimes in the subject matter areas over which the Constitution gave Congress jurisdiction to legislate (e.g., “counterfeiting the securities and current coin of the United States,” “piracies and felonies committed on the high seas, and offences against the law of nations,” and “treason against the United States”).<sup>418</sup>

In discussing the prohibitions against cruel and unusual punishments in early American state constitutions, James Iredell looked to English history even as he recognized that Americans were making history.<sup>419</sup> “It may be observed, in the first place,” he wrote, “that a declaration against ‘cruel and unusual punishments’ formed part of an article in the Bill of Rights at the revolution in England in 1688.”<sup>420</sup> “The prerogative of the Crown having been grossly abused in some preceding reigns,” Iredell stressed, “it was thought proper to notice every grievance they had endured, and those declarations went to an abuse of power in the Crown only, but were never intended to limit the authority of Parliament.”<sup>421</sup> “Many of these articles of the Bill of Rights in England, without a due attention to the difference of the cases,” Iredell continued, “were eagerly adopted when our constitutions were formed, the minds of men then being so warmed with their exertions in the cause of liberty as to lean too much perhaps towards a jealousy of power to repose a proper confidence in their own government.”<sup>422</sup> With Iredell asserting that Congress should have “a just right to authority” to delineate crimes and punishments, he pondered the issue of “whether it is practicable and proper to prescribe limits to its exercise, for fear that they should inflict punishments unusual and severe.”<sup>423</sup>

For Iredell, the prohibitions in state constitutions against cruel and unusual punishments were too ambiguous or nebulous to warrant inclusion in the U.S. Constitution.<sup>424</sup> “From these articles in the State constitutions,” Iredell explained, “many things were attempted to be transplanted into our new Constitution, which would either have been nugatory or improper.”<sup>425</sup> “This is one of them,” Iredell offered of the proscription.<sup>426</sup> “The expressions ‘unusual and severe’ or ‘cruel and unusual,’”

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THE FOUNDERS CONST., <http://press-pubs.uchicago.edu/founders/documents/v1ch14s36.html> [<http://perma.cc/HD6R-83BM>].

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *See id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

Iredell emphasized, “surely would have been too vague to have been of any consequence, since they admit of no clear and precise signification.”<sup>427</sup> “If to guard against punishments being too severe,” Iredell observed of the Constitutional Convention in Philadelphia,

the Convention had enumerated a vast variety of cruel punishments, and prohibited the use of any of them, let the number have been ever so great, an inexhaustible fund must have been unmentioned, and if our government had been disposed to be cruel their invention would only have been put to a little more trouble.<sup>428</sup>

“If to avoid this difficulty,” he added:

they had determined, not negatively what punishments should not be exercised, but positively what punishments should, this must have led them into a labyrinth of detail which in the original constitution of a government would have appeared perfectly ridiculous, and not left a room for such changes, according to circumstances, as must be in the power of every Legislature that is rationally formed.<sup>429</sup>

“[W]hen we enter into particulars,” Iredell concluded, “we must be convinced that the proposition of such a restriction would have led to nothing useful, or to something dangerous, and therefore that its omission is not chargeable as a fault in the new Constitution.”<sup>430</sup> “Let us also remember,” Iredell assured his audience:

[T]hat as those who are to make those laws must themselves be subject to them, their own interest and feelings will dictate to them not to make them unnecessarily severe; and that in the case of treason, which usually in every country exposes men most to the avarice and rapacity of government, care is taken that the innocent family of the offender shall not suffer for the treason of their relation.<sup>431</sup>

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<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 207 (1858); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788, at 360 (Paul Leicester Ford ed., 1888); THE FEDERALIST AND OTHER CONTEMPORARY PAPERS ON THE CONSTITUTION OF THE UNITED STATES 908 (E. H. Scott ed.,

Notably, Iredell later seems to have had a change in heart—or, at the very least, felt compelled to acknowledge the significance and legal import of the U.S. Constitution’s Cruel and Unusual Punishments Clause.<sup>432</sup> In April 1795, Iredell, then an Associate Justice of the U.S. Supreme Court, delivered a grand jury charge in New York City that was later published at the grand jury’s request.<sup>433</sup> In that grand jury charge, he described the series of protections laid out in the U.S. Constitution for criminal suspects and criminal defendants.<sup>434</sup> After reciting a whole host of protections—from the right to grand juries and to trial by jury, to the protection against double jeopardy and freedom from self-incrimination, to due process and the rights to a speedy trial and assistance of counsel—Iredell emphasized that “[b]esides the provisions in the constitution I have already noticed, there are other provisions in it calculated to secure still farther the invaluable possession of personal liberty, so that it may not be unjustly sacrificed to any arbitrary measures.”<sup>435</sup> Among the rights Iredell then listed, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>436</sup> “The above contain all the restrictions in the constitution I proposed to enumerate,” Iredell added, emphasizing: “Subject to these, the following authority in regard to the criminal law is vested in the legislature of the United States.”<sup>437</sup>

### B. Early American Legal Commentary

Enlightenment thinkers and America’s founders recognized that power had to be checked by power, and a great many of those thinkers and lawmakers believed that *certain* punishments were preferable to *severe* ones.<sup>438</sup> In his *Commentaries on the Constitution of the United States* (1833), Joseph Story, the influential American jurist and Harvard professor who served on the U.S. Supreme Court from 1811 to 1845,<sup>439</sup> specifically emphasized the importance of the separation-of-powers principle to

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1894); James Iredell, *Marcus, Answers to Mr. Mason’s Objections to the New Constitution*, *supra* note 416.

<sup>432</sup> See *United States*, PHILA. INQUIRER, Apr. 17, 1795, at 2.

<sup>433</sup> See *id.*

<sup>434</sup> See *id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the U.S. Supreme Court has articulated and exercised the power of judicial review to strike down legislative enactments that run afoul of the U.S. Constitution. Because the protections against excessive bail, excessive fines, and cruel and unusual punishments were included in the U.S. Bill of Rights, any governmental actions that violate those protections are unconstitutional.

<sup>438</sup> See BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 46.

<sup>439</sup> R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 64, 238 (2004).

American legal systems.<sup>440</sup> As Story wrote, “In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen.”<sup>441</sup> Noting that it had become “a maxim of vital importance that these powers should for ever be kept separate and distinct,” Story emphasized that it was Montesquieu—the French thinker—who “seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value.”<sup>442</sup> As Story emphasized: “No remark is better founded in human experience, than that of Montesquieu, that ‘there is no liberty, if the judiciary power be not separated from the legislative and executive powers.’”<sup>443</sup> In his three-volume *Commentaries*, Story cited both Montesquieu’s *Spirit of the Laws* and Beccaria’s *On Crimes and Punishments*.<sup>444</sup> For example, Story had this to say about the French jurist: “Montesquieu has remarked, that the Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel is incompatible with the despotic rage, with which a prince punishes his subjects, and exercises himself in cruelty.”<sup>445</sup> In *On Crimes and Punishments*, Beccaria, the law-trained criminal-law theorist from Milan, argued for the abolition of torture and capital punishment and sought proportionate punishments, writing of a scale of crimes and a corresponding scale of punishments.<sup>446</sup>

Ultimately, the U.S. Bill of Rights, like the English Bill of Rights before it,<sup>447</sup> included the prohibitions against excessive bail and fines and barred cruel and unusual punishments.<sup>448</sup> Although those proscriptions were rarely litigated in the early days of the American Republic,<sup>449</sup> they were seen as important constitutional

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<sup>440</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 2–3 (Hilliard, Gray, and Co., 1833).

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 3.

<sup>443</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 426 (1833).

<sup>444</sup> See, e.g., 1 STORY, *supra* note 440, at 455 n.1.

<sup>445</sup> 3 STORY, *supra* note 443, at 725.

<sup>446</sup> CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764).

<sup>447</sup> *Magna Charta and the Bill of Rights*, LEEDS MERCURY (Leeds, England), Jan. 21, 1809, at 3 (quoting Lord Chatham as saying that “Magna Charta, the Petition Rights and the Bill of Rights, form that code which, I call *the Bible of the English Constitution*”). See also THE STAR OF FREEDOM (Leeds, England), June 24, 1848, at 3 (describing “excessive bail” as “a gross violation of the Constitution, and a crime against the subject expressly forbidden by both Magna Charta and the Bill of Rights”).

<sup>448</sup> U.S. CONST. amend. VIII.

<sup>449</sup> E.g., BANNER, *supra* note 413, at 232:

Neither the Eighth Amendment’s cruel and unusual punishments clause nor its state constitutional analogues were used much in the century that followed. The lack of much early litigation on the subject,



guarantees—and it has long been held that those proscriptions restrict the actions of all three branches of government.<sup>450</sup> Whereas the Northwest Ordinance of 1787, in a provision modeled on the Massachusetts Constitution, barred “cruel or unusual punishments,”<sup>451</sup> further providing that “[a]ll fines shall be moderate” and that “[a]ll

combined with the virtual absence of recorded debate over the Eighth Amendment and its antecedents, has left little evidence of exactly what Americans of the late eighteenth century understood by the concept of cruel and unusual punishment. The phrase appears to have been used in three distinct but related senses.

By prohibiting cruel and unusual punishments, some may have believed themselves to be holding government to the principle of proportionality, the idea that the harshest sentences had to be reserved for the worst crimes. . . . That the punishment should fit the crime was a truism of Enlightenment penology, repeated by Beccaria, Montesquieu, and virtually all eighteenth-century writers on the subject. The original appearance of the cruel and unusual punishments clause in the English Bill of Rights had been a response to judicial overreaching in the political trials of the 1670s and 1680s, during which several defendants had received sentences widely perceived to be disproportionate to their crimes. . . .

A second meaning was more common. Some understood *cruel and unusual* to refer to punishment unauthorized by law and therefore outside the authority of a court to impose. Such had also been a standard complaint about the harsh sentences imposed after the English political trials of the 1670s and 1680s—that the penalties had been not just disproportionate but illegal. . . . The future Supreme Court Justice James Iredell seems to have had this definition in mind in 1788, when he referred to the cruel and unusual punishments clause and related provisions of the English Bill of Rights as limitations that “went to an abuse of power in the Crown only, but were never intended to limit the authority of Parliament.”

The third meaning of *cruel and unusual* in circulation in the late eighteenth century referred only to *methods* of punishment. . . . Abraham Holmes worried at the Massachusetts ratifying convention that in the unamended Constitution Congress was “nowhere restrained from inventing the most cruel and unheard-of punishment . . . *racks* and *gibbets* may be amongst the most mild instruments of their discipline.

At the Virginia convention, Patrick Henry complained that without a ban on cruel and unusual punishments Congress might “introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime.”

See also BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 162–98 (discussing debate over the prohibition of cruel and unusual punishments and early American judicial decisions interpreting that concept); THE COMPLETE BILL OF RIGHTS, *supra* note 383, at 927–28 (quoting comments of “Mr. HOLMES,” “Mr. HENRY,” and “Mr. GEORGE NICHOLAS”).

<sup>450</sup> *Separation of Powers—An Overview*, *supra* note 383. See also Granucci, *supra* note 18, at 840–42.

<sup>451</sup> 1 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: ORIGINS

persons shall be bailable, unless for capital offences, where the proof shall be evident or the presumption great,”<sup>452</sup> the U.S. Constitution banned “cruel and unusual punishments” and more generically prohibited “excessive” bail or fines.<sup>453</sup> Unlike Virginia’s Declaration of Rights (1776), the Eighth Amendment used the “shall not” language instead of the more hortatory “ought not” phraseology.<sup>454</sup> At the First Congress, during the debates on the U.S. Bill of Rights, only two mentions were made about the text that became the Eighth Amendment.<sup>455</sup> William Loughton Smith, of South Carolina, “objected to the words ‘nor cruel and unusual punishments;’ the import of them being too indefinite.”<sup>456</sup> And Samuel Livermore, of New Hampshire, offered this perspective:

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 lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.<sup>457</sup>

In spite of these two expressed concerns, the Eighth Amendment “was agreed to by a considerable majority” of legislators in the First Congress.<sup>458</sup>

### *C. Early Views of the U.S. Constitution’s Eighth Amendment*

In the generations that came after America’s founding generation, everyone (but especially lawyers and judges) had their own take on the import of the Eighth Amendment’s words. For example, Justice Story later offered a short explanation

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THROUGH THE CIVIL WAR 365–66 (Scott J. Hammond, Kevin R. Hardwick & Howard L. Lubert eds., 2007).

<sup>452</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 118.

<sup>453</sup> U.S. CONST. amend. VIII.

<sup>454</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 178, 193.

<sup>455</sup> *Id.* at 186.

<sup>456</sup> *Id.* See also THE COMPLETE BILL OF RIGHTS, *supra* note 383, at 926–27 (quoting comments made by “Mr. Livermore”).

<sup>457</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 186.

<sup>458</sup> *Id.*

for why, in his judgment, the Eighth Amendment was ultimately added to the U.S. Constitution. In two sections of his *Commentaries on the Constitution of the United States* (1833), Story gave this history and context, explaining, at a time before the ratification of the U.S. Constitution's Fourteenth Amendment, how the Eighth Amendment only served to restrain the federal government:

The next amendment is: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." This is an exact transcript of a clause in the bill of rights, framed at the revolution of 1688. 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. It was, however, adopted, as an admonition to all departments of the national government,<sup>459</sup> to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts. In those times, a demand of excessive bail was often made against persons, who were odious to the court, and its favourites; and on failing to procure it, they were committed to prison. Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments inflicted. Upon this subject Mr. Justice Blackstone has wisely remarked, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak

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<sup>459</sup> Other public officials around that time also saw the Eighth Amendment's language as an admonition and a call to action. Gov. Gabriel Moore, *Governor's Message* (Tuscaloosa, Ala., Nov. 16, 1830), *THE DEMOCRAT* (Huntsville, Ala.), Nov. 25, 1830, at 2:

In connexion with other means calculated to advance the prosperity and general welfare of the community, I have thought it my duty to bring to your notice our criminal *code*, and submit to the wisdom of the Legislature, whether the great objects of punishment will not be better attained by the establishment of a Penitentiary system.

I find our attention has been most clearly pointed to this interesting topic by the 19th Sec. of the 6th Art. under the head of general provisions in our constitution. "It shall be the duty of the General Assembly as soon as circumstances will permit, to form a penal code founded on principles of reformation and not of vindictive justice." Again, in Sec[.] 16, Art. 1, declaration of rights—"excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." In the like liberal spirit, the federal compact points emphatically to the protection of the personal rights of the citizen, as one of its prominent objects:—thus we find it forbidding the passage of bills of attainder, the suspension of the writ of habeas corpus, the exaction of unreasonable fines, and the infliction of cruel and unusual punishments. These, gentlemen, we should receive as powerful admonitions to us, and great incentives in this work of humanity.

constitution. The laws of the Roman kings, and the twelve tables of the Decemviri, were full of cruel punishments; the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished. Under the emperors severe laws were revived, and then the empire fell.

It has been held in the state courts, (and the point does not seem ever to have arisen in the courts of the United States,) that this clause does not apply to punishments inflicted in a state court for a crime against such state; but that the prohibition is addressed solely to the national government, and operates, as a restriction upon its powers.<sup>460</sup>

How legal commentators viewed the Eighth Amendment's prohibitions were, necessarily, shaped by their own times—and by their own understanding of history, of constitutional language, and of the meaning of their individual words. For example, in *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts in the United States* (1824), Peter Du Ponceau—the provost of the Law Academy of Philadelphia—distinguished the American prohibition on cruel and unusual punishments from the earlier one contained in the English Bill of Rights.<sup>461</sup> In his dissertation, Du Ponceau wrote of “certain harsh punishments which our modern manners reprove, but which still stain the page of the common law; as for instance the punishment of petty treason in men by drawing and quartering, and in women by burning.”<sup>462</sup> He then wrote this about the difference between American and English law:

But the 10th amendment of our Constitution has sufficiently provided that ‘no cruel and unusual punishment shall be inflicted,’ which word ‘unusual’ evidently refers to the United States, and the time when the Constitution was made, and therefore is not to be confounded with the same clause in the English bill of rights, which referring to another period and to another country, may have been differently construed.<sup>463</sup>

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<sup>460</sup> 3 STORY, *supra* note 443, at 750–51.

<sup>461</sup> PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES, BEING A VALEDICTORY ADDRESS DELIVERED TO THE STUDENTS OF THE LAW ACADEMY OF PHILADELPHIA, AT THE CLOSE OF THE ACADEMIC YEAR, ON THE 22ND OF APRIL, 1824, at 95–97 (1824) (published in Philadelphia by Abraham Small and dedicated “To the Honourable William Tilghman, LL.D., Chief Justice of the Supreme Court of the Commonwealth of Pennsylvania, and Patron of the Law Academy of Philadelphia”).

<sup>462</sup> *Id.* at 95.

<sup>463</sup> *Id.*

Du Ponceau then emphasized that *peine forte et dure* (pressing to death) and burning in the hand in cases of manslaughter had been abolished, with “milder substitutes provided by our national statutes.”<sup>464</sup> As Du Ponceau wrote, reflecting his view of what he perceived as the progressive nature of that time:

[C]orruption of blood, trial by battle, all other modes of trial, but trial by jury in criminal cases are also abolished; in short the common law as modified by our Constitution, by our laws, manners and usages, is as wholesome and as harmless a system, in criminal as well as in civil cases, as any that can be devised.<sup>465</sup>

As Du Ponceau’s *Dissertation* then continued:

As to offences not capital, cruel and unusual punishments being forbidden by our Constitution, there remains none but fine, imprisonment and, perhaps, whipping and the pillory. I hope I shall hear nothing of the ducking stool and other obsolete remains of the customs of barbarous ages. The pillory and whipping, I know, are out of use in most of the States, imprisonment at hard labour having been substituted in lieu of them. Yet Congress have thought proper to retain the latter punishment in their penal code, and we have seen it inflicted not long since in our city on an offender against the laws of the United States. It is in the power of the national Legislature to alter or amend the law in this respect, as they shall think proper; but until they do so, I see nothing inhuman in the moderate infliction of either of these penalties, nor any reason why we should reject the common law on their account.

It may be said, perhaps, that there is too much left to the discretion of the Judges as to the quantum, and even the nature of the punishment and sometimes also as to deciding what is or what is not an indictable act. As to the quantum of punishment, I know no system of laws in which some discretion at least is not left to the Court according to the greater or lesser magnitude of the offence. It is impossible to avoid this inconvenience by any legislation. The same thing may be said of the authority to choose between two or three mild punishments; there may be cases in which imprisonment would be death to the party, and when a fine may be inflicted upon him with greater effect; others when the reverse may be the case.<sup>466</sup>

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<sup>464</sup> *Id.* at 95–96.

<sup>465</sup> *Id.* at 96.

<sup>466</sup> *Id.* at 96–97. The pillory and the whipping post were once usual punishments in colonial



The American prohibition against cruel and unusual punishments applies not just to *judicial* discretion but to restraining the conduct of all three branches of government: legislative, executive, and judicial.<sup>467</sup> Through the Eighth Amendment's history, however, there have been fierce disputes about what precisely the Eighth Amendment prohibits.<sup>468</sup> For example, in his treatise on the constraints on the legislative branch, Thomas Cooley, a justice of the Supreme Court of Michigan,<sup>469</sup> included a section on "*Excessive Fines and Cruel and Unusual Punishments.*"<sup>470</sup> In it, he wrote that "the question what fine shall be imposed is one addressed to the discretion of the court" but that "it is a discretion to be judicially exercised; and there may be cases in which a punishment . . . is nevertheless so clearly excessive as to be erroneous in law."<sup>471</sup> As Cooley wrote:

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and early America. PETER C. HOLLORAN, *HISTORICAL DICTIONARY OF NEW ENGLAND* 496 (2d ed. 2017) ("Boston last used the pillory in 1803."); HOWARD O. SPROGLE, *THE PHILADELPHIA POLICE, PAST AND PRESENT* 56 (1887). In America's founding era, various civic leaders and lawmakers sought not only the abolition of capital punishment but the abolition of corporal punishments. See BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 191; *see also* BOB NAVARRO, *THE FIRST EXECUTIVES: LIVES AND EVENTS IN THE SHADOW OF THE AMERICAN REVOLUTION* 143–44 (2000) (noting that John Hancock's "final action as Governor was a plea to the General Court of Massachusetts against capital punishment, branding and the public whipping post").

<sup>467</sup> BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 294. *See also* JOHN C. KLOTTER & JACQUELINE R. KANOVITZ, *CONSTITUTIONAL LAW* 531 (6th ed. 1991) ("[T]he Eighth Amendment restrains the legislature from imposing cruel forms of punishment."). Because of the ratification of the Fourteenth Amendment, the Eighth Amendment's prohibition against cruel and unusual punishments also now applies against *state* governments and *state* officials, and not just against the federal government and its officials.

<sup>468</sup> *See, e.g.*, *O'Neil v. Vermont*, 144 U.S. 323, 330–32 (1892) (finding the Eighth Amendment inapplicable to a state-law punishment in which a defendant had been found guilty of 307 offences of selling intoxicating liquors in violation of Vermont law, and sentenced to be fined and to be imprisoned at hard labor for 19,914 days in the event the fine was not paid); *id.* at 337, 339–40 (Field, J., dissenting) (labeling the punishment at issue "unusual and cruel" while noting that such a designation "is usually applied" to punishments "which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering. 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 imposed, nor cruel and unusual punishments inflicted. . . . 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 offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted"); *see also* MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE* 388–400 (2015) (discussing the Eighth Amendment views of Justice William Brennan and Justice Thurgood Marshall on capital punishment).

<sup>469</sup> THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (1878).

<sup>470</sup> *Id.* at 406–08.

<sup>471</sup> *Id.* at 406.

A fine should have some reference to the party's ability to pay it. By Magna Charta a freeman was not to be amerced for a small fault, but according to the degree of the fault, and for a great crime in proportion to the heinousness of it, *saving to him his contenment*; and after the same manner a merchant, *saving to him his merchandise*. . . . The merciful spirit of these provisions addresses itself to the criminal courts of the American States through the provisions of their constitutions.<sup>472</sup>

In his section on cruel and unusual punishments, Cooley further wrote: "It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offence which was punishable in the same way at the common law, could not be regarded as cruel or unusual in the constitutional sense."<sup>473</sup> "And probably any new statutory offence," he added, "may be punished to the extent and in the mode permitted by the common law for offences of similar nature."<sup>474</sup> "But those degrading punishments which in any State had become obsolete before its existing constitution was adopted," Cooley opined, "we think may well be held forbidden by it as cruel and unusual."<sup>475</sup> As Cooley editorialized,

We may well doubt the right 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. In such States, the public sentiment must be regarded as having condemned them as 'cruel,' and any punishment which, if ever employed at all, has become altogether obsolete, must certainly be looked upon as 'unusual.'<sup>476</sup>

#### CONCLUSION

A lot has transpired since the late seventeenth century, when the Glorious Revolution deposed King James II and elevated William and Mary to the throne. In time, the anti-Catholic fervor that drove the Glorious Revolution<sup>477</sup> gave way to American

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<sup>472</sup> *Id.* at 406–07 (citation omitted).

<sup>473</sup> *Id.* at 407–08.

<sup>474</sup> *Id.* at 408.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *E.g.*, HUTTON WEBSTER, *EARLY EUROPEAN HISTORY: MEDIEVAL AND EARLY MODERN TIMES 720–71* (1917) ("In settling the crown on William and Mary, Parliament took care to safeguard its own authority and the Protestant religion. It enacted the Bill of Rights, which has a place by the side of Magna Carta and the Petition of Right among the great documents of English constitutional history. This act decreed that the sovereign must henceforth be a

legal protections (e.g., the U.S. Constitution's First, Fifth, and Fourteenth Amendments, as well as various civil rights acts) that guarantee religious freedom, non-discrimination, due process, and equal protection of the law.<sup>478</sup> The language of the U.S. Constitution's Eighth Amendment, made applicable to the states by virtue of the Fourteenth Amendment, closely resembles that of Section 10 of the English Bill of Rights.<sup>479</sup> While slavery and the transatlantic slave trade existed in the days of the Glorious Revolution and through the American Revolution, slavery—a practice which many of America's founders tolerated or embraced—is now expressly outlawed by international law and there is a *jus cogens* (peremptory) norm prohibiting it.<sup>480</sup>

The prohibitions set forth in the English Bill of Rights against excessive bail, excessive fines, and cruel and unusual punishments came about as a result of a peculiar set of circumstances. But each generation—from participants in the Glorious Revolution, to America's Founding Fathers, to nineteenth-century legal commentators, to modern-day jurists—has, naturally, put its own indelible stamp upon those historic Anglo-American prohibitions against “excessive bail,” “excessive fines,” and “cruel and unusual punishments.” What is clear from an examination of the historical record is that this process will continue into the future. It is, in fact, inevitable that how one generation views the prohibitions against “excessive” bail and fines or “cruel and unusual punishments” will not inhibit a later generation from reading those proscriptions in a different way in an ever-changing world.<sup>481</sup> If the Eighth

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member of the Anglican Church. . . . It also declared . . . that excessive bail ought not to be required, or excessive fines imposed, or cruel and unusual punishments inflicted.”)

<sup>478</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”); *id.* amend. XIV (“[N]or 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.”). See also TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 (2014).

<sup>479</sup> 1–3 THE ENCYCLOPEDIA OF CIVIL LIBERTIES IN AMERICA 249 (David Schultz & John R. Vile eds., 2005) (noting that “[t]he text of the Eighth Amendment’s ban on cruel and unusual punishments is borrowed almost verbatim from Section 10 of the English Bill of Rights (1689)”).

<sup>480</sup> THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* 209–13 (2015).

<sup>481</sup> For example, while the Eighth Amendment was understood in America's founding era to prohibit torture, I have argued that capital punishment, which was not seen as a form of torture in the eighteenth century, should now be classified under the rubric of torture. JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* (2017). See also JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* (1997) (discussing the history of capital punishment in early America); John D. Bessler, *Capital Punishment Law and Practices: History, Trends, and Developments*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014) (same); John D. Bessler, *The American Death Penalty: A Short (But Long) History*, in *ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT* (Robert M. Bohm & Gavin Lee eds., 2018) (same); John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature*

Amendment were read in a static manner<sup>482</sup>—something already rejected decades ago by the U.S. Supreme Court—the Eighth Amendment’s prohibitions, originally targeted at the most extreme and grotesque of Stuart excesses,<sup>483</sup> would be rendered moot or meaningless.

History is revealing, but history—as history itself shows—does not necessarily dictate the law’s future. The Enlightenment inspired new forms of government and greater protection of human rights,<sup>484</sup> and the American Revolution forged the United States of America and forever changed Americans’ relationship with England and the English common law.<sup>485</sup> American revolutionaries<sup>486</sup> and various American lawmakers rejected

*of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. U.L. REV. 1 (2019) [hereinafter Bessler, *Taking Psychological Torture Seriously*] (discussing death threats, including state-sanctioned ones); John D. Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should Be Strictly Prohibited by American and International Law*, 58 WASHBURN L.J. 1 (2019).

<sup>482</sup> See *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (“The words of the [Eighth] Amendment are not precise, and that their scope is not static.”).

<sup>483</sup> JOHN W. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* 237 (9th ed. 2015) (“The proscription of cruel and unusual punishments has been attributed to reaction to barbaric, torturous punishments imposed by the Stuarts, and to illegal punishments (such as defrocking) imposed by the King’s Bench.”).

<sup>484</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30 (1967) (“[T]he major figures of the European Enlightenment and many of the lesser, contributed substantially to the thought of the Americans”; “the colonists cited with enthusiasm the theorists of universal reason, so too did they associate themselves, with offhand familiarity, with the tradition of the English common law.”).

<sup>485</sup> See, e.g., HARRY POTTER, *LAW, LIBERTY AND THE CONSTITUTION: A BRIEF HISTORY OF THE COMMON LAW* 2 (2015) (“The origins of the English common law are to be found in Anglo-Saxon times and on these island shores. While Germanic and Nordic practices have influenced its creation, it owes relatively little to Roman or continental exemplars.”); EMPIRE AND NATION: *THE AMERICAN REVOLUTION IN THE ATLANTIC WORLD* 98 (Eliga H. Gould & Peter S. Onuf eds., 2005) (“The idea that the English common law was born out of immemorial custom was deeply ingrained in the English consciousness, and the common law’s ability to endure across the ages was a source of great pride for Englishmen. Habitual usage was, to the English mind, the most perfect litmus test of a regulation. If a practice could hold up to years of use without rejection by the governed, it carried great legal authority among the English. Americans shared English pride in their common legal tradition, and they too emphasized the importance of custom, particularly in solidifying and giving strength to a constitution and law seemingly without beginning. The idea of an ancient, unwritten law was so much a part of Anglo-American culture that it was difficult, if not impossible, for many to imagine living without it. In his address to the incoming law students at the College of Pennsylvania in 1824, Philadelphia lawyer and law lecturer Peter DuPonceau called the common law ‘a metaphysical being’ grown out of feudal customs that had gradually ‘become incorporated and in a manner identified not only with the national jurisprudence, but, under the name of *Constitution*,’ with America’s government.”).

<sup>486</sup> E.g., PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 132 (rev. ed. 1998) (“From 1763 to 1775 American lawyers ransacked common law to find evidence against parliamentary impositions. The major obstacle they faced was that Parliament was not only a maker of statutes but the highest common-law court in the land. Undeterred, like every good

certain English customs,<sup>487</sup> with American constitutional law itself changing substantially over the ensuing centuries.<sup>488</sup> The Fourteenth Amendment, most notably, made the Eighth Amendment applicable against the states, and added the Equal Protection Clause to the Constitution—which itself must be understood to have transformed the Eighth Amendment’s meaning and calculus because of the equality principle it embodies.<sup>489</sup>

There is no reason to believe that the law will not continue to evolve in the decades and years to come, with the U.S. Supreme Court’s “evolving standards of decency” test actually compelling that result.<sup>490</sup> In fact, history makes clear that the law is constantly in motion, with archaic punishments such as ducking, the pillory, and the whipping post no longer with us.<sup>491</sup> The Eighth Amendment sets forth *general* prohibitions framed with *general* language, and each generation is bound to interpret, and to reinterpret, those prohibitions in their own time.<sup>492</sup> Indeed, the

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counselor in the service of a client, the American revolutionary lawyers sought to distinguish their case from earlier colonial claims rejected by Parliament and the crown. If common law was what English authorities said it was, a coil in the cord that bound the subordinate colonies to a dominant metropolitan center of power, the lawyers would fashion an American common law that was part of the longer cord but still gave Americans freedom to protest parliamentary impositions.”).

<sup>487</sup> *E.g.*, HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW 432 (1912) (“In several of the states, at an early day, statutes were enacted prohibiting the citation of decisions of the English courts except such as were rendered before the separation from the mother country. Thus, in Kentucky, it was enacted in 1807 that ‘reports and books containing adjudged cases in the kingdom of Great Britain, which decisions have taken place since the 4th July, 1776, shall not be read nor considered as authority in any of the courts of this commonwealth.’”); WILLIAM H. LOYD, THE EARLY COURTS OF PENNSYLVANIA 150 (1986) (“[A]n act was passed March 19, 1810, which provided that it should not be lawful to read or quote in any court of this commonwealth, any British precedent or adjudication which had been given or made subsequent to the fourth of July, 1776, except those relating to maritime law or the law of nations.”); PATRICIA EARNEST SUTER & RUSSELL & CORINNE EARNEST, THE HANGING OF SUSANNA COX: THE TRUE STORY OF PENNSYLVANIA’S MOST NOTORIOUS INFANTICIDE AND THE LEGEND THAT’S KEPT IT ALIVE 37 (2010) (“As an extreme reaction to the overthrow of British rule, Delaware, New Jersey, Pennsylvania, and Kentucky passed laws prohibiting the citation of English legal decisions and precedents.”).

<sup>488</sup> The law is constantly evolving, as it always will be. *E.g.*, LAURENCE CLAUS, LAW’S EVOLUTION AND HUMAN UNDERSTANDING (2012); *see also* JANE MALLOR, ET AL., BUSINESS LAW: THE ETHICAL, GLOBAL, AND E-COMMERCE ENVIRONMENT 60 (16th ed. 2016) (“American constitutional law has evolved rather than being static. Many of these changes result from the way one public decision maker—the nine-member U.S. Supreme Court—has interpreted the Constitution over time.”).

<sup>489</sup> Bessler, *The Inequality of America’s Death Penalty*, *supra* note 15, at 542.

<sup>490</sup> *See Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>491</sup> *See id.* The “evolving standards of decency” test adopted by the U.S. Supreme Court in 1958 ensures the evolution of Eighth Amendment jurisprudence. *See also* HOLLORAN, *supra* note 466.

<sup>492</sup> *See* DWORKIN, *supra* note 19, at 127.



concepts of “excessive” bail and fines and “cruel and unusual punishments” depend upon the views of those interpreting those concepts, as well as on the time and context of the particular issues that come before the courts.<sup>493</sup>

The law is a product of those who write and apply and interpret it. The Englishmen in the time of William and Mary decried the hefty bail amounts and fines imposed upon fellow noblemen and the draconian punishments that had been imposed upon the likes of men such as Titus Oates.<sup>494</sup> While members of England’s Parliament continued to decry the kind of cruel and excessive punishments inflicted by the Stuarts long after the passage of the English Bill of Rights,<sup>495</sup> America’s founders

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<sup>493</sup> See, e.g., *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018) (“We consider whether the Eighth Amendment’s prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does.”).

<sup>494</sup> See *supra* notes 217–26 and accompanying text.

<sup>495</sup> E.g., 19 THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME: FORMING A CONTINUATION OF THE WORK ENTITLED ‘THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803,’ at 602–03 (T.C. Hansard ed., 1811):

To look at the practices of modern times under this pretended libel law, one would almost think we had relapsed it to the odious times of the Stuarts. This was the very rock upon which they split. It was owing to these very practices, and that Martyr to obstinacy, Charles the 1st, lost his head, that James the 2d, was expelled the throne, and the family finally banished the land. This was effected by those infamous Star Chamber proceedings which the King’s Bench seems now willing to adopt, as well as those cruel sentences and punishments equally abhorrent to the nature of English law, and equally detestable, whether inflicted by one court or another. For what was it that was complained of in the Star Chamber, but *Ex Officio* prosecutions and cruel and unjustifiable punishments; and amongst all the cruelties exercised by that infamous court? The practice most complained against the modern practice of sending to distant gaols and close custody. “When,” says some one in Rushworth, speaking of the cruelties of the Star Chamber, “when nothing would satisfy the rancor of some churchmen but whipped backs, gagged mouths, and slit noses, and above all the transporting men to distant prisons, and keeping them in solitary confinement; when wives and children and friends were, by orders from that court, prevented from entering those prisons where their husbands and fathers lay in misery, then began the English nation to lay to heart the slavish condition they were brought unto. Should this court be longer suffered to exercise its tyrannical power?” and it is high time when the same system is reintroduced, when cruel and unusual punishments, and, above all, distant gaols and solitary confinement are again resorted to, that we should lay to heart, in like manner, the slavish condition likely to be brought upon ourselves, if no restraint should be put upon the powers and practices now claimed and exercised by the Attorney General against the liberty of the press. In order, therefore, to commence some cheque upon these arbitrary, cruel, and unconstitutional proceedings,

worried about acts of civil-law-style torture, just as those who lived in later times (e.g., in the first quarter of the nineteenth century) worried about the inhumanity of corporal punishments such as the pillory, whipping and ducking—barbaric practices used on offenders and slaves or that, in the case of ducking, was once considered to be the usual punishment to be inflicted upon “scolds.”<sup>496</sup> While anti-slavery crusaders in America’s slavery era discussed how the “cruel and unusual punishments” language might be perverted by slaveholders to institutionalize the whipping of slaves,<sup>497</sup> those supportive of slavery or other barbaric practices in antebellum America made use of the “cruel and unusual punishments” language but simultaneously saw the whipping of slaves as an acceptable practice.<sup>498</sup>

Although the Eighth Amendment’s protections have been part of America’s national conversation for multiple centuries, it was in the 1950s and 1960s that the modern Eighth Amendment really came into its own. It was in 1958 that the U.S. Supreme Court crafted its now famous “evolving standards of decency” test,<sup>499</sup> and it was in 1962 that the Court first applied the Eighth Amendment’s prohibition against cruel and unusual punishments against the states.<sup>500</sup> In 1968, in a particularly notable lower-court decision from the 1960s, Harry Blackmun, then a judge on the U.S. Court of Appeals for the Eighth Circuit, held in *Jackson v. Bishop*<sup>501</sup> that the prohibition against “cruel and unusual punishments” outlawed the use of the strap in Arkansas prisons.<sup>502</sup> After citing language from the U.S. Supreme Court’s opinion in *Trop v. Dulles* about “the dignity of man” grounding that Eighth Amendment prohibition,<sup>503</sup> Blackmun wrote for the Eighth Circuit:

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I shall give my decided support to the motion for inquiry brought forward by the noble lord.

<sup>496</sup> See *supra* note 311 and accompanying text.

<sup>497</sup> See, e.g., WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 165 (1853) (“[I]t is only an ‘unusual’ punishment that is forbidden! 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*.”).

<sup>498</sup> Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment*, 94 N.C. L. REV. 817, 837, 844–45 (2016).

<sup>499</sup> See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>500</sup> SUSAN LOW BLOCH & VICKI C. JACKSON, *FEDERALISM: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 113 n.147 (2013) (“The view that the states were not bound by the Eighth Amendment was not clearly repudiated until *Robinson v. California*, 370 U.S. 660, 667 (1962); see also *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (assuming, arguendo, that the prohibition against “cruel and unusual punishment” applied to the states).”).

<sup>501</sup> 404 F.2d 571 (8th Cir. 1968).

<sup>502</sup> TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 101 (2008).

<sup>503</sup> *Trop*, 356 U.S. at 100.

[W]e have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and humanity dignity and precepts of civilization which we profess to possess.<sup>504</sup>

The origins of the English Bill of Rights and its prohibitions against excessive bail, excessive fines, and cruel and unusual punishments are rooted in the abuses of the Stuart monarchs. But for the Eighth Amendment's very American proscriptions against excessive governmental actions and cruel and unusual punishments to maintain their currency, a thoughtful understanding of the Eighth Amendment's protections cannot be focused on the seventeenth or eighteenth centuries. Those centuries, which gave rise to the English Bill of Rights and then to revolutionary constitutions and the Eighth Amendment, are long past, and twenty-first century Americans and state and federal judges have new challenges and circumstances that they must confront. The Stuarts are not the only ones who were capable of abuses of power, and the Eighth Amendment must be interpreted and understood as nothing less than an Enlightenment-inspired bulwark against tyrannous and cruel and arbitrary and unnecessary governmental behavior—whether that behavior comes in the form of excessive bail determinations, excessive fines, or punishments that are found to be cruel and unusual by modern-day judges.

The Justices of the U.S. Supreme Court are now engaged in a fierce debate over the Eighth Amendment's proper interpretation. In its recent decision in *Bucklew v. Precythe*,<sup>505</sup> the Supreme Court rejected a death row inmate's as-applied challenge to the State of Missouri's lethal injection protocol.<sup>506</sup> In doing so, a bare majority of the Supreme Court purported to “examine the original and historical understanding of the Eighth Amendment.”<sup>507</sup> The majority opinion, written by Justice Neil Gorsuch, failed to even allude to the Court's long-standing “evolving standards of decency” test.<sup>508</sup>

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<sup>504</sup> *Jackson*, 404 F.2d at 579–80. The fact that *non-lethal* corporal punishments have been declared unconstitutional makes the continued use of *lethal* punishments a particular enigma. See, e.g., John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEG. STUD. 297 (2013); John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913 (2012).

<sup>505</sup> No. 17-8151 (U.S. Apr. 1, 2019).

<sup>506</sup> *Id.* at 4, 8, 14–15, 17–18. The death row inmate, Russell Bucklew, suffers from a rare medical condition known as cavernous hemangioma, which causes tumors to grow in the head, neck and throat. *Id.* at 5.

<sup>507</sup> *Id.* at 8. See also *id.* at 16 (“Mr. Bucklew's argument fails for another independent reason: It is inconsistent with the original and historical understanding of the Eighth Amendment on which *Baze* and *Glossip* rest.”).

<sup>508</sup> Garrett Epps, *Unusual Cruelty at the Supreme Court*, THE ATLANTIC (Apr. 4, 2019),

Instead, Justice Gorsuch's opinion concluded that the Constitution permits capital punishment,<sup>509</sup> that it is for "the people and their representatives" to decide whether to authorize it,<sup>510</sup> and that "the Eighth Amendment does not guarantee a prisoner a painless death."<sup>511</sup> "Under our Constitution," Gorsuch wrote, "the question of capital punishment belongs to the people and their representatives, not the courts, to resolve."<sup>512</sup>

In his opinion, Justice Gorsuch discussed English law and invoked the eighteenth-century writings of Sir William Blackstone.<sup>513</sup> That opinion, however, neglected to mention that Blackstone himself greatly admired the writings of Enlightenment thinker Cesare Beccaria,<sup>514</sup> a pioneering advocate of the death penalty's abolition.<sup>515</sup>

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<https://www.theatlantic.com/ideas/archive/2019/04/bucklew-v-precythe-supreme-court-turns-cruelty/586471> [<https://perma.cc/7XGU-LPTW>]. The "evolving standards of decency" test, laid down in *Trop v. Dulles*, 356 U.S. 86 (1958), has been used to strike down the death penalty for various classes of offenders. *E.g.*, STEPHANIE A. JIRARD, CRIMINAL LAW AND PROCEDURE: A COURTROOM APPROACH 379 (2019) (citing cases and noting, "Societal standards on death as a just punishment for certain crimes has informed the U.S. Supreme Court's evolving standards of decency standard"). Instead, Justice Gorsuch's majority opinion focused on the fact that "death was 'the standard penalty for all serious crimes' at the time of the founding." *Bucklew*, No. 17-8151, at 8.

<sup>509</sup> *Bucklew*, No. 17-8151, at 8 ("The Constitution allows capital punishment.").

<sup>510</sup> *Id.* at 9 ("The same Constitution that permits States to authorize capital punishment also allows them to outlaw it."); *id.* ("[T]he judiciary bears no license to end a debate reserved for the people and their representatives.").

<sup>511</sup> *Id.* at 12.

<sup>512</sup> *Id.* at 29.

<sup>513</sup> *Id.* at 9 ("At the time of the framing, English law still formally tolerated certain punishments even though they had largely fallen into disuse—punishments in which 'terror, pain, or disgrace [were] superadded' to the penalty of death. These included such '[d]isgusting' practices as dragging the prisoner to the place of execution, disemboweling, quartering, public dissection, and burning alive, all of which Blackstone observed 'savor[ed] of torture or cruelty.'" (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 370 (1769)). In his majority opinion, Justice Gorsuch wrote that the barbaric methods of execution Blackstone listed in his *Commentaries* "readily qualified as 'cruel and unusual,' as a reader at the time of the Eighth Amendment's adoption would have understood those words." *Bucklew*, No. 17-8151, at 9.

<sup>514</sup> Cesare Beccaria's *On Crimes and Punishments* argued for proportionality between crimes and punishments and for the death penalty's abolition. In his *Commentaries on the Laws of England*, William Blackstone called Beccaria "an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the certainty, than by the severity, of punishment." BESSLER, CRUEL AND UNUSUAL, *supra* note 7, at 48. *See also* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES SHOWING HOW BLACKSTONE, EMPLOYING EIGHTEENTH-CENTURY IDEAS OF SCIENCE, RELIGION, HISTORY, AESTHETICS, AND PHILOSOPHY, MADE OF THE LAW AT ONCE A CONSERVATIVE AND A MYSTERIOUS SCIENCE 150 (1996) ("The theory of criminal law suggested by Montesquieu, and developed by Beccaria, was wholeheartedly adopted by Blackstone. And, although Beccaria's *Essay on Crimes and Punishments* did not appear until 1764, Blackstone referred to it several times and made extensive use of the ideas in it.").

<sup>515</sup> Marcello Maestro, *A Pioneer for the Abolition of Capital Punishment: Cesare Beccaria*, 34 J. HIST. IDEAS 463 (1973).

Gorsuch, while referring to “the Constitution’s original understanding,”<sup>516</sup> wrote in *Bucklew* of the Supreme Court’s only recently imposed requirement for a death row inmate’s assertion of a legal challenge to a particular method of execution: “To determine whether the State is cruelly superadding pain, our precedents and history require asking whether the State had some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain.”<sup>517</sup> That requirement, which imposes on a death row inmate the obligation to prove an alternative method of execution by which an inmate can be executed,<sup>518</sup> was first mentioned in the Supreme Court’s plurality opinion in *Baze v. Rees*,<sup>519</sup> then adopted by five members of the Court in *Glossip v. Gross*.<sup>520</sup>

The *Bucklew* decision upheld Missouri’s use of lethal injection in spite of the death row inmate’s assertion—only begrudgingly made after the trial court insisted that the inmate identify an alternative method of execution by which he could be put to death—that execution by nitrogen gas would be less painful.<sup>521</sup> The Court, Justice

<sup>516</sup> *Bucklew*, No. 17-8151, at 10.

<sup>517</sup> *Id.* at 17. *See also id.* at 12 (“[W]hat unites the punishments the Eighth Amendment was understood to forbid, and distinguishes them from those it was understood to allow, is that the former were long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) “superadd[ition]” of “terror, pain, or disgrace.”) (citations omitted); *id.* at 13:

[W]here (as here) the question in dispute is whether the State’s chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.

<sup>518</sup> ALESSANDRA MIGNOLLI, THE EUROPEAN UNION AND SUSTAINABLE DEVELOPMENT: A STUDY ON UNILATERAL TRADE MEASURES 151 (2018) (noting that, in *Glossip v. Gross*, the Supreme Court upheld the constitutionality of the use of midazolam in an execution protocol and “controversially held” that the petitioners had to themselves “identify an alternative and less painful method of execution”).

<sup>519</sup> 553 U.S. 35, 52 (2008) (opinion of Chief Justice Roberts and Justices Alito and Kennedy concluding that a State’s refusal to alter its lethal injection protocol could violate the Eighth Amendment only if an inmate first identified a “feasible, readily implemented” alternative procedure that would “significantly reduce a substantial risk of severe pain”).

<sup>520</sup> While *Baze* upheld the constitutionality of Kentucky’s lethal injection protocol, *Glossip* upheld the constitutionality of Oklahoma’s lethal injection protocol. In *Baze*, the Supreme Court’s plurality opinion explained that the petitioners in the case failed to establish that Kentucky’s protocol created a “substantial risk of serious harm” or “an ‘objectively intolerable risk of harm’” to death row inmates compared to “known and available alternative[ ]” methods of execution. *Baze*, 553 U.S. at 61. In *Glossip*, the Court held that the district court did not err in finding that Oklahoma’s protocol presented no “substantial risk of severe pain” and that “the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain.” *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

<sup>521</sup> *Bucklew*, No. 17-8151, at 20:

Through much of this case and despite many opportunities, Mr. Bucklew



Gorsuch emphasized, faulting the inmate for failing to satisfy the requirements of the Court's newly created test (one imposed in 2015),<sup>522</sup> “has yet to hold that a State's method of execution qualifies as cruel and unusual.”<sup>523</sup> Beginning with its 2015 decision in *Glossip v. Gross*,<sup>524</sup> the Supreme Court has required that whenever a method of execution is challenged, the inmate must simultaneously propose another readily available alternative method of execution that would “significantly” reduce a “substantial risk of pain.”<sup>525</sup> Gorsuch, writing for the Court in *Bucklew* and discussing the sordid history of hanging,<sup>526</sup> noted that “traditionally accepted methods of execution” are not necessarily unconstitutional.<sup>527</sup> His opinion—as well as Justice Brett Kavanaugh's concurring opinion—referenced the possibility of the firing squad as an alternative method of execution.<sup>528</sup>

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refused to identify *any* alternative method of execution, choosing instead to stand on his argument that *Baze* and *Glossip*'s legal standard doesn't govern as-applied challenges like his (even after the Eighth Circuit rejected that argument). Only when the district court warned that his continued refusal to abide this Court's precedents would result in immediate dismissal did Mr. Bucklew finally point to nitrogen hypoxia.

<sup>522</sup> *Id.* at 21 (“[W]e conclude Mr. Bucklew has failed for two independent reasons to present a triable question on the viability of nitrogen hypoxia as an alternative to the State's lethal injection protocol.”); *id.* (“the inmate's proposal must be sufficiently detailed” to permit a finding that the alternative method of executions could be carried out “relatively easily and reasonably quickly”; “Mr. Bucklew's bare-bones proposal falls well short of that standard.”); *id.* at 23 (“Even if a prisoner can carry his burden of showing a readily available alternative, he must still show that it would significantly reduce a substantial risk of severe pain. A minor reduction in risk is insufficient; the difference must be clear and considerable.”).

<sup>523</sup> *Id.* at 12.

<sup>524</sup> 135 S. Ct. 2726 (2015).

<sup>525</sup> *Id.* at 2737.

<sup>526</sup> *Bucklew*, No. 17-8151, at 11 (“At the time of the [Eighth] Amendment's adoption, the predominant method of execution in this country was hanging. While hanging was considered more humane than some of the punishments of the Old World, it was no guarantee of a quick and painless death.”) (citation omitted). As Justice Gorsuch wrote in graphic terms of hanging as a method of execution:

The force of the drop could break the neck and sever the spinal cord, making death almost instantaneous. But that was hardly assured given the techniques that prevailed at the time. More often it seems the prisoner would die from loss of blood flow to the brain, which could produce unconsciousness usually within seconds, or suffocation, which could take several minutes.

*Id.*

<sup>527</sup> *Id.* at 13–14 (“Nor do *Baze* and *Glossip* suggest that traditionally accepted methods of executions—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as an arguably more humane method like lethal injection becomes available.”).

<sup>528</sup> *Id.* at 10 (“Consistent with the Constitution's original understanding, this Court in *Wilkerson v. Utah*, 99 U.S. 130 (1879), permitted an execution by firing squad while observing that the Eighth Amendment forbade the gruesome methods of execution described by Blackstone

The majority opinion in *Bucklew* drew sharply worded dissents. Justice Stephen Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, wrote that the evidence presented by Bucklew “established at this stage of the proceedings<sup>529</sup> that executing Bucklew by lethal injection risks subjecting him to constitutionally impermissible suffering.”<sup>530</sup> “Bucklew,” Justice Breyer emphasized of Bucklew’s rare medical condition, “cites evidence that executing him by lethal injection will cause the tumors that grow in his throat to rupture during his execution, causing him to sputter, choke, and suffocate on his own blood for up to several minutes before he dies.”<sup>531</sup> As Breyer then lamented of Bucklew and the majority opinion’s approach: “The majority holds that the State may execute him anyway. In my view, that holding violates the clear command of the Eighth Amendment.”<sup>532</sup> “I cannot reconcile the majority’s decision with a constitutional Amendment that forbids all ‘cruel and unusual punishments,’” Breyer observed.<sup>533</sup>

In a separate dissent, Justice Sonia Sotomayor was especially critical of the Supreme Court’s newly created requirement that death row inmates challenging a method of execution must identify an alternative method in order to make out a viable claim.<sup>534</sup> “As I have maintained ever since the Court started down this wayward path in *Glossip v. Gross*,” Justice Sotomayor wrote, “there is no sound basis in the Constitution for requiring condemned inmates to identify an available

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‘and all others in the same line of unnecessary cruelty.’”); *id.* at 11 (“It’s instructive, too, to contrast the modes of execution the Eighth Amendment was understood to forbid with those it was understood to permit. At the time of the Amendment’s adoption, the predominant method of execution in this country was hanging.”); *id.* at 2 (Kavanaugh, J., concurring) (“I do not here prejudge the question whether the firing squad, or any other alternative method of execution, would be a feasible and readily implemented alternative for every State.”).

<sup>529</sup> In *Bucklew*, the U.S. Supreme Court was reviewing a summary judgment ruling. *Id.* at 6–7, 14.

<sup>530</sup> *Id.* at 1 (Breyer, J., dissenting); *id.* at 2 (“Bucklew has easily established a genuine issue of material fact regarding whether an execution by lethal injection would subject him to impermissible suffering.”); *id.* at 5 (concluding that executing Bucklew in a manner that would cause him to “suffocate on his blood” would “exceed ‘the limits of civilized standards’”).

<sup>531</sup> *Id.* at 1.

<sup>532</sup> *Id.* at 1–2.

<sup>533</sup> *Id.* at 14–15. As Justice Breyer wrote in his dissent: “We have repeatedly held that the Eighth Amendment is not a static prohibition that proscribes the same things that it proscribed in the 18th century. Rather, it forbids punishments that would be considered cruel and unusual today.” *Id.* at 15. *See also id.* at 15–16 (citation omitted):

The Constitution prohibits gruesome punishments even though they may have been common at the time of the founding. Few would dispute, for example, the unconstitutionality of “a new law providing public lashing, or branding of the right hand, as punishment . . . [e]ven if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791.

<sup>534</sup> *Id.* at 1 (Sotomayor, J., dissenting).

means for their own executions.”<sup>535</sup> “If a death sentence or the manner in which it is carried out violates the Constitution,” Sotomayor stressed, “that stain can never come out.”<sup>536</sup> In fact, forcing a death row inmate to identify an alternative method of execution turns America’s adversarial system on its head.<sup>537</sup> Unlike the vigorous advocacy of John Adams on behalf of his clients at the Boston Massacre trial,<sup>538</sup> a modern-day lawyer—forced to comply with *Glossip*’s Kafkaesque requirements—must, in order to try to *save* the life of a death row client, make a detailed proposal for how that same client can be readily *executed*.<sup>539</sup>

The Supreme Court’s majority opinion in *Bucklew* was, not surprisingly, sharply criticized in the wake of its issuance.<sup>540</sup> The ruling, one commentator wrote for *Slate*, “signals the end of an Eighth Amendment jurisprudence governed by ‘civilized standards’—and the beginning of a new, brutal era in American capital punishment.”<sup>541</sup> Although it is too early to tell what will transpire in the months and years to come, what is at stake is nothing less than a decades-old legal standard<sup>542</sup> and the future

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<sup>535</sup> *Id.*

<sup>536</sup> *Id.* at 5.

<sup>537</sup> *Introduction*, in STEPHEN BREYER, *AGAINST THE DEATH PENALTY* 14 (John D. Bessler ed., 2016).

<sup>538</sup> As John Adams said in open court in representing his clients at the Boston Massacre trial in 1770:

“I am for the prisoners at the bar, and shall apologize for it only in the words of the Marquis Beccaria: “If by supporting the rights of mankind, and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or ignorance, equally fatal, his blessings and tears of transport shall be sufficient consolation to me for the contempt of all mankind.”

BESSLER, *supra* note 385, at 207.

<sup>539</sup> *E.g.*, FRANK R. BAUMGARTNER ET AL., *DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY* 213 (2018) (“Most defense attorneys are loath to suggest to the government how best to kill their clients; they only object to those methods that are proposed.”).

<sup>540</sup> Mark Joseph Stern, *The Supreme Court’s Conservatives Just Legalized Torture*, SLATE (Apr. 1, 2019, 1:14 PM), <https://slate.com/news-and-politics/2019/04/supreme-court-neil-gor-such-eighth-amendment-death-penalty-torture.html> [<https://perma.cc/4DMW-THMD>].

<sup>541</sup> *Id.*

<sup>542</sup> The “evolving standards of decency” test has been in use since 1958 and has been invoked countless times by American courts. Jonathan Simon, *The Legal Civilizing Process: Dignity and the Protection of Human Rights in Advanced Bureaucratic Democracies*, in *PUNISHING THE OTHER: THE SOCIAL PRODUCTION OF IMMORALITY REVISITED* 37 (Anna Eriksson ed., 2016) (“*Trop v. Dulles* (1958), decided four years into [Earl] Warren’s transformative Chief Justiceship, represented the most significant early effort to discern the implications of the new focus on human dignity for the state’s power to punish.”). *See also* Ruth Hargrove & Roberta Thyfault, *The Impact of, and Resistance to, the Use of Foreign Law on Juvenile Punishment in the United States*, in *TRANSNATIONAL LEGAL PROCESSES AND HUMAN RIGHTS* 41 (Kyriaki Topidi & Lauren Fielder eds., 2016):

Since 1958, when the Court decided *Trop v. Dulles*, the Court has held

development of Eighth Amendment jurisprudence.<sup>543</sup> When, for example, in *Atkins v. Virginia*,<sup>544</sup> the Supreme Court outlawed the execution of persons with intellectual disabilities, it applied the “evolving standards of decency” test.<sup>545</sup> In invoking that test, and thus rejecting an originalist view of the Eighth Amendment, the Court in *Atkins* explicitly ruled: “A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”<sup>546</sup>

In future Eighth Amendment cases, the U.S. Supreme Court would be wise to remember the historical context in which the U.S. Constitution’s Cruel and Unusual Punishments Clause was adopted. Whereas the Glorious Revolution led to the adoption of the English Bill of Rights, American revolutionaries were products of the Enlightenment and avid readers of Montesquieu, Beccaria, and other leading intellectuals of the age.<sup>547</sup> Whereas the Enlightenment—a period of history focused on progress, rationality, and advances in science and legal and penal thought—was decidedly *forward-looking*,<sup>548</sup> the interpretive theory of originalism looks *backward*,<sup>549</sup> harkening

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that a punishment is cruel and unusual if society’s “evolving standards of decency” say it is. The “evolving standards of decency” test sees the Eighth Amendment as “progressive,” recognizing that contemporary society may reject a punishment that was accepted when the Framers wrote the Bill of Rights.

<sup>543</sup> Stern, *supra* note 540 (speculating that the Supreme Court’s 5–4 decision in *Bucklew v. Precythe* did “much more than condemn” an inmate to “a harrowing demise”; “[i]t also quietly overrules, or at least erodes, more than 60 years of precedents, including several written by Justice Anthony Kennedy”).

<sup>544</sup> 536 U.S. 304 (2002).

<sup>545</sup> *Id.* at 321.

<sup>546</sup> *Id.* at 311.

<sup>547</sup> See generally BESSLER, *supra* note 49 (discussing the influence of Montesquieu and Beccaria on America’s founders); see also BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 46, at 75–271 (discussing the influence of Enlightenment thinkers on America’s founders).

<sup>548</sup> STEVEN PINKER, *ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM, AND PROGRESS* 8 (2019):

The Enlightenment is conventionally placed in the last two-thirds of the 18th century, though it flowed out of the Scientific Revolution and the Age of Reason in the 17th century and spilled into the heyday of classical liberalism of the first half of the 19th. Provoked by challenges to conventional wisdom from science and exploration, mindful of the bloodshed of recent wars of religion, and abetted by the easy movement of ideas and people, the thinkers of the Enlightenment sought a new understanding of the human condition.

<sup>549</sup> PATRICK J. CHARLES, *HISTORICISM, ORIGINALISM AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE* 1 (2014) (noting that “originalism invokes history . . . to define the contours of the Constitution” and that “[s]ome view originalism as the use of historical sources to discern the meaning or intentions of the Constitution” while “[o]thers perceive the task of originalism to be more complex” and “less about history and more about defining legal meaning at a particular point in time”); compare DAVID A. STRAUSS,

back to a time (i.e., the eighteenth century) when slavery and archaic and gruesome corporal punishments were still in use.<sup>550</sup> Unlike in the Enlightenment, when the central question posed was whether a punishment was necessary or absolutely necessary,<sup>551</sup> the *Bucklew* ruling would allow the use of punishments that are not only unnecessary, but cruel and unusual.<sup>552</sup>

The Supreme Court's decision in *Bucklew* not only threatens the development of modern Eighth Amendment jurisprudence, but it cuts against the prevailing trend worldwide against the death penalty's use<sup>553</sup> and toward a recognition of death sentences and executions as acts of physical and psychological torture.<sup>554</sup> Indeed, in essentially ruling out the notion of a future U.S. Supreme Court decision outlawing capital punishment,<sup>555</sup> the majority opinion in *Bucklew* took a far different approach than that taken by the Constitutional Court of South Africa in 1995,<sup>556</sup> the Connecticut Supreme Court in 2015,<sup>557</sup> and other judges who have examined the death penalty's characteristics and constitutionality.<sup>558</sup> The "evolving standards of decency" test invites the Supreme Court to periodically revisit the constitutionality of

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THE LIVING CONSTITUTION 17 (2010) ("Originalism is inconsistent with principles that are at the core of American constitutional law").

<sup>550</sup> See, e.g., MARTHA L. FINCH, *DISSENTING BODIES: CORPOREALITIES IN EARLY NEW ENGLAND* 125 (2010) ("Historians of early America are familiar with the corporal punishments, like whippings, colonial courts imposed on criminals"); see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 594 (2d ed. 1985):

Corporal punishment (whipping and flogging) survived in a few states—in Delaware for example—as a kind of abominable relic. Elsewhere, even in the South, its legitimacy was slowly sapped. Though whipping was still legal in South Carolina up to the Civil War, a "cloud of disapproval" made public whipping of whites a rare event. By 1900, except for convicts, whipping was almost extinct in the South—at least as a *legitimate* punishment; it was common, however, for prisoners, especially on the chain gang.

<sup>551</sup> See generally BESSLER, *supra* note 49 (tracing the history of Montesquieu's maxim—later publicized by Beccaria—that any punishment that goes beyond necessity is "tyrannical").

<sup>552</sup> See generally BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7; *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* (Michael L. Radelet ed., 1989).

<sup>553</sup> JOSEPH A. MELUSKY & KEITH A. PESTO, *THE DEATH PENALTY: A REFERENCE HANDBOOK* 266–68 (2017) (discussing U.N. resolutions calling for a moratorium on the death penalty).

<sup>554</sup> See, e.g., AUSTIN SARAT, *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY* (2014) (discussing and analyzing botched executions in the United States); Bessler, *Taking Psychological Torture Seriously*, *supra* note 481, at 1–97 (discussing the torturous and coercive nature of threats of death).

<sup>555</sup> *Bucklew v. Precythe* at 29–30, No. 17-8151 (U.S. Apr. 1, 2019).

<sup>556</sup> *State v. Makwanyane and Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC).

<sup>557</sup> *State v. Santiago*, 122 A.3d 1 (Conn. 2015) (outlawing Connecticut's death penalty).

<sup>558</sup> Barry, *supra* note 4, at 521 (gathering the opinions of judges who have advocated for the death penalty's abolition over the past half-century).



punishments, but *Bucklew*—on its face—seems intended to foreclose that, at least for capital punishment.<sup>559</sup>

Whereas South Africa's highest court invoked the concepts of cruelty and human dignity in declaring capital punishment unconstitutional,<sup>560</sup> and whereas Connecticut's highest court invoked Beccaria's memory and civilized standards in doing the same,<sup>561</sup> the U.S. Supreme Court—in *Bucklew*—narrowly focused on whether a death row inmate would suffer excruciating *physical* pain at the moment of his execution.<sup>562</sup> For the Eighth Amendment to be read in a principled manner, though, the punishment of death—a far more severe punishment than already abandoned or barred *non-lethal* corporal punishments—must be declared unconstitutional.<sup>563</sup> While the English Bill of Rights set the stage for the adoption of the U.S. Constitution's Eighth Amendment, the law is not static—and it never has been. And punishments once meted out with regularity in seventeenth-century England or eighteenth-century America are now known to bear the clear indicia—and the immutable characteristics—of torture.<sup>564</sup> Just as the English Bill of Rights, in 1689, barred punishments seen as

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<sup>559</sup> In his dissent in *Glossip*, Justice Breyer—joined by Justice Ginsburg—had specifically called for a “full briefing” on “whether the death penalty violates the Constitution.” *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

<sup>560</sup> LILIAN CHENWI, TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE 128 (2007):

The Constitutional Court of South Africa, in *S v Makwanyane*, had to decide whether the death penalty was cruel, inhuman and degrading within the meaning of section 11(2) of the Interim Constitution Act 200 of 1993. Ten of the 11 judges considered the death penalty as cruel, inhuman and degrading punishment.

<sup>561</sup> Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 388 (2017) (“[J]ust eight weeks after *Glossip*, the Connecticut Supreme Court handed down a sweeping decision in *State v. Santiago*, which ruled Connecticut’s 400-year-old death penalty cruel and unusual in violation of the state’s constitution.”).

<sup>562</sup> In ignoring the concept of *psychological* torture, the U.S. Supreme Court in *Bucklew* completely disregarded the modern definition of torture, which includes both physical or mental torture. DAVID LUBAN, TORTURE, POWER, AND LAW 153 (2014).

<sup>563</sup> E.g., John D. Bessler, *Beccaria in America: How the Italian Enlightenment Shaped American Law*, in AN DEN WURZELN DES MODERNEN STRAFRECHTS: DIE JURISTISCHE AUFKLÄRUNG CESARE BECCARIAS UND DIE STRAFGEWALT 119 (Lorenzo Picotti ed. 2017):

Ironically, *non-lethal* corporal punishments such as ear cropping, the pillory and whipping—the latter closely associated with slavery—have already, for decades, been abandoned in the U.S. penal system. Indeed, non-lethal bodily punishments have long been considered unconstitutional in U.S. courts. Back in 1968, Harry Blackmun—then a judge on the U.S. Court of Appeals for the Eighth Circuit—ruled that the infliction of lashes violated the Eighth Amendment prohibition on “cruel and unusual punishments.”

<sup>564</sup> Bessler, *Taking Psychological Torture Seriously*, *supra* note 481, at 1–97 (discussing torture and the torturous characteristics of the death penalty).

inconsistent with the standards of that day and age, the U.S. Supreme Court—which has the duty to interpret the Constitution<sup>565</sup>—must not shirk its obligation, or abdicate its duty, to declare *any* punishment unconstitutional that, in the twenty-first century, runs afoul of the “cruel and unusual punishments” prohibition.<sup>566</sup>

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<sup>565</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the Judicial Department to say what the law is.”).

<sup>566</sup> BESSLER, *CRUEL AND UNUSUAL*, *supra* note 7, at 312:

If the Justices find executions both “cruel” and “unusual,” and they should, that should be the end of the story—period. Any punishment that is “cruel and unusual” is unconstitutional, and the fact that some Southern prosecutors and members of the general public still vocally support or want to use that punishment does not make that punishment any less so.