THE ANTIDISCRIMINATION EIGHTH AMENDMENT

LAURENCE CLAUS*

INTRODUCTION

What is the Eighth Amendment really about? Members of the Supreme Court in two recent cases offered alternative visions of the Amendment's function.[1] According to Justice John Paul Stevens, "The Eighth Amendment succinctly prohibits '[e]xcessive'

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1. *See* Ewing v. California, 538 U.S. 11 (2003); Atkins v. Virginia, 536 U.S. 304 (2002).

sanctions."[2] The Amendment uses this term twice: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3] Dissenting from the Court's vindication of California's "three-strikes" law, Justice Stevens observed: "It 'would be anomalous indeed' to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment."[4] Justice Antonin Scalia, on the other hand, understands the Cruel and Unusual Punishments Clause of the Eighth Amendment to condemn "only certain *modes* of punishment."[5] In particular, the Amendment prohibits two categories of punishment: "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted,"[6] and "modes of punishment that are inconsistent with modern 'standards of decency,' as evinced by objective indicia, the most important of which is 'legislation enacted by the country's legislatures.'"[7] Consequently, Justice Scalia dissented from the Court's conclusion that imposing death sentences on mentally retarded offenders violates the Amendment.[8]

Both Justices miss the principle at the Eighth Amendment's core. Neither the Stevens vision of an "excessiveness" amendment, nor the Scalia vision of a "vicious methods" amendment, adequately fits the Amendment's history any better than it fits the Amendment's language. And that language invites an historical inquiry. It is the *text* of the Amendment that seems "anomalous indeed." If that text were meant simply to condemn *excessive* punishment, why does it not say so? The term "excessive" was, after all, on the tips of the drafters' tongues, for they used it in respect to bail and fines. Why was it not deployed more generally? On the other hand, if the Cruel and Unusual Punishments Clause were about vicious *methods* of punishment, why would the Amendment condemn excessiveness at all? Why, in particular, would excessiveness in fines warrant a special condemnation from which excessiveness in other acceptable methods

2. *Atkins*, 536 U.S. at 311.

3. U.S. CONST. amend. VIII.

4. *Ewing*, 538 U.S. at 33 (Stevens, J., dissenting) (quoting Solem v. Helm, 463 U.S. 277, 289 (1983)).

5. *Id.* at 31 (Scalia, J., concurring).

6. *Atkins*, 536 U.S at 339 (Scalia, J., dissenting) (quoting Ford. v. Wainwright, 477 U.S. 399, 405 (1986)).

7. *Id.* at 339–40 (Scalia, J., dissenting) (quoting Penry v. Lynaugh, 492 U.S. 302, 330–31 (1989)).

8. *Id.* at 337–54 (Scalia, J., dissenting).

of punishment was exempted?

History resolves the Eighth Amendment's linguistic anomaly by revealing that the Amendment was meant to address a problem distinct from either excessive punishment or vicious punishment. That problem was *discriminatory* punishment. The principle that lies behind the Eighth Amendment is nondiscrimination. The Eighth Amendment is a founding-era expression of equal protection. Its specific provision concerning punishments was a forerunner to the sweeping generality of the Fourteenth Amendment's Equal Protection Clause. The Court implicitly recognized as much in *Furman v. Georgia* when condemning broad judicial discretion to impose the death penalty.[9] In the words of Justice Douglas:

> The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.[10]

In an uncharacteristic dalliance with originalism, Douglas observed:

> There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.[11]

In adopting the 1689 Bill of Rights, the English Parliament sought to condemn punishments that were illegal because they were contrary to the common law. Punishments that departed from the common law, that is, punishments that departed from the historic custom of the community, could be described as "illegal" or as "*unusual*." In the England of 1689, those two terms were used interchangeably. But in adopting the Bill of Rights, the English Parliament sought to condemn only punishments that departed from the common law in the direction of greater severity. In other words, they sought to condemn

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9. Furman v. Georgia, 408 U.S. 238 (1972).

10. *Id.* at 256 (Douglas, J., concurring). Discriminatory application was considered relevant to varying degrees by the other members of the *Furman* majority. *See id.* at 291–96 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364–66 (Marshall, J., concurring); *see also* Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 116–17 (1991); Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359, 403–11 (2001).

11. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

punishments that were harsher than the common law allowed, and thus *cruel* and unusual.[12]

A century later, the American founders took this language of their English heritage and applied it as a constitutional limitation upon the validity of federal action. Through the Eighth Amendment and its state counterparts, they sought to condemn whatever the English prototype condemned. Those among them who had read Blackstone, and thus understood what the 1689 Bill of Rights condemned, would have known that the provision made the common law an objective referent for which punishments were unusual (illegal at common law) and cruel (harsher than the common law allowed).

"Unusual" was a synonym for "illegal" at common law because the common law doctrine of precedent insisted that judicial decisions could succeed in articulating law if and only if they served an underlying principle of moral—and therefore legal—equality among litigants. The principle that underlay the doctrine of precedent was nondiscrimination, that is, of treating like cases alike. A leading rationale for the common law method was avoidance of immoral discrimination. If a particular punishment was distinguishable from its predecessors for good reason, then it reflected an evolved understanding of the common law rather than a departure from the common law. But to impose on an offender a punishment different from that imposed on other offenders for no good reason—that is, either without reason or for a morally insufficient reason—was to depart from the common law and thus to act unusually and illegally.

To call a punishment "unusual" was to call it immorally discriminatory. To call a punishment "cruel and unusual" was to call it immorally discriminatory in the direction of greater severity. Understanding the Cruel and Unusual Punishments Clause as a prohibition of discrimination most faithfully translates the historic text into a modern context.[13]

Reading the Cruel and Unusual Punishments Clause with the rest of the Eighth Amendment confirms the propriety of a "no-discrimination" understanding. The common law of 1689 afforded courts broad discretion in determining amounts to set for bail (in cases where bail was appropriate before conviction) or to impose as fines (in cases where fines were appropriate as punishment). For bail to

12. *See infra* Part V.

13. *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (discussing the correct methodology for translating historical texts into a modern context).

deter a person charged from absconding before conviction and for a fine to deter a person convicted from re-offending, the amounts of each must be calibrated to the financial circumstances of the person. During the 1670s and 1680s, however, the Court of King's Bench repeatedly abused its discretion by setting bail and imposing fines of *more than the offender could pay*. In this way, the court effectively imposed indefinite prison sentences upon political opponents of the Stuart monarchs.[14] The Eighth Amendment's prohibition of excessive bail and excessive fines thus contemplated an objective referent for what counted as excessive. Where the circumstances of the case were such that bail or a fine was appropriate, the court's jurisdiction to offer bail or to impose a fine was not to be exercised through terms that operated as an indefinite prison sentence. Where a court exercises its bail or fine jurisdiction to set bail or to impose a fine that cannot be paid, its action is objectively excessive and that excessiveness invites an inference of immoral discrimination.

In the case of other punishments, the language of the Eighth Amendment in its original context also identified an ostensibly-objective criterion for condemnation. It did not simply condemn "excessive" punishments, for it was not meant to authorize a clash of subjective impressions. Instead, it condemned punishments unknown to the common law for the offense of conviction. The original language presupposed that the common law both defined offenses and provided standard sentences or standard ranges of sentences for conviction. Harsher sentences than the common law allowed were *cruel and unusual*. The sentences particularly on the drafters' minds did not involve intrinsically unacceptable *methods* of punishment, but were tailor-made *combinations* of punishments that were harsher than the common law allowed. The person-specific character of those punishments suggested that they were discriminatory for no morally sufficient reason. Applying this no-discrimination understanding of "cruel and unusual punishment" to the validity of legislation that prescribes punishments, and to the validity of judicial sentencing under statutory discretions, is akin to applying the Equal Protection Clause of the Fourteenth Amendment to those governmental acts.

Through the Eighth Amendment's guarantee of no discriminatory punishments, the American founders enshrined a hallowed phrase of their English heritage. They were not seeking to create some new and novel limitation on government power, a fact that helps to explain

14. *See infra* Part V.

why they recorded no concern with the provision's potential overlap with due process in the Fifth Amendment and about the prohibition of bills of attainder in the original Constitution. Applying the historic limitation in a new context did not change its essential character as a no-discrimination requirement. In *Furman*, members of the Court recognized this. But when the *Furman* understanding of the Eighth Amendment is compared with the understandings articulated in other Supreme Court opinions (including the recent *Atkins* and *Ewing* opinions), the Amendment seems to acquire a chameleon-like quality. In particular, the Amendment is treated by the Court as alternating between a condemnation of discrimination and a condemnation of judicially-assessed excessiveness per se. Can the Amendment plausibly have such a two-tone meaning? Can it have a three-tone meaning that also directly addresses *methods* of punishment?

In this article, I elaborate the no-discrimination vision of the Eighth Amendment, beginning with that vision's firm foundation in the history of the Amendment. I then explain the emergence of alternative visions, and why only the no-discrimination vision affords a coherent understanding of the Eighth Amendment.

I. COLONIAL RECEPTION

The language of the Eighth Amendment was first born into law as section 10 of a Bill of Rights enacted by the English Parliament in 1689. It read: "That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."[15] Those words made their first American appearance in the Virginia Declaration of Rights, penned in the vortex of the independence movement.[16] The historic language was added to Virginia's Declaration during committee deliberations upon George Mason's draft, but Mason claimed responsibility for the addition.[17] The last Virginia colonial convention adopted it unanimously on June 12, 1776.[18]

Why did a gathering whose raison d'être was to sever ties with Britain adopt the language of the oppressor? Were the American

15. English Declaration of Rights, 1 W. & M., sess. 2, c. 2 (1689) (Eng.), *in* 3 STATUTES AT LARGE 416, 417 (1770).

16. "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Virginia Declaration of Rights § 9 (1776), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 235 (1971).

17. *See* 1 THE PAPERS OF GEORGE MASON 286 (Robert A. Rutland ed., 1970).

18. 1 SCHWARTZ, *supra* note 16, at 231.

colonists so devoid of imagination that they could not come up with a homegrown formulation? Mason's writings suggest an answer. In a letter of June 6, 1766, the Virginia planter insisted that the colonists claimed "Nothing but the Liberty & Privileges of Englishmen."[19] Later, as independence loomed, the "rights of Englishmen" were identified with the rights of Nature, but that did not change their perceived detail. In the Fairfax County Resolves adopted on July 18, 1774, Mason wrote:

> That our Ancestors, when they left their native Land, and setled in America, brought with them (even if the same had not been confirmed by Charters) the Civil-Constitution and Form of Government of the Country they came from; and were by the Laws of Nature and Nations, entitled to all it's Privileges, Immunities and Advantages; which have descended to us their Posterity, and ought of Right to be as fully enjoyed, as if we had still continued within the Realm of England.[20]

Mason was but echoing a regular theme of colonial complaint. The second provision of the Declaration of Rights issued by the Stamp Act Congress on October 19, 1765, asserted: "That his majesty's liege subjects in these colonies are entitled to all the inherent rights and privileges of his natural born subjects within the kingdom of Great Britain."[21] The First Continental Congress elaborated that claim in its

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19. The letter states the following:

> We claim Nothing but the Liberty & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain: these Rights have not been forfeited by any Act of ours, we can not be deprived of them, without our Consent, but by Violence & Injustice; We have received them from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity... .
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> ... .
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> These are the sentiments of a Man ... who tho' not born within the Verge of the British Isle, is an Englishman in his Principles, a Zealous Asserter of the Act of Settlement ... who adores the Wisdom & Happiness of the British Constitution; and if He had his Election now to make, wou'd prefer it to any that does, or ever did exist. I am not singular in this my Political Creed; these are the general Principles of his Majesty's Subjects in America; they are the Principles of more than nine-tenths of the People who have been so basely misrepresented to you, and whom you can never grant too much; because you can hardly give them any thing, which will not redound to the Benefit of the Giver.

Letter from George Mason to the Committee of Merchants in London (June 6, 1766), *in* 1 THE PAPERS OF GEORGE MASON, *supra* note 17, at 65, 71–72.

20. Fairfax County Resolves (1774), *reprinted in* 1 THE PAPERS OF GEORGE MASON, *supra* note 17, at 201, 210; *see also* HELEN HILL, GEORGE MASON: CONSTITUTIONALIST 112–14 (1938) (citing Mason as author of the Resolves).

21. Stamp Act Congress Declaration of Rights (1765), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 270 (Richard L. Perry ed., rev. ed. 1978).

Declaration and Resolves on October 14, 1774.[22]

The Virginia Declaration of 1776 eschewed explicit reference to the colony's English legal heritage and invoked the nature of Man for its claim of inherent rights, as Jefferson's Declaration of Independence was soon to do. But that formulation served only to emphasize that the assembly was reciting rights already *possessed*, not mere aspirations for future reform. The English Bill of Rights of 1689 articulated rights of Englishmen. Whatever its words meant, they captured elements of the status for which the colonists had argued in their dispute with the British Government. By adopting the language, the colonists made clear that citizens under the new political order would enjoy the status that they had claimed all along.

Other newly-independent states followed Virginia's lead and adopted "bills of rights." Of that description, Hugh Grigsby observed:

> It is remarkable that the Virginia Declaration of Rights was always spoken of in debate, even by Mason, who drafted it, as the *Bill of Rights* — a name appropriate to the British Bill of Rights, which was ... enacted into a law; but altogether inapplicable to our Declaration, which had never been a bill, and was superior to all bills. It is true that the Declaration of Rights was read three times in the Convention which adopted it; but so was the Constitution,

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22. The Declaration and Resolves include the following:

> *Resolved*, N.C.D. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.
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> *Resolved*, N.C.D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.
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> ....
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> *Resolved*, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.
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> *Resolved*, 6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.
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> *Resolved*, N.C.D. 7. That these, his majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.
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> ....
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> *Resolved*, N.C.D. 10.... All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

Declaration and Resolves of the First Continental Congress (1774), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 21, at 286–88.

which nobody would call a bill.[23]

The colonists' choice to describe their declarations of rights as "bills of rights" pointed to a shared English source and signaled that where the American founders appropriated the language of the source, they sought to adopt the *meaning* of the source.

III. THE EIGHTH AMENDMENT

Among the delegates to the Virginia Convention of 1776 was James Madison, who subsequently said that he had been "initiated into the political career" by the proceedings.[24] "Being young," he did not hold the floor on that occasion,[25] but twelve years later he did. As a primary architect of the draft Constitution that emerged from Philadelphia in 1787, Madison substantially bore the burden of defending his handiwork in his home state. The Virginia Ratification Convention of 1788 endorsed the Constitution, but appended to its approval a list of proposed amendments, which were collectively described as "a declaration or bill of rights."[26] Thirteenth among the recommendations was the language of the Virginia Declaration: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[27]

Virginia was not alone in demanding that the first Congress to convene under the new Constitution should initiate the amendment process to add a bill of rights. Among the lists of amendments proposed by state ratification conventions, those of New York,[28] North Carolina,[29] Rhode Island,[30] and the Pennsylvania minority[31] each included a provision resembling section 10 of the English Bill of Rights. But when drafting amendments for presentation to the first

23. 1 HUGH BLAIR GRIGSBY, THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788, at 260 n.214 (1890).

24. 1 SCHWARTZ, *supra* note 16, at 231.

25. *Id.*

26. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 657 (Jonathan Elliot ed., 2d ed. 1836).

27. *Id.* at 658.

28. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 613 (Neil H. Cogan, ed., 1997) ("That excessive Bail ought not to be required; nor excessive Fines imposed; nor Cruel or unusual Punishments inflicted.").

29. *Id.* ("13th. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, [sic].").

30. *Id.* ("13th. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.").

31. *Id.* ("4. That excessive bail ought not to be required nor excessive fines imposed, nor cruel or unusual punishments inflicted."). *See also* 2 SCHWARTZ, *supra* note 16, at 665 (detailing the same amendment but with slightly different wording).

Congress in 1789, Madison had primary regard to Virginia's list of proposals. "[E]very specific guarantee in the Virginia-proposed Bill of Rights later found a place in the federal Bill of Rights, except for Article 19, allowing conscientious objectors to hire substitutes (and even that was included in the amendments which Madison proposed to Congress)."[32] His only modification of Virginia's amendment thirteen was to substitute an imperative "shall not" for the more hortatory "ought not to": "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[33]

Madison's draft amendment was considered by the House of Representatives on August 17, 1789, and only two members were recorded as speaking to its merits:

> Mr. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.
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> Mr. LIVERMORE. - 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.
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> The question was put on the clause, and it was agreed to by a considerable majority.[34]

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32. 2 SCHWARTZ, *supra* note 16, at 765.

33. *Id.* at 1008–09.

34. 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789). The Gazette version reads as follows:

> Mr. LIVERMORE said, the clause appears to express much humanity, as such, he liked it; but as it appeared to have no meaning, he did not like it: As to bail, the term is indefinite, and must be so from the nature of things; and so with respect to fines; and as to punishments, taking away life is sometimes necessary, but because it may be thought cruel, will you therefore never hang any body—the truth is, matters of this kind must be left to the discretion of those who have the administration of the laws.
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> This amendment was adopted.

THE COMPLETE BILL OF RIGHTS, *supra* note 28, at 618; *see also* HELEN E. VEIT ET AL.,

Samuel Livermore's objection implied that capital and corporal punishment, by the conventional methods of the era, were necessarily cruel. No one in the House spoke up to contradict that conclusion. They left his objection unanswered, and passed the amendment anyway. Yet the same House passed the Fifth Amendment, which provided, in relevant part:

> No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor shall any person be subject for the same offence to be twice put in jeopardy of *life* or *limb* ... nor be deprived of *life*, liberty, or property, without due process of law ... .[35]

A limb meant then what a limb does now. Though "life or liberty" might have been a more apposite formulation for the double jeopardy clause even in 1789, no one in that chamber could have been under an illusion that they were making infliction of severe hurt unconstitutional. The same House was soon to pass the first federal Crimes Act, under which

> forgery of public securities, or knowingly uttering forged public securities with intent to defraud, as well as treason, murder, piracy, mutiny, robbery, or rescue of a person convicted of a capital crime, was punishable by death ... whipping was part of the punishment of stealing or falsifying records, fraudulently acknowledging bail, larceny of goods, or receiving stolen goods; ... and those convicted of perjury or subornation of perjury, besides being fined and imprisoned, were to stand in the pillory for one hour, and rendered incapable of testifying in any court of the United States.[36]

Livermore's objection cried out for an answer. "What do we think we're banning here? We seem to be saying we won't be cruel to criminals, but of course we're going to be. So what's our point?" No answer was forthcoming. Why was Congress content to adopt the language of the Eighth Amendment without any attempt to elucidate what that language did? The most plausible answer is that "the cruel and unusual punishments clause was considered constitutional 'boilerplate.'"[37] For many in the founding generation, it had become the verbiage of civility, and they were intent on employing it for whatever it was worth. Like the Latin Mass, it was valued by those

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CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 179–80 (1991).

35. U.S. CONST. amend. V (emphasis added).

36. *Ex parte* Wilson, 114 U.S. 417, 427 (1885) (citing Act of April 30, 1790, ch. 9, 1 Stat. 112 (establishing punishments for various crimes against the United States)).

37. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:"* [sic] *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

for whom it was cultural heritage, whether understood or not.

When George Mason and his fellow Virginians sat down to draft a Declaration of Rights in 1776, they had just spent over a decade declaring at every opportunity that all they sought were the "rights of Englishmen." Now that the bonds with Britain were broken, they described the rights they claimed as natural rather than English, but the content of those rights did not change. The language of the English Bill of Rights meant for the Founders whatever it meant for the English.[38]

Some in the founding generation did, however, express concern that a powerful national government might resort to unacceptably vicious *methods* of punishment. One commentator has inferred from those expressions of concern that the founding generation misunderstood what the English Bill of Rights did in Britain, and expected the Eighth Amendment to prohibit particular methods of punishment outright.[39] The evidence of founding-era concern about methods of punishment is, however, too sparse to support that conclusion.

The first piece of such evidence is Abraham Holmes's complaint about the proposed Constitution on the floor of the Massachusetts ratification convention:

> Congress [shall] have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.[40]

One sentence earlier, Holmes had alleged that the proposed Congress would have power to initiate a counterpart to the Spanish Inquisition, doubtless an especially horrific prospect for the descendants of refugee Puritans to contemplate.

Massachusetts had a long history of humanitarian concern about methods of punishment. Section 46 of its colonial Body of Liberties, which provided that "[f]or bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel,"[41] pre-dated the English

38. Allusions to this conclusion appear in two of the Supreme Court's recent examinations of the Eighth Amendment. *See* Harmelin v. Michigan, 501 U.S. 957, 966–67 (1991); Solem v. Helm, 463 U.S. 277, 286 (1983).

39. Granucci, *supra* note 37, at 841–43, 860–65.

40. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 26, at 111.

41. 1 SCHWARTZ, *supra* note 16, at 77.

Bill of Rights by almost half a century. But Holmes' invective did not impress his fellow delegates, who ratified the Constitution without including *any* "punishments" provision among their state's proposed amendments.[42] Thus his words do not evidence a general appreciation, even in Massachusetts, of a need to limit methods of punishment available to the proposed federal government. They certainly do not support a conclusion that the Eighth Amendment was understood to meet such a need.

A second reference to vicious methods of punishment appears in a colloquy involving Patrick Henry and George Mason during debate at the Virginia ratification convention. After reciting the "cruel and unusual punishments" provision of the Virginia Declaration, Henry asked rhetorically: "What has distinguished our ancestors? — That they would not admit of tortures, or cruel and barbarous punishment."[43] George Nicholas contended that the declaration of rights had not succeeded in preventing torture,[44] to which George Mason replied: "Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition."[45] Nicholas then "acknowledged the bill of rights to contain that prohibition ... but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity."[46]

Although this dialogue was facially focused on vicious methods of punishment, Henry and Mason did not deny the clause's confinement to prohibiting punishments that were *both* cruel and unusual. Torture sessions are inherently non-standard because they are designed to elicit individualized results—a confession, a recantation, or some other information, which may be swiftly forthcoming from some persons and not from others. To the extent that torture sessions form parts of sentences, they are an easy case for applying the Eighth Amendment prohibition, with conjunction intact. "Barbarity" does, however, hint at methods of punishment that belonged to more primitive times.

Outside the convention, Mason expressed concern that the proposed constitution would allow Congress to "inflict unusual and

42. *See* 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 26, at 176–78.

43. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 26, at 447.

44. *Id.* at 451.

45. *Id.* at 452.

46. *Id.*

severe punishments."[47] James Iredell, writing under the nom de plume "Marcus," replied: "The expressions 'unusual and severe' or 'cruel and unusual' surely would have been too vague to have been of any consequence, since they admit of no clear and precise signification."[48]

Available records of ratification-period debate thus afford little evidence of what people in the founding generation expected the Cruel and Unusual Punishments Clause to do.[49] None of the recorded speeches address how the Cruel and Unusual Punishments Clause operated *in England*, namely as a prohibition of discriminatory punishment. One of Iredell's reasons for thinking the Amendment unnecessary presupposed that discriminatory punishment was not possible: "Let us also remember, that 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... ."[50] William Randolph echoed the same point:

> 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.[51]

The Eighth Amendment was adopted at the dawn of a period of substantial reform in the common law world directed toward eliminating vicious methods of punishment.[52] The phrase "cruel and unusual punishment" was linguistically plausible as a condemnation of vicious methods of punishment that civilized people were disinclined to use, and which had thus fallen into disuse. The evidence for this understanding in the founding generation is, however, sparse. And alongside it we have the authority of Blackstone for a no-discrimination reading of the phrase.[53] Given Blackstone's influence among late-eighteenth-century Americans as *the* authoritative source concerning their English legal heritage, a no-discrimination vision of the Eighth Amendment is the understanding

47. 1 SCHWARTZ, *supra* note 16, at 446.

48. *Id.* at 453.

49. The famous antifederalist who wrote as "Brutus" extolled the clause at necessary, but did not discuss what he thought it meant. *See id.* at 508.

50. *Id.* at 453.

51. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 26, at 468.

52. *See infra* Part IX.

53. *See infra* Part VI.

most likely to have been prevalent in the founding era.

IV. ADOPTION IN THE STATES

The analytic void in which the Eighth Amendment was passed mirrored the adoption of its counterparts in the states. In the wake of the Virginia Declaration, Delaware,[54] Maryland,[55] Massachusetts,[56] New Hampshire,[57] and North Carolina[58] all adopted provisions that tracked Virginia's, but prohibited "cruel *or* unusual" punishments. Pennsylvania and South Carolina banned "cruel punishments" simpliciter.[59] New York prohibited "cruel *and* unusual" punishments,[60] but later proposed an amendment to the federal Constitution that would have prohibited "cruel *or* unusual" ones,[61] while the record of New York's ratification convention committee's assent to that proposal reads: "8—Bail—or unusual excessive punisht.—agreed."[62] North Carolina, conversely, proposed a ban on "cruel *and* unusual" punishments for the federal Bill of Rights,[63] despite the disjunctive form of its own.[64] The Confederation Congress also used the disjunctive form in its Northwest Territory Ordinance of 1787.[65] The significance of these syntactic differences appears to have been universally ignored. Had legislators in the states that banned cruel punishments outright possessed a coherent vision of the difference that made, and a consequent preference for the disjunctive form, they would surely have resisted ratifying the Eighth Amendment. We have no record of debates in which they were placated with assurances that the two formulae amounted to the same thing, and with explanations of what that thing was. Though one state court recently thought otherwise,[66] it seems that these ostensibly

54. *See* 1 SCHWARTZ, *supra* note 16, at 278.

55. *See id.* at 282.

56. *See id.* at 343.

57. *See id.* at 379.

58. *See id.* at 287.

59. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 28, at 616. Pennsylvania's first constitution omitted the Punishments Clause altogether. *See* 1 SCHWARTZ, *supra* note 17, at 272.

60. THE COMPLETE BILL OF RIGHTS, *supra* note 28, at 615.

61. *Id.* at 613.

62. 2 SCHWARTZ, *supra* note 16, at 897.

63. THE COMPLETE BILL OF RIGHTS, *supra* note 28, at 613; 2 SCHWARTZ, *supra* note 17, at 968.

64. THE COMPLETE BILL OF RIGHTS, *supra* note 28, at 615.

65. *See* 1 SCHWARTZ, *supra* note 16, at 400; THE COMPLETE BILL OF RIGHTS, *supra* note 28, at 617.

66. *See* People v. Bullock, 485 N.W. 2d 866, 872–73 (Mich. 1992); Recent Case,

significant departures from the language of the English Bill of Rights were not prompted by a clear conception of different meaning.

V. IMPLICATIONS FOR INTERPRETATION

The founding generation's failure to have more public conversations about what the Eighth Amendment meant suggests that many of its members were uncritically claiming a liberty of their heritage, and expected it to mean what it had always meant. Yet courts in the early republic and since failed to implement a holistic vision of the Amendment that attends to the history of the constitutional language.[67]

The creators of a new political order had appropriated language that had an established legal meaning in the land from which they had come. When interpreting that language, should not a rebuttable presumption be applied that legal phraseology was chosen for its established legal meaning? The founding generation seem to have had what Michael Moore calls *spare* semantic intentions with respect to the whole provision.[68] But the spareness of their intentions with respect to that language derived from knowledge that the words had a *legal* essence, which they and later generations could simply research. The founders might well have believed that a general prohibition of extreme methods of punishment would invite later generations to come up with their best moral theories about acceptable and unacceptable infliction of hurt. They might likewise have expected that a general requirement that the punishment fit the crime would invite later generations to formulate their best moral theories of proportionality. And finally, they might have expected that a general requirement that punishment not be discriminatory would invite later generations to formulate their best moral theories of human equality and of improper bases for drawing legal distinctions among people. But if so, which of these three invitations did the founding generation succeed in issuing through the Eighth Amendment? For the answer to that question, the founders would have pointed their thumbs over their shoulders, to the English legal heritage from which the Clause had

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Michigan Supreme Court Casts Doubt on Its Commitment to Adhere to Federal Interpretations of Parallel Constitutional Provisions, 106 HARV. L. REV. 1230, 1231 (1993).

67. *See infra* Part IX.

68. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 340 (1985); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989); Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087 (2001).

come.

VI. WHAT THE ENGLISH BILL OF RIGHTS DID

Seventeenth-century England was not an ideal place to be a Roman Catholic. King James II was, and did little during his short reign (1685-88) to endear himself to the predominantly Protestant population. After he was ousted in favor of his daughter Mary and her husband, Prince William of Orange, Parliament assembled and presented a Declaration to the monarchs-designate. The Declaration of Rights began by reciting seriatim what had been wrong with James's rule, and then set forth a list of rights that corresponded to James's wrongs and that the new monarchs were expected to uphold as the basis on which the Crown was being proffered to them.[69]

The committee appointed to prepare the English Declaration presented a draft to the House of Commons on February 2, 1689. Clause 19 read: "The requiring excessive Bail of Persons committed in criminal Cases and imposing excessive Fines, and illegal Punishments, to be prevented."[70] The final version, which was approved by the Parliament on February 12, 1689,[71] read to William and Mary on February 13,[72] and subsequently enacted,[73] included among the litany of James's wrongs:

> 10. And 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.
>
> 11. And excessive Fines have been imposed; and illegal and cruel punishments inflicted.
>
> . . . .
>
> All which are utterly and directly contrary to the known Laws and Statutes, and Freedom of this Realm.[74]

Correspondingly, the assembled legislators declared, "for the vindicating and asserting [of] their ancient Rights and Liberties," "10.

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69. English Declaration of Rights, 1 W. & M., sess. 2, c. 2 (1689) (Eng.), *in* 3 STATUTES AT LARGE, *supra* note 15, at 416.

70. 10 H.C. JOUR. 17 (1689).

71. *See id.* at 28–29.

72. *See id.* at 29.

73. *See* English Declaration of Rights, *in* 3 STATUTES AT LARGE, *supra* note 15, at 417. Earlier printings used archaic spelling and contained some variations in format. For example, the original Declaration of Rights did not number individual propositions, either of wrongs or of rights, *see* 10 H.C. JOUR. 28–29 (1689), but later printings did.

74. English Declaration of Rights, *in* 3 STATUTES AT LARGE, *supra* note 15, at 417.

That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."[75]

"Unusual" in the right corresponded to "illegal" in the wrong, and the committee's first draft revealed that their core concern was illegality, that is, violation of the common law or of existing statutes. The bill took a declaratory, not a prescriptive, tone. What James had done was wrong because it violated pre-existing rights of Englishmen, which the bill merely articulated. "Each of them—excessive bail, excessive fines, and cruel and unusual punishments—was declared to be a violation of known law, but at the same time the use of the verb 'ought' implied ambivalence about whether these procedures did violate known law."[76] The tentativeness of the "ought" suggested that the common law was understood to be the source of *these* asserted rights—had existing statutes clearly established them, greater certitude would have been appropriate.[77]

In the context of common law punishment for common law crimes, to punish illegally was to punish differently for no morally sufficient reason. The word *unusual* "was appropriate to convey the idea that the punishments were 'uncommon' and 'exceptional,' outside what the law permitted."[78] To punish *cruelly* and unusually was to single out an offender on a morally insufficient basis for *more* punishment than was customarily imposed. *That* was the kind of punishment that the English Parliament sought to condemn when it enacted the Declaration of Rights—a law known ever after as the Bill of Rights of 1689. In the same year, the Parliament directly considered some notorious sentences that had been imposed on Protestant clergymen by King James's courts, and the House of Commons explicitly declared that the Bill of Rights condemned that very kind of sentence. In so doing, the legislators provided some very concrete referents as to the reach of the Cruel and Unusual Punishments Clause.[79]

Titus Oates had been convicted of perjury for making false accusations of treason against several Roman Catholics, leading to their conviction and execution during the reign of a previous

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75. *Id.*

76. LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 87 (1981).

77. Statutes were an exceptional source of legal principle in 1689. The first two volumes of Statutes at Large (published in 1786) include all statutes enacted from the Magna Carta to the end of Elizabeth I's reign. By the nineteenth century, however, volumes of comparable size each typically covered a two-year period.

78. SCHWOERER, *supra* note 76, at 92.

79. *See, e.g., id.* at 93–94 (citing several punishments issued under the authority of King James); 10 H.C. JOUR. 193 (1689) (same).

monarch. In the Court of King's Bench, Lord Chief Justice Jeffreys complained:

> [A] proportionable punishment of that crime can scarce by our law, as it now stands, be inflicted upon him... . [B]ut by the unanimous opinion of all the judges of England, whom we purposely consulted with upon this occasion, it is conceived, that by the law, crimes of this nature are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or member.[80]

Mr. Justice Withins then pronounced a composite sentence that included among its elements a large fine, life imprisonment, and divestiture of clerical status. His Lordship went on to order that the following week be an unforgettable one for ex-Reverend Oates. On Monday he was to stand in the pillory at Westminster-hall gate for an hour "with a paper over your head (which you must first walk with round about to all the Courts in Westminster-hall) declaring your crime." On Tuesday, he was to stand in the pillory at the Royal Exchange for an hour, sporting the same sign. On Wednesday he was to be "whipped from Aldgate to Newgate." Thursday was a recovery day. On Friday he was to be "whipped from Newgate to Tyburn, by the hands of the common hangman." And there was more. Mr. Justice Withins concluded: "[A]s 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." Every April 24, August 9, August 10, August 11, and September 2 (dates of significance in his perjured testimony), Titus Oates was to be a fixture on the London pillory circuit.[81]

Samuel Johnson had been convicted on two counts of a misdemeanor called seditious libel. Mr. Justice Withins imposed a prohibitively large fine, and required that Johnson be imprisoned until he paid it. Three pilloryings were scheduled for separate London locations, to be topped off with a whipping "by the common hangman from Newgate to Tyburn." The court added that "he should be degraded from the order of priesthood," and selected three tame bishops to do the job.[82]

Johnson had been in trouble before. Howell's State Trials records of another conviction:

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80. Trial of Titus Oates, 10 Howell's State Trials 1079, 1314 (K.B. 1685).

81. *Id.* at 1316–17.

82. *See* The Proceedings against Mr. Samuel Johnson, 11 Howell's State Trials 1339, 1350 (K.B. 1686); 10 H.C. JOUR. 193 (1689) (report of House committee reviewing sentence).

> Mr. Johnson, 1683, was tried on an Information, in the King's Bench, for writing "Julian the Apostate," and fined 500 marks, and committed prisoner to the King's Bench till he should pay it; which they knew was the same with perpetual imprisonment, since he was not able to pay that sum. Thus he was condemned and committed, to the great joy of the Papists; when in him they saw the laws of England condemned by the judges, who studied more to oblige the court than to do their duty.[83]

A similar fate had befallen other political enemies of the Stuart kings. "In 1684 Sir Samuel Barnardiston was fined £10,000 for writing letters alleged to be seditious; the sum was so huge that he languished in prison and his estate was ruined."[84] Both fines and bail were susceptible of such discriminatory use to effect indefinite imprisonment, and the evil of that use was a primary consideration underlying the Bill of Rights' condemnation of excessive bail and fines. In relation to bail, the drafters recited their concern explicitly: "[E]xcessive Bail hath been required of Persons committed in Criminal Cases, to elude the Benefit of the Laws made for the Liberty of the Subjects."[85] A decade earlier, Parliament had enacted the Habeas Corpus Act, which "set out procedures to prevent abuses in the use of the writ and prohibit detention of the accused in cases which by law permitted bail."[86] The Act did not, however, regulate the quantum of bail, and "judges evaded its purpose by setting bail so high that the prisoner was unable to raise the sum, in effect, denying him the right to bail."[87]

In 1680, a committee of the House of Commons condemned the King's courts for an obvious pattern of setting excessive bail and imposing excessive fines.[88] That pattern evidenced discrimination against those perceived to be political and religious opponents of the Stuart monarchy. The committee "resolved that in imposing fines the judges had acted 'arbitrarily, illegally, and partially,' and in favor of the Papists."[89] Seven members of that committee were later to serve

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83. *Johnson*, 11 Howell's State Trials at 1350.

84. SCHWOERER, *supra* note 76, at 91; *see also* Trial of Sir Samuel Barnardiston, 9 Howell's State Trials 1333, 1371–72 (K.B. 1684).

85. English Declaration of Rights, 1 W. & M., sess. 2, c. 2 (1689) (Eng.), *in* 3 STATUTES AT LARGE, *supra* note 15, at 417.

86. SCHWOERER, *supra* note 76, at 90.

87. *Id.*

88. 9 H.C. JOUR. 661 (1680).

89. SCHWOERER, *supra* note 76, at 91 (quoting 9 H.C. JOUR. 692 (1680)). The committee's report elaborated:

> [U]pon Information, That a very great Latitude had been taken of late by the Judges, in imposing Fines on the Persons found guilty before them; [the

on the committees that drafted the Bill of Rights.[90] One of these complained during parliamentary debate in 1680 that "[m]en have been fined, not according to their Crimes, but their Principles: Sometimes because they have been Protestants."[91]

After the 1688 Revolution, both Titus Oates and Samuel Johnson petitioned Parliament for relief from their sentences. On June 11, 1689, the House of Commons resolved that the judgments against Oates and Johnson were "cruel and illegal."[92] The House appointed a committee to prepare a bill to reverse Johnson's judgment and investigate his defrocking,[93] and the committee subsequently concluded—which the House agreed—was "null and illegal."[94] Further, on July 2, the House passed a bill to reverse the judgment against Oates.[95] In debate, Sir Robert Howard said:

> committee] caused a Transcript of all the Fines imposed by the King's Bench since *Easter* Term, in the Twenty-eighth of his Majesty's Reign, to be brought before them ... By Perusal of which, it appeared to this Committee, That the Quality of the Offence, and the Ability of the Person found guilty, have not been the Measures that have determined the Quantity of many of these Fines ... .

9 H.C. JOUR. 689 (1680). The committee gave three examples of large fines imposed for political speech. In each case, the fine was more than the offender could pay. Of Joseph Browne, the committee observed: "[H]e being not able to pay, living only upon his Practice, he lay in Prison for Three Years, till His Majesty graciously pardoned him." *Id.* John Harrington was likewise subjected to a fine that "he was in no capacity of ever paying," and Benjamin Harris "remains yet in Prison, unable to pay the said Fine." *Id.* The committee then recounted a series of lenient sentences that other persons had received for serious offenses, and concluded "[t]hat it is the Opinion of this Committee, That the Court of King's Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty's Protestant Subjects." *Id.* at 690.

Next, the committee addressed abuse by the court of its power to determine bail, recited a series of refusals to grant sufficient bail or any bail at all, and concluded "[t]hat it is the Opinion of this Committee, That the refusing sufficient Bail in these Cases, wherein the Persons committed were Bailable by Law, was illegal, and a high Breach of the Liberty of the Subject." *Id.* at 690. The House of Commons declared its agreement with the Committee's conclusions "*Nemine contradicente*." *Id.* at 692.

90. *See* SCHWOERER, *supra* note 76, at 90 (citing 9 H.C. JOUR. 661 (1680)).

91. 8 DEBATES OF THE HOUSE OF COMMONS 228 (Anchitell Grey ed., 1763) (remarks of Foley). The bill under debate sought to curtail judicial discretion by capping fines at £100 unless all judges of the Court of King's Bench agreed to a higher amount. It also provided for jury review of any such higher amount "to enquire what the Estate is of the Person fined." *Id.* at 227, 228 (remarks of Maynard). As another participant in the debate noted: "The scope of this Bill is, that a man shall not be fined, by the Judges, more than he is worth." *Id.* at 229 (remarks of Powle). After observing that fines had been deployed to discriminate based on political and religious opinion, Foley continued: "If you can help excessive Fines any other way than by this Bill, I am content." *Id. at* 228 (remarks of Foley). The bill was not enacted. *Id.* at 229.

92. 10 H.C. JOUR. 177 (1689); The Proceedings against Mr. Samuel Johnson, 11 Howell's State Trials 1339, 1351 (K.B. 1686).

93. *See* 10 H.C. JOUR. 177 (1689).

94. 10 H.C. JOUR. 194 (1689); *Johnson*, 11 Howell's State Trials at 1353–54.

95. Trial of Titus Oates, 10 Howell's State Trials 1079, 1329 (K.B. 1685); 10 H.C. JOUR. 203 (1689).

> [W]hen Judgments of Law came to be given on the Person, not the Cause considered, there grew the rise of a Popish Successor, the violation of the choice of Sheriffs, Corruption of Judges, and their extraordinary Censures, which produced this Judgment on *Oates* and *Johnson*, one of the greatest Persons of the Nation ... . Oates is the least of my thoughts, but to have Oates's Judgment confirmed, and we all reproached for it, that sticks with me.[96]

And Sir William Williams observed:

> There may be a Precedent for whipping, but for all these parts in one Judgment, let any man give us a Precedent to square with that Judgment. It makes the Judges arbitrary, and thereafter the Judges may be most injurious in punishing, this Judgment having had this Sanction in the House of Peers.[97]

As Howard's words suggested, Titus Oates was not widely well-regarded, and the House of Lords had already decided, in its judicial capacity, not to reverse his convictions. [98] Rather, the Lords decided to ask the King and Queen to pardon him.[99] A minority of Lords who favored reversal issued a written dissent in which they made six points. First, the Court of King's Bench had exceeded its jurisdiction in purporting to defrock Oates. His clerical status was "a matter wholly out of their power, belonging to the ecclesiastical courts only."[100] Second, the judgments were "barbarous, inhuman and unchristian," and there was "no precedent to warrant the punishments of whipping and imprisonment for life, for the crime of perjury." Third, most of the witnesses whose testimony convicted him had also testified at the trials where he had allegedly perjured himself, and where he had been believed and they had not (perhaps suggesting that the politics of the times had something to do with who was believed). Fourth, failure to reverse would encourage and allow similar "cruel, barbarous, and illegal judgments hereafter." Fifth, a phalanx of distinguished jurists had unanimously advised the House that "the said judgments were contrary to law and ancient practice, and

96. 9 DEBATES OF THE HOUSE OF COMMONS, *supra* note 91, at 288–89.

97. 9 DEBATES OF THE HOUSE OF COMMONS, *supra* note 91, at 291. Williams proposed that the Commons pass a *separate* bill with respect to Johnson, to which he thought the Lords would consent. *Id.* at 293. The Commons resolved "that Bills be brought in to reverse the Judgments against Mr. *Oates* and Mr. *Johnson*, as cruel and illegal." *Id.* at 294. Williams' assessment of the Lords' disposition proved accurate. "Mr. *Samuel Johnson's* Judgment was this day [June 24, 1689] reversed, and he was recommended to the King for Preferment." *Id.* at 361.

98. Oates had "Writs of Error returned before the Lords in Parliament." 10 H.C. JOUR. 176 (1689).

99. *Oates*, 10 Howell's State Trials at 1328; 10 H.C. JOUR. 176 (1689).

100. *Oates*, 10 Howell's State Trials at 1325; 10 H.C. JOUR. 176 (1689).

therefore erroneous, and ought to be reversed." And sixth, the judgments were "contrary to the declaration on the twelfth of February last ... whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."[101]

Representatives of the two Houses conferred,[102] but the Lords' majority held the line against reversal, and Oates had to settle for a pardon.[103] The Commons' report of the conference revealingly includes the following passage:

> [T]he Commons had hoped, That, after the Declaration [of Rights] presented to their Majesties upon their accepting the Crown (wherein their Lordships had joined with the Commons in complaining of the cruel and illegal Punishments of the last Reign; and in asserting it to be the ancient Right of the People of *England* that they should not be subjected to cruel and unusual Punishments; and that no Judgments to the Prejudice of the People in that kind ought in any wise to be drawn into Consequence, or Example); and after this Declaration had been so lately renewed in that part of the Bill of Rights which the Lords have agreed to; they should not have seen Judgments of this Nature affirmed, and been put under a Necessity of sending up a Bill for reversing them; since those Declarations will not only be useless, but of pernicious Consequence to the People, if, so soon after, such judgments as these stand affirmed, and be not taken to be cruel and illegal within the Meaning of those Declarations.
>
> *That the Commons had a particular Regard to these Judgments, amongst others, when that Declaration was first made*; and must insist upon it, That they are erroneous, cruel, illegal, and of ill Example to future Ages; which is the Character fixed upon them by the Bill sent up to the Lords.[104]

The manner in which the two Houses of Parliament handled the Oates and Johnson cases reveals an overarching concern about immorally discriminatory punishments that were harsher than the law allowed. It was the dual character of the Oates and Johnson punishments as *cruel and illegal* that caused the Parliament to act. The punishments were illegal, unusual and void because they departed from precedent for no morally—and therefore no legally—

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101. *Oates*, 10 Howell's State Trials at 1325; 10 H.C. JOUR. 177 (1689).

102. *See* 10 H.C. JOUR. 246–47 (1689).

103. *See Oates*, 10 Howell's State Trials at 1329–30.

104. 10 H.C. JOUR. 247 (1689) (second paragraph emphasis added); *see also id.* at 193–94 (report from the committee that reviewed Johnson's defrocking); SCHWOERER, *supra* note 76, at 273.

sufficient reason. The unusualness of the judgments was cited interchangeably with their illegality in Parliament's deliberations on the judgments and in the Bill of Rights. Titus Oates's punishment was unusual not because it successfully articulated a changed understanding of the common law of perjury, but because it was a *departure* from the common law of perjury. It was unusual because other perjurers were not subjected to it.[105] When a legal system is built on custom, to impose a novel sentence is to impose an illegal sentence.[106] Further, the punishments were "cruel, barbaric, inhuman, and unchristian" because they departed from precedent in the direction of greater severity.[107]

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105. The Commons managers contended "[t]hat Violation of Law, Partiality, and Corruption, were the Character of the Times; and were visible in every thing that moved towards the attaining of those Verdicts ... That the prosecutions were notoriously carried on by express Directions and Commands from the Court ... ." 10 H. C. JOUR. 248 (1689).

106. The Lords managers questioned Oates's credibility and integrity ("his Brain seemed to be turned"), *id.* at 249, but the Commons managers replied:

> That, by taking upon them to affirm such Judgments as These, the Lords had, in a manner, taken the Law into their Hands.
>
> That this arbitrary Power, in the Lords Judicature, is a new Discovery; and if it had been understood in former Times, would have been a very expeditious Way of altering the Law, upon several Occasions ... .
>
> ... Instead of correcting the acknowledged Errors of their Judgments in the King's Bench, they affirm them; and so change the Law, which ought to be the certain and steady Rule of Government, into the arbitrary Resolutions of that House.
>
> ... .
>
> ... For their Lordships' Clause [Lords' proposed amendment to the Commons' bill] did really countenance the Judgments against *Oates*; enacting only, That such punishment shall not be inflicted for the future.
>
> That it is of great Importance to the Kingdom, to have this Matter settled; Judgments of this Kind having been extended to several Persons, and to very different Cases; as in That of Mr. *Johnson* ... .
>
> ... .
>
> That it was notorious, That the whole Administration of the Government, especially with relation to Religion, was at That time corrupt.

Id. at 250. The Commons managers summed up that the Lords in their judicial capacity had conceded the judgments against Oates to be erroneous, but had affirmed them for the collateral reason that Oates was deranged and best kept out of witness boxes. The Commons had sent up a bill to reverse Oates's convictions and asked that the Lords in their legislative capacity agree to it. The Commons rejected the Lords' proposed amendments to the bill. *Id.* at 251.

107. The Commons managers observed:

> That the Lords having gone so far as to agree the Judgments to be erroneous, it could not be denied, that they were illegal: For that which makes a judgment erroneous is, For that it is against the Law.
>
> That it seems no less plain, That the Judgments were cruel, and of ill Example to future Ages.
>
> ...
>
> That it was of ill Example, and illegal, That a Judgment of perpetual Imprisonment should be given in a Case, where there is no express Law to warrant it. [Thus comporting with the Bill of Rights' condemnation of excessive

In enacting the Bill of Rights, Parliament was explicitly not in the business of law *reform*. It was in the business, it declared, of enshrining what the law already was.[108] Accordingly, calling the Oates and Johnson punishments "cruel, barbaric, inhuman, and unchristian" was *not* a criticism of particular *methods* of punishment. The methods mandated by the Oates and Johnson judgments were wholly unremarkable. The ones that have since passed out of use in Britain and the United States — whipping and pillorying — remained available under American federal criminal law until 1839.[109] Whipping officially "continued in use in England until 1948." And "[a]s late as 1963 the Supreme Court of Delaware held that the imposition of 20 lashes for a robbery conviction was not cruel or unusual."[110] But the law did not allow the Court of King's Bench to impose those punishments for the offenses of conviction to the degree and in the combination that the Court had done.[111]

Some scholars have mistakenly suggested that the cruel-and-unusual-punishments clause responded to brutal methods of punishment employed by Sir George Jeffreys when sentencing perpetrators of a rebellion against King James in 1685.[112] The chief prosecutor at the "Bloody Assizes" was Sir Henry Pollexfen, who was "a leading member of the committee which drafted the Bill of Rights."[113] It was *against* Oates's sentence that Pollexfen spoke in

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bail and fines that also effected perpetual imprisonment.]

It was of ill Example, and unusual, That an Englishman should be exposed upon a Pillory, so many time a Year, during his Life.

That it was illegal, cruel, and of dangerous Example, That a Freeman should be whipped in such a barbarous manner, as, in Probability, would determine in Death.

That here were Precedents made, which did not concern this Man only, or only this offence; but the Judgments pronounced against *Oates*, were Judgments against every Englishman ... .

10 H.C. JOUR. 247 (1689).

108. SCHWOERER, *supra* note 76, at 100, 283.

109. *Ex parte* Wilson, 114 U.S. 417, 427 (1885) (citing Act of Feb. 28, 1839, ch. 36, § 5, 5 Stat. 321, 322 (abolishing the punishment of whipping and pillorying)).

110. Granucci, *supra* note 37, at 859 (citing State v. Cannon, 55 Del. 587, 596 (1963)).

111. During the conference between managers of the two Houses, the Commons managers noted that the Oates sentence's spacing of whippings (set for a Wednesday and the following Friday) was designed to elicit a recantation on the Thursday, and thus operated like torture. They compared it to use of the rack. *See* 10 H.C. JOUR. 251 (1689). Their point was that, in the manner administered, acceptable methods of punishment were operating akin to an unacceptable method of treatment. To say that they were condemning a vicious method of punishment involves collapsing Justice Scalia's distinction between methods and severity.

112. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 967–69 (1991).

113. Granucci, *supra* note 37, at 856; 10 H.C. JOUR. 15 (1689).

1689.[114] Further, if the cruel-and-unusual-punishments clause *had* been meant to ban particular methods of punishment inflicted on Monmouth's rebels, why did none of those methods cease to be used?[115] When the Jacobite rebellion led by James II's grandson Bonnie Prince Charlie was subdued, a substantial number of the rebels were executed in the traditional manner for treason.[116] This punishment involved disemboweling them and cutting off their limbs while alive, and was euphemistically called "drawing and quartering."[117] Some 1,500 of the rebels were transported to the colonies,[118] so eighteenth-century Americans would have been well aware that such grotesque forms of punishment survived under the Bill of Rights. British law did not discontinue their use until the nineteenth century.[119] In enacting the Bill of Rights, Parliament did not purport to change the law. Whatever the common law prescribed as punishment for particular conduct remained so, however harsh.

VII. BLACKSTONE'S OPINION AND ITS AMERICAN RECEPTION

In volume four of his *Commentaries*, published in 1769, William Blackstone offered his readers a gruesome catalogue of violent punishments that remained very much part of the law of England. Conceding that his audience might find these "[d]isgusting,"[120] he sought to console them by observing that things were even worse on the Continent and by celebrating the principle of the cruel-and-unusual-punishments clause.[121] That principle, Blackstone made clear, protected not from brutal punishment per se, but from novel, *discriminatory* punishment:

> [I]t is moreover one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is ascertained for every offense; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect

114. Trial of Titus Oates, 10 Howell's State Trials 1079, 1325 (K.B. 1685); 10 H.C. JOUR. 176–77 (1689).

115. Granucci, *supra* note 37, at 855–56.

116. *Id.* at 856.

117. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 370 (Oxford Univ. Press 1966) (1769).

118. *See* Granucci, *supra* note 37, at 856; 4 BLACKSTONE, *supra* note 118, at 370.

119. *See* Act of July 4, 1870, 33 & 34 Vict., c. 23, § 31 (Eng.) (repealing quartering and beheading for traitors); Act of July 27, 1814, 54 Geo. 3, c. 146 (Eng.) (repealing drawing for traitors and providing that quartering occur only after hanging or beheading had caused death).

120. 4 BLACKSTONE, *supra* note 117, at 370.

121. *Id.* at 371.

> of persons... . [W]here an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.[122]

Blackstone noted that judicial discretion as to amount of fine or length of imprisonment might seem an exception to the rule he had just identified, but really it was not. Why not? Because judges in exercising that discretion could have regard only to *relevant* circumstances of aggravation or mitigation. Their discretion, he said, "is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second) ... ."[123] Blackstone added that "the bill of rights was only declaratory, throughout, of the old constitutional law of the land ... ."[124]

On the subject of excessive fines, Blackstone elaborated:

> The reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna carta*, concerning amercements for misbehaviour in matters of civil right... . [N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear... . [I]t is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life.[125]

One year before the Virginians adopted the words of the Bill of Rights in their Declaration, "Edmund Burke, speaking on reconciliation with America in the House of Commons ... told that body that almost as many copies of the *Commentaries* had been sold in America as in England."[126] For those among the American colonists who had read and understood Blackstone's discussion of punishments, there would have been no doubt about what the "punishments" provision of the Bill of Rights did. It required that fines not be "arbitrary," and not be more than the defendant could pay. It required that punishments be determined "without respect of

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122. *Id.*
123. *Id.* at 372.
124. *Id.*
125. *Id.* at 372–73.
126. ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN: 1817–1967, at 25 (1967).

persons." It required generality. It did not prohibit vicious methods of punishment, but it did prohibit immoral discrimination. When the American founders sought to appropriate whatever call to decency the clause had sounded in England, they prohibited immoral discrimination too.[127]

VIII. THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF 1791

The English Declaration of Rights deeply influenced the American colonists' political sensibilities. In particular, it afforded them a rhetorical framework for alleging political misconduct and claiming political entitlements. Jefferson imitated the English Declaration's preambular recital of wrongs when drafting the Declaration of Independence, even down to laying all the blame at the monarch's feet. The English document recited what was wrong with a King's rule because it really had been *the King's* rule. Jefferson's Declaration of Independence actually complained about what a parliamentary government had done, but he chose to emphasize the colonists' lack of representation by writing as though they had been ruled by the agents and allies of a despot.[128] Under that Declaration of Independence, the American states were to adopt constitutions to which bills of rights imitating the English original were often appended.

The American founders adopted the "punishments" prohibition of the English Bill of Rights as a limitation on the power of the new federal government, without specifying to which branch or branches of that government the limitation applied. Did they expect the Eighth Amendment to limit Congress' power to enact statutory punishments and to limit the power of judges and other officers of the federation to implement federal statutes? The English Bill of Rights effectively

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127. Joseph Story cited Blackstone and analyzed the Eighth Amendment's adoption as follows:

> It was, however, adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts. 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.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1006, at 170–11 (Carolina Acad. Press 1987) (1833) (emphasis added).

128. *See* THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776) ("He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation ... .").

instructed English courts not to impose punishments that discriminated—that is, departed from precedent—for morally insufficient reasons in the direction of greater severity. Could that declaration of common law principle operate as a limitation on *legislative* power? If so, how?

The understanding of the common law that informed the original drafting of the English cruel-and-unusual-punishments clause was also the understanding of the common law that prevailed at the American founding. It was, in Justice Frankfurter's memorable words, "a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare... . Law was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations."[129] American deference to Blackstone's scholarship reflected such a conception of the law as a Platonic reality, of which the individual actions of courts and legislatures were at best illustrative, not constitutive. Arthur Sutherland recounts that "[l]awyers cited Blackstone in American courts as today they cite opinions of their state's highest court."[130] As late as 1928, Oliver Wendell Holmes observed:

> Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found.[131]

The founding generation's pre-realist vision of law may have caused its members to expect that the Eighth Amendment would limit all federal government action, including legislative action,[132] and

129. Guaranty Trust Co. v. York, 326 U.S. 99, 101–02 (1945).

130. SUTHERLAND, *supra* note 126, at 24.

131. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

132. In his early commentary on the Constitution, William Rawle observed:

> The prohibition of unusual punishments applies alike, under the qualifications already noticed, to the legislative and to the judicial power.

perhaps executive action.[133] The content of the limitation would come from the common law.[134] The fledgling Supreme Court early declared that it lacked common law jurisdiction over criminal proceedings,[135] but that conclusion did not preclude the common law's operation, via the Eighth Amendment, as a limitation on the exercise of any statutory jurisdiction.

Conceived as a limitation on legislative power, how did the Cruel and Unusual Punishments Clause operate? As explained already, its limitation on common law punishment condemned immoral

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> The laws of a free country seldom leave the sort of punishment to be inflicted to the discretion of the judge, although the measure or extent of it, as for instance the *quantum* of a limited fine, or the duration of a term of imprisonment, which, by the law is not to be exceeded, is often submitted to him... . But a law which subjects an offender to any sort of punishment, is unknown to our civil code.

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 131 (2d ed. 1829). Rawle implied that a statute that conferred on the judiciary a broad discretion to punish for an offense however the judges pleased would be inconsistent with the Cruel and Unusual Punishments Clause. He did not, however, think the judiciary could strike down the statute on that account. *See id.*

133. Three of the states that adopted bills of rights in Virginia's wake rephrased their versions of the Cruel and Unusual Punishments Clause to make clear that it applied only to the conduct of courts. Maryland's version provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted; by the courts of law." Maryland Declaration of 1776, art. 2, *in* 1 SCHWARTZ, *supra* note 16, at 282. Likewise, a New Hampshire statute provided: "No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." New Hampshire Bill of 1783 § 33, *in* 1 SCHWARTZ, *supra* note 16, at 379. And Massachusetts law provided: "No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." Massachusetts Declaration of 1780, art. 26, *in* 1 SCHWARTZ, *supra* note 16, at 343. Against this backdrop, the first U.S. Congress adopted the Eighth Amendment without explicitly confining its operation to the courts. The Supreme Court has since applied the Amendment to the executive's implementation of punishments. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994); Helling v. McKinney, 509 U.S. 25 (1993); Estelle v. Gamble, 429 U.S. 97 (1976). Understood as a prohibition of discrimination, the Eighth Amendment would have nothing to say about awful prison conditions—or other executive action—per se. It would, however, prohibit prison authorities from victimizing individual prisoners.

134. Thomas Cooley indirectly recognized this conception of the Amendment's language:

> Probably a 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. And probably any new statutory offence may be made punishable to the extent permitted by the common law for similar offences.

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 329 (1868). After considering the constitutionality of vicious methods of punishment, Cooley continued: "A defendant, however, in any case, is entitled to have the precise measure of punishment meted out to him which the law provides, and no other. A different punishment cannot be substituted, on the ground of its being less in severity." *Id.* at 330.

135. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). *Cf.* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 5 (1842) (refusing to find a common law limitation implicit in the Constitution).

discrimination in the direction of greater severity. Applied to statutes, the provision apparently focused on enactments that purported to punish a person or class of persons more harshly than common law precedent permitted. The decisive question was whether the enactment departed from precedent for a morally sufficient reason. If so, then the act was consistent with the "true" common law, and the punishment it imposed was not cruel and unusual. If, however, the enactment departed from precedent without morally sufficient reason, then it violated the Amendment.

Loss of the pre-realist vision of the common law necessarily changes the way in which judicial review under the Eighth Amendment is conceived. A modern court cannot ask itself whether a statutory punishment conforms to the "true" common law. Yet the principle that underlay common law method, the principle of moral—and therefore legal—equality, of treating like cases alike, remains comprehensible to modern minds. A court can still ask whether a person or class of persons designated by statute for punishment has been distinguished from other persons for morally sufficient reason. Lack of morally sufficient reason for a departure from precedent would have established unusualness in 1791, and lack of morally sufficient reason for punishing a person or group differently may establish unusualness now. But the Eighth Amendment condemns only punishments that are both *cruel* and unusual. The punishments originally condemned were those that departed from precedent without morally sufficient reason in the direction of greater severity. That concept translates readily: the Eighth Amendment condemns punishing a person or class of persons more harshly than others for morally insufficient reason.

To the extent the founders knew anything about the historic operation of the Eighth Amendment's language, they knew it to prohibit punishing particular persons in uniquely harsh ways. Moreover, the terms of the original Constitution reveal the founders' particular hostility toward punitive discrimination by legislatures. That hostility was manifested in the original Constitution's prohibition of bills of attainder, which condemned a particular kind of person-specific statutory punishment, but left room for a provision that would condemn person-specific statutory punishments more generally.

IX. THE CONSTITUTION'S PROHIBITION OF BILLS OF ATTAINER

When analyzing the constitutionality of legislation that invidiously

targets identity, the Supreme Court has consistently turned to the Constitution's prohibitions of bills of attainder.[136] In so doing, it has ignored both language and history, for the founding generation knew perfectly well what attainder meant, and the debates surrounding adoption of the constitutional prohibitions do not suggest that they intended an artificially extended meaning. To be attainted was to be "dead in law," and its consequences went beyond capital punishment, to forfeiture of all property and to "corruption of blood," which meant that relatives could not inherit property through the attainted person.[137] The founders' acute familiarity with the concept is reflected in Article III, section 3, clause 2 of the Constitution, which provides: "[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[138] Given the remaining horrible consequences of attainder, it made good sense for the founders to insist that the sentence be imposed only after properly constituted judicial trials.

Such insistence on judicial process was criticized by none less than Thomas Jefferson, who drafted a bill in 1778 by which the Virginia legislature attainted a notorious criminal called Josiah Phillips. Jefferson subsequently defended bills of attainder in a letter of 1815:

> The occasion and proper office of a bill of attainder is this: When a person charged with a crime withdraws from justice, or resists it by force, either in his own or a foreign country, no other means of bringing him to trial or punishment being practicable, a special act is passed by the legislature adapted to the particular case. This prescribes to him a sufficient time to appear and submit to a trial by his peers; declares that his refusal to appear shall be taken as a confession of guilt, as in the ordinary case of an offender at the bar refusing to plead, and pronounces the sentence which would have been rendered on his confession or conviction in a court of law. No doubt that these acts of attainder have been abused in England as instruments of vengeance by a successful over a defeated party. But what institution is insusceptible of abuse in wicked hands?[139]

The bill passed against Phillips imposed the consequences of

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136. U.S. CONST. art. I, § 9, cl. 3; *id.* art. 1, § 10, cl. 1. *See* United States v. Lovett, 328 U.S. 303, 315–17 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798).

137. 4 BLACKSTONE, *supra* note 117, at 373–82; STORY, *supra* note 127, § 678, at 484.

138. U.S. CONST. art. III, § 3, cl. 2.

139. Letter from Thomas Jefferson to L.H. Girardin (March 12, 1815), *in* 14 THE WRITINGS OF THOMAS JEFFERSON 272 (Andrew A. Lipscomb & Albert Ellery Burgh eds., 1905).

attainder under Virginia law—death and forfeiture.[140] Jefferson's defense of attainder conflated the concept of bills of attainder with that of bills imposing lesser penalties. But as the Court and commentators well into the nineteenth century continued to agree, an enactment that imposed on an individual some punishment short of attainder was called a bill of pains and penalties.[141] Had the founders prohibited bills of pains and penalties, an inference that banning the lesser necessarily meant banning the greater would have been reasonable. The converse inference was not. A prohibition against legislatures passing bills to attaint particular persons says nothing about legislative capacity to pass bills imposing lesser penalties on individuals.

The original Constitution prohibited both the federal Congress and state legislatures from enacting bills of attainder.[142] The Eighth Amendment, prohibiting discriminatory punishment more generally, did not apply to state legislatures. Perhaps for this reason, the members of the Supreme Court showed an early inclination to extend the Constitution's prohibition of bills of attainder to bills of pains and penalties, rather than applying the Eighth Amendment to the latter. John Marshall blurred the issue in *Fletcher v. Peck* by saying that a "bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."[143] Joseph Story seized on that formulation in his *Commentaries* to support a conclusion that "in the sense of the constitution, it seems, that bills of attainder include bills of pains and penalties."[144]

The Eighth Amendment, like the bills of attainder clauses, "constitutes one among the many mechanisms implementing the separation of powers."[145] On a plausible reading, the Supreme Court's "bills of attainder" jurisprudence belongs under the rubric of its Eighth Amendment jurisprudence.[146] Congress enjoys some powers to pass person-specific measures, but aside from exercising its

140. *See* Virginia Act Declaring What Shall Be Treason (1776), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 430 (Philip B. Kurland & Ralph Lerner eds., 1987); Thomas Jefferson, Bill to Attaint Josiah Phillips (1778), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra*, at 345–46.

141. *Cummings*, 71 U.S. (4 Wall.) at 323; *Calder*, 3 U.S. (3 Dall.) at 389; COOLEY, *supra* note 135, at 261; STORY, *supra* note 127, § 678, at 484.

142. U.S. CONST. art. I, § 9 cl. 3; *id.* art. I, § 10, cl. 1.

143. 10 U.S. (6 Cranch) 87, 138 (1810).

144. STORY, *supra* note 127, § 678, at 484.

145. United States v. Brown, 381 U.S. 437, 473 (1965) (White, J., dissenting).

146. *See id.* at 437.

impeachment[147] and internal disciplinary[148] powers, it cannot *punish* persons specifically. Neither can state legislatures, thanks to the Fourteenth Amendment,[149] and the constitutionality of such impeachment and disciplinary powers as their state constitutions bestow on them perhaps turns on analogy to the powers of their federal counterpart. Those powers may be read as beyond the scope of "punishment" within the meaning of the Eighth Amendment. Like a family of babushka dolls, the bills of attainder prohibition fits inside the Eighth Amendment, which in turn fits inside Article III's separation of judicial power and the Due Process Clauses of the Fifth and Fourteenth Amendments. As applied to the states, the bills of attainder prohibition and the Eighth Amendment's language also belong inside the Equal Protection Clause.

X. THE FORK IN THE ROAD: HOW THE NONDISCRIMINATION PRINCIPLE LOST PROMINENCE

In 1820, the Kentucky Court of Appeals heard a case against certain state officials that was brought by Rhody Ely, "a free person of color."[150] The officials had subjected Ely to thirty lashes on his bare back in accordance with a state statute that prescribed that punishment for any person of color who, "at any time, lift[ed] his or her hand in opposition to any person not being a negro, mulatto or Indian."[151] Ely alleged torts of trespass, assault, battery, and imprisonment. The officials raised the statute in their defense. The court held the statute invalid, and therefore no defense, on the ground, among others, that it violated the Kentucky Constitution's guarantee "[t]hat excessive bail shall not be required, nor excessive fines imposed, nor *cruel punishments inflicted.*"[152] The impugned statute purported to subject "a free person of color to thirty lashes for lifting his hand in opposition to a white person who was attempting wantonly to violate his or her person."[153] In such circumstances, the court concluded, "all men must pronounce the punishment *cruel* indeed."[154]

The Kentucky statute was invalid not because of the *method* of

147. U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3 cl. 6; *id.* art. II, § 4.
148. *Id* art. I, § 5, cl. 2.
149. *See infra* Part IX.
150. Ely v. Thompson, 10 Ky. (3 A.K. Marsh) 70, 70 (1820).
151. *Id.* at 71.
152. *Id.* at 74 (emphasis in the report).
153. *Id.*
154. *Id.* (emphasis in original).

punishment employed. In 1820, whipping was commonplace. As late as 1892, Justice Field observed: "The State has the power to inflict personal chastisement, by directing whipping for petty offences—repulsive as such mode of punishment is—and should it, for each offence, inflict twenty stripes it might not be considered, as applied to a single offence, a severe punishment ... ."[155] And the Kentucky statute was invalid not because the amount of punishment was *excessive*, for the very notion of excess presupposes that some measure of punishment is due. The Kentucky statute was invalid because it was invidiously *discriminatory*. It called otherwise blameless conduct punishable based on the race of the perpetrator. Thus one of the earliest judicial applications of the historic language drawn from the English Bill of Rights recognized the true character of that language as a bulwark against discrimination. That vision of the "punishments" clause, however, soon receded.

By the early nineteenth century, the phrase "cruel and unusual punishment," sometimes rendered as "cruel or unusual punishment," or even just "cruel punishment," had so entered the lexicon as a synonym for improper treatment that legislatures inserted it in a variety of penal statutes. In some states it became the touchstone for unlawful treatment of slaves.[156] Under federal law, officers of American ships were prohibited from inflicting "any cruel or unusual punishment" with malice upon crew members.[157] In these new legal contexts, the phrase appeared in isolation, not as companion to prohibitions of excessive bail and fines. Wrenched from its place in an historic formula, the phrase was interpreted by early American courts as a freestanding prohibition, the meaning of which could be determined without having to account for a nexus to prohibitions of excessive bail and fines.[158]

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155. O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting).

156. *See* Turnipseed v. State, 6 Ala. 664, 665 (1844); Scott v. State, 31 Miss. 473, 474, 476 (1856); Dowling v. State, 13 Miss. (5 S. & M.) 664, 687 (1846).

157. *See* Charge to Grand Jury, 30 F.Cas. 981 (C.C.D.R.I. 1853) (No. 18,249) (Curtis, J.); United States v. Winn, 28 F.Cas. 733, 733 (C.C.D. Mass. 1838) (No. 16,740) (Story, J.).

158. Interpretation of constitutional prohibitions of excessive fines had an inauspicious beginning. In 1799, the Pennsylvania Supreme Court upheld an order that two men—who had been acquitted of being accessories to murder—should nonetheless remain imprisoned, unless they posted "security to keep the peace ... for the term of fourteen years, each in the sum of 10,000 dollars, and two good sureties in 10,000 dollars each." Respublica v. Donagan, 2 Yeates 437, 437 (Pa. 1799). The defendants' counsel argued that the orders "would operate on them as sentences of imprisonment for life, it being wholly out of their power to procure the security required." *Id.* at 438. The Court, however, held that Pennsylvania's constitutional prohibition of excessive bail and excessive fines was unavailing; judicial suspicion of guilt was enough. "Unsafe would the

What did a freestanding prohibition of cruel and unusual punishment achieve? The early decades of the American republic coincided with a period of significant penological reform in the common-law world, directed toward abolishing methods of punishment that had come to be considered too vicious for a civilized society. Blackstone reflected the prevailing sentiment when reporting such methods in his *Commentaries*.[159] Readers might, he acknowledged, consider the punishments "[d]isgusting."[160] Between 1790 and 1870, British legislation abolished the most vicious methods of capital punishment hitherto authorized under English law.[161] In the United States, federal legislation discarded whipping and pillorying as methods of punishment in 1839.[162] In this climate sympathetic toward the reform of the methods used under law to punish criminals, courts naturally interpreted a freestanding prohibition of "cruel and unusual punishments" to prohibit methods of punishment that had fallen into disuse because of perceived viciousness. That "vicious methods" vision of the cruel-and-unusual-punishments clause also shaped interpretation of the language in its original American contexts, namely the Eighth Amendment and its state counterparts.[163] None of the early judicial interpretations of the phrase reflect significant attention to its history and in particular to the reason that the Clause

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community be, if such characters could prowl at large through the country, without a sufficient tie on them." *Id.* In the same year, the Virginia Supreme Court of Appeals held that the practice of joint fining, under which multiple offenders were made jointly and severally liable to pay a collectively-imposed fine, violated the state bill of rights's prohibition of excessive fines and cruel and unusual punishments. Each offender's punishment should, said the court, "be according to the degree of the fault, and the estate of the defendant." Jones v. Commonwealth, 5 Va. 555, 557–58, 1 Call 482, 484 (1799). No defendant could validly have his level of punishment depend upon whether his co-offenders paid their share. *Id.* at 558, 1 Call at 484. This rationale is consistent with viewing the constitutional restriction as prohibiting arbitrary punishment.

159. 4 BLACKSTONE, *supra* note 117, at 370.

160. *Id.*

161. Act of July 4, 1870, 33 & 34 Vict., c. 23, § 31 (Eng.) (repealing quartering and beheading for traitors); Act of July 27, 1814, 54 Geo. 3, c. 146 (Eng.) (repealing drawing for traitors and providing that quartering occur only after hanging or beheading had caused death); Act of June 5, 1790, 30 Geo. 3, c. 48 (Eng.) (repealing burning for female traitors and substituting hanging).

162. *Ex parte* Wilson, 114 U.S. 417, 427 (1885) (citing Act of Feb. 28, 1839, ch. 36, § 5, 5 Stat. 321, 322 (abolishing the punishments of whipping and pillorying)).

163. Thomas Cooley observed:

> But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held to be forbidden by it as cruel and unusual. 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, had forbidden cruel and unusual punishments.

COOLEY, *supra* note 134, at 329–30.

had been associated with prohibitions of excessive bail and fines.

In 1823, New York's Supreme Court of Judicature treated its cruel-and-unusual-punishments clause as prohibiting methods of punishment never before used.[164] Counsel below had argued that punishment was unusual if "unknown to the common law, as it respects this offence [of challenging to a duel]," and cruel if disproportionate to the offense. The Supreme Court concluded that "unusual" did concern a lack of past use, but was only satisfied by *methods* of punishment *never* used before for *any* offense: "The disenfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences."[165]

Other state and federal courts took differing views of how un-used a method of punishment had to have been in order to count as unusual, but most early interpretations of the phrase "cruel and unusual punishments" understood it to prohibit vicious methods of punishment. In 1828, the Supreme Court of Virginia considered a state law that provided for punishment by imprisonment for one to six months plus whipping as often during that period as the court might direct, so long as the convict never received more than thirty-nine stripes at any one time.[166] Did the statute violate the prohibition of cruel and unusual punishments in Virginia's bill of rights? Counsel argued that the discretion reposed in sentencing courts was facially invalid because it authorized "the Court to inflict the lightest punishment by stripes imaginable, or the most cruel, even necessarily extending to death itself, for an offence of the same character and grade." It might be exercised "to subserve vindictive passions," that is, to target disliked individuals.[167] The Court did not agree, and upheld the statute, at least from facial challenge:

> [I]n all cases, where by Law, whether Statute or Common Law, a subject is referred to the discretion of the Court, that must be regarded as a *sound discretion*, to be exercised according to the circumstances of each particular case. If the Judge should not so limit the authority of his discretion, but extend it further to subserve motives of oppression, or his own vindictive passions, he might and would be impeached. The punishment of offences by

164. Barker v. People, 3 Cow. 686, 694 (N.Y. 1824).
165. Barker v. People, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823).
166. Commonwealth v. Wyatt, 27 Va. (6 Rand.) 694 (1828).
167. *Id.* at 700.

stripes is certainly odious, but cannot be said to be *unusual*.[168]

The Court's reference to the structural protection of impeachment was hardly adequate. What if the community shared the judge's "vindictive passions" concerning the prisoner at bar? The Court implied that abuse of the sentencing discretion to impose "cruel torture" would be contrary to law,[169] and thus challengeable on appeal, but did not clearly locate that unlawfulness in a violation of the cruel-and-unusual-punishments clause. It read "unusual" in the clause to protect only against impermissible *methods* of punishment, not against excessive amounts of punishment, even if the excess was discriminatory.

Ten years later, the Supreme Court of North Carolina carefully avoided an antidiscrimination reading of its state constitution's counterpart to the Eighth Amendment. The court tentatively endorsed both "vicious methods" and "excessiveness per se" interpretations.[170] A state statute required free persons of color to work off fines that they could not pay. Insolvent white convicts were not subject to the work requirement. The Court read the words "nor cruel nor unusual punishments inflicted" in its state bill of rights to refer only to "a punishment which we think too severe or not of an usual kind," and was skeptical of its authority to strike down statutorily-mandated punishments on that account.[171]

Sitting on circuit, Justice Curtis of the United States Supreme Court embraced a "vicious methods" understanding of the Clause when interpreting the federal prohibition of cruel or unusual punishment of crew members at sea. He described the statutory provision as a prohibition of cruel *and* unusual punishment, thus implying that he saw no difference between the statute's principle and that of the Eighth Amendment. He then held that the statutory prohibition did not apply to a malicious flogging. For Justice Curtis, discriminatory severity was no concern of the clause:

[The cruel and unusual punishment] clause was not designed to

168. *Id.* at 701.

169. *Id.* at 700.

170. State v. Manuel, 20 N.C. (4 Dev. & Bat.) 20, 36 (N.C. 1838). The Court responded to an antidiscrimination challenge mounted under other constitutional provisions by finding racial discrimination in sentencing defensible on the same grounds as discrimination by gender and age. *Manuel*, 20 N.C. (4 Dev. & Bat.) at 37; *see also* Kelly v. State, 11 Miss. (3 S. & M.) 518, 526 (1844) (neglecting to clarify whether the state's statutory prohibition against slaveowners inflicting cruel or unusual punishments upon their slaves precluded vicious methods, excessiveness, discrimination, or more than one of these).

171. *See Manuel*, 20 N.C. (4 Dev. & Bat.) at 35–36.

> include the punishment of flogging, which was not an unusual punishment when the act of 1835 was passed. On the contrary, it was the kind of punishment then most usual, and known to and sanctioned by the law. However unjustifiably it may have been inflicted, it is not the kind of punishment against which these particular words in the act were directed, and consequently the defendant must be acquitted.[172]

Similarly, the Supreme Judicial Court of Massachusetts held that the prohibition of cruel or unusual punishment in the state's Declaration of Rights merely concerned methods of punishment.[173] The Court upheld a large fine and mandatory imprisonment for a first offense of unlawfully selling intoxicating liquor: "These are clearly not cruel or unusual punishments. They are the lightest punishments known to our law; and have been constantly applied to similar offences. The question whether the punishment is too severe, and disproportionate to the offence, is for the legislature to determine."[174]

In 1878 and again in 1890, the United States Supreme Court assumed a "vicious methods" understanding of "cruel and unusual punishments."[175] Two years later, dissenting in *O'Neil v. Vermont*, Justice Field erroneously alleged that vicious methods of punishment had been "rendered impossible" by the English Bill of Rights.[176] But he further contended that the Eighth Amendment "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."[177] Field proceeded to articulate for the first time a clear "excessiveness" vision of the Eighth Amendment: "The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted."[178] Justices Harlan and Brewer agreed.[179]

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172. United States v. Collins, 25 F.Cas. 545 (C.C.D.R.I. 1854) (No. 14,836) (Curtis, J.). The federal law separately prohibited malicious "beating or wounding," and Justice Curtis held that the offender should have been indicted for that offense. *Id.*

173. *See* Commonwealth v. Hitchings, 71 Mass. (5 Gray) 482 (1855).

174. *Id.* at 486.

175. *See In re* Kemmler, 136 U.S. 436, 446–47 (1890); Wilkerson v. Utah, 99 U.S. 130, 137 (1878).

176. O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

177. *Id.* at 339–40 (Field, J., dissenting).

178. *Id.* at 340 (Field, J., dissenting). Field's dissent was also notable for claiming that the Privileges or Immunities Clause of the Fourteenth Amendment incorporates the Eighth Amendment's language as a federal constitutional limitation upon state governments. *See id.* at 360–64 (Field, J., dissenting). Justices Harlan and Brewer agreed that the Fourteenth Amendment had achieved incorporation of the Eighth Amendment's limitation against the states. They did not, however, clearly identify which clause in the Fourteenth Amendment had done the work, and they appear to have focused on the Due Process Clause. *Id.* at 370–71 (Harlan, J., dissenting).

The Court could have—but did not—decided *O'Neil* as an "excessive fines" case, for the punishment at issue was actually a massive fine for selling intoxicating liquor without permission. The sentence provided that in default of payment, the offender was to be imprisoned for up to fifty-four years and two hundred and four days. The Supreme Court's majority left him to that fate, noting that the Eighth Amendment did not apply to the states.[180] The three dissenters disagreed and labeled the sentence a "cruel and unusual punishment."[181] Nowhere in the opinions was discrimination recognized as a concern of the Eighth Amendment and a potential ground for decision. A ruling made on circuit thirteen years earlier suggests that Justice Field may have thought discrimination relevant to the Eighth Amendment inquiry only to the extent that discrimination afforded evidence of excessiveness.[182] That understanding turned the historic function of the Amendment's language on its head—the language historically condemned excessiveness in fines for the purpose of protecting against immoral discrimination.

Justice Field's "excessiveness" vision of the Eighth Amendment

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179. *Id.* at 371 (Harlan, J., dissenting).

180. *Id.* at 332. *See also* Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 479–80 (1866).

181. *O'Neil*, 144 U.S. at 339–40 (Field, J., dissenting); *id.* at 370–71 (Harlan, J., dissenting).

182. *See* Ho Ah Kow v. Nunan, 12 F.Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6,546) (Field, J.). While in prison for failure to pay a fine, the plaintiff wore his hair in a braided "queue," as was traditional among nineteenth-century Chinese men. The defendant sheriff of San Francisco county cut the hair off, in accordance with a local ordinance that required male inmates of the county jail to have their hair "cut or clipped to an uniform length of one inch from the scalp." The plaintiff sued for damages, and Justice Field concluded that the ordinance afforded no defense to the sheriff:

> The class character of this legislation is none the less manifest because of the general terms in which it is expressed... . [T]he ordinance acts with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them. Upon the Chinese prisoners its enforcement operates as "a cruel and unusual punishment."
>
> Many illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them.

Id. In a note appended to the report of *Nunan*, Judge Cooley wrote:

> When the law imposes a punishment which only a certain class of persons, because of peculiar but innocent habits, sentiments or beliefs, can feel, and imposes it for the avowed purpose of affecting this class as others are not affected, it seems plain that not only is the equal protection of the laws denied to the class, but that they are directly and purposely subjected to pains and penalties which others of different habits, sentiments or beliefs are never expected to feel.

Id. at 257.

was endorsed and applied by the Court in *Weems v. United States*[183] and in *Weems*'s direct successor, *Solem v. Helm*[184]—endorsed and applied. For the two decades since *Solem*, the "excessiveness" vision of the Eighth Amendment has unambiguously prevailed in the Court's jurisprudence, despite Justice Scalia's robust advocacy of the "vicious methods" vision.[185] The "no-discrimination" vision of the Amendment's language, clearly expressed by Blackstone and unquestioned at the American founding, has dropped from sight. Yet as Justice Scalia memorably observed of a suggestion "that because the Founders did not specifically exclude a proportionality component from words that 'could reasonably be construed to include it,' the Eighth Amendment must prohibit disproportionate punishments as well:"[186]

> Surely this is an extraordinary method for determining what restrictions upon democratic self-government the Constitution contains. It seems to us that our task is not merely to identify various meanings that the text "could reasonably" bear, and then impose the one that from a policy standpoint pleases us best. Rather, we are to strive as best we can to select from among the various "reasonable" possibilities *the most plausible* meaning.[187]

The most plausible meaning of the Eighth Amendment is "no discriminatory punishment."

XI. IS THE EIGHTH AMENDMENT A CHAMELEON?

"No discriminatory punishments is the most faithful translation of the Eighth Amendment's historic command into a contemporary context.[188] But what of the other candidates? Could the Eighth Amendment mean more than one thing?

In 1791, an American court that consulted Blackstone would have understood the Eighth Amendment to prohibit punishments that departed from precedent in the direction of greater severity without morally sufficient reason. On that ground, a court might well have struck down a statutory penalty attached to a general prohibition of certain conduct. If the penalty were markedly harsher than would have been imposed at common law for such conduct, the penalty

183. 217 U.S. 349, 371, 380–82 (1910).

184. 463 U.S. 277, 277 (1983).

185. *See* Ewing v. California, 538 U.S. 11, 31–32 (2003) (Scalia, J., concurring); Harmelin v. Michigan, 501 U.S. 957, 961–94 (1991).

186. *Harmelin*, 501 U.S. at 976 n.6.

187. *Id.* (emphasis in original).

188. *See* Lessig, *supra* note 13, *passim*.

might have been held cruel and unusual. Why, then, should we not say with Justice Stevens that the Eighth Amendment directly prohibits "'[e]xcessive' sanctions"?[189] The legal realists have, of course, destroyed the old conception of the common law as a transcendental corpus, and thus deprived the courts of an ostensibly objective referent for what counts as excessive. A moral realist might, however, propose translating an inquiry concerning "true" common law into an inquiry concerning when punishment is immorally too much.

The greatest obstacle to translating "cruel and unusual" as "immorally too much" is that it only translates half the phrase. "Unusual" simply does not function within the translation. An immorally excessive punishment may be called cruel, but cannot on that ground alone be called unusual. Those who seek a mandate in the Eighth Amendment to condemn "excessive" punishment per se have had to cast about for a way to allege unusualness. The device upon which they have seized is inter-jurisdictional comparison.[190]

The first difficulty with using inter-jurisdictional comparison to

189. Atkins v. Virginia, 536 U.S. 304, 311 (2002).

190. Applying their respective "excessiveness" and "vicious methods" understandings of the Amendment, members of the current Court agree that inter-jurisdictional comparison is relevant to the constitutional enquiry. *See Ewing*, 538 U.S. at 43 (Breyer, J., dissenting); *Atkins*, 536 U.S. at 340–41 (Scalia, J., dissenting). Sometimes expressly, *see* Stanford v. Kentucky, 492 U.S. 361, 369 (1989), sometimes implicitly, *see Ewing*, 538 U.S. at 33–34 (Stevens, J., dissenting), members of the Court have suggested that comparing the punishment at issue with what is done in other jurisdictions may answer the question whether the punishment is "unusual." They do not, however, agree about *which* inter-jurisdictional comparisons are relevant. The majority that upheld death sentences imposed on sixteen and seventeen year-olds in *Stanford v. Kentucky* emphasized "that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* ... that the sentencing practices of other countries are relevant." *Stanford*, 492 U.S. at 369 n. 1. Four members of that majority also refused to consider any evidence of "[a] revised national consensus" short of "the operative acts (laws and the application of laws) that the people have approved." *Id.* at 377 (Scalia, J., joined by Rehnquist, C.J., White, J., and Kennedy, JJ.). The four dissenters in *Stanford* disagreed: "The views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society." *Id.* at 384 (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J., dissenting). *See also* Lawrence v. Texas, 539 U.S 558, 572–73, 576–77 (2003) (endorsing international comparison when considering a due process claim).

A claim that inter-jurisdictional comparison among the states may answer an "unusualness" enquiry invites puzzlement over what the clause was understood to accomplish in the original bill of rights, which applied to the federal government alone. Akhil Amar suggests that "[a]t most, the clause seemed to disfavor the oddball statute, wholly out of sync with other congressional criminal laws." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 279 (1998). Perhaps "unusual" in 1791 *could* have been understood to prevent the federal government from creating penalties that did not conform to the penal standards of the states. The historical context suggests that "unusual" was understood to prevent departures from common law precedent without morally sufficient reason.

find "unusualness" is that proponents of this methodology do not actually believe that inter-jurisdictional comparison should determine whether a punishment is in fact "too much." Inter-jurisdictional comparison may assist a court in deciding whether a punishment is excessive, but it does not *determine* the issue. In *Atkins*, Justice Stevens mentioned "[r]elying in part"[191] on the practices of other jurisdictions, but observed: "We also acknowledged in *Coker* that the objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"[192] If the Court thought a punishment immorally excessive, Justice Stevens made clear, that punishment would not have to be an inter-jurisdictional novelty to be condemned. Inter-jurisdictional comparison has served the Supreme Court's "proportionality" inquiries as an afterthought. Justices cherry-pick state practices that support conclusions independently reached, in a fashion resembling use of legislative history.[193] In *Atkins*, for example, Justice Stevens' majority opinion placed weight on the "consistency of the direction of change" in other states' laws concerning execution of mentally retarded persons.[194] Yet Justice Stevens avoided that consideration when dissenting from the Court's vindication of California's "three-strikes" law.[195]

The current Court's approach to inter-jurisdictional comparison belies the claim that such comparisons serve to establish "unusualness." The Court concedes that it may hold a punishment unconstitutionally excessive even if that punishment is not inter-jurisdictionally novel. In other words, the Court is willing to apply the Cruel and Unusual Punishments Clause to a punishment that is, on the Court's own terms, not unusual.

Even if the Court were to shift ground and to hold the Eighth Amendment to condemn only punishments that are both immorally excessive (cruel) and inter-jurisdictionally novel (unusual), another objection remains. Inter-jurisdictional novelty is not the most

191. *Atkins*, 536 U.S. at 312.

192. *Id.* (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

193. *See* Convoy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

194. *Atkins*, 536 U.S. at 315.

195. *See Ewing*, 538 U.S. at 32–35 (Stevens, J., dissenting).

plausible translation of what "unusual" in the Clause meant to the founding generation. "Unusual" meant illegal because a departure from common law precedent without morally sufficient reason. In other words, "unusual" meant *intra*-jurisdictionally novel. The Court concedes intra-jurisdictional comparison to be relevant,[196] but it is much more than that. To violate the Eighth Amendment, a punishment *must* be unusual *within* the jurisdiction where it is imposed. The most plausible translation of that concept is discrimination without morally sufficient reason. Unusualness vis-à-vis *other* jurisdictions does not count as unusualness for purposes of the constitutional prohibition at all. To hold a punishment constitutionally unusual on the ground that other jurisdictions do not impose it is to rely on linguistic happenstance. It is like holding that the Second Amendment protects the right of the people to keep and bear their upper limbs.

The American founders in 1791, like their English predecessors in 1689, believed that the common law could be discovered only through faithful analysis of precedent. The word "unusual" in the Cruel and Unusual Punishments Clause reflected a commitment to the common law method. That method in turn reflected a commitment to the *commonality* of the common law—a commitment to the principle that like cases be treated alike. Translating the clause to prohibit excessive punishment does not honor that commitment. Translating the clause to prohibit discriminatory punishment does.[197]

Does the Eighth Amendment have any other plausible complexions? Justice Scalia's nominee, the prohibition of vicious methods, receives the least support from the history of the provision. No one at the American founding who had read Blackstone or who otherwise knew the English history of the cruel-and-unusual-punishments clause would have thought that the proposed constitutional language prohibited vicious methods of punishment. Penological reform was an emerging issue, but only at the Virginia ratification convention was the cruel-and-unusual-punishments clause linked to the prohibition of vicious methods. If the evidentiary threshold for according constitutional text multiple independent meanings is substantial, then the available evidence does not meet it.

196. *See* Solem v. Helm, 463 U.S. 277, 291–92 (1983).

197. It is also not subject to Justice Scalia's criticism that prevailing Eighth Amendment doctrine incoherently includes the penological goals of deterrence, rehabilitation, and incapacitation among relevant considerations when assessing proportionality between punishment and crime. *See Ewing*, 538 U.S. at 31–32 (Scalia, J., concurring); Harmelin v. Michigan, 501 U.S. 957, 989 (1991).

Yet perhaps the prohibition of cruel and unusual punishments that applies to the states through the Fourteenth Amendment should be understood differently from the Eighth Amendment.[198] Antebellum case law had so misapprehended the Eighth Amendment's meaning that the adopters of the Fourteenth Amendment may well have thought the "privileges or immunities of citizens of the United States" or "due process of law" included protection from vicious methods of punishment.[199] As applied to the states, therefore, the historic language might be understood to prohibit *both* discrimination *and* vicious methods, using inter-jurisdictional comparison among the states as the measure of methodological novelty. There is no reason, however, to think that the generation that adopted the Fourteenth Amendment in 1868 meant to prohibit excessiveness per se, for that reading of the Eighth Amendment was yet to receive significant judicial support.

XII. THE REQUIREMENT OF NONDISCRIMINATION

History calls the Eighth Amendment a protection from immoral discrimination. For the enactors of the English Bill of Rights, and for Blackstone, the cruel-and-unusual-punishments clause condemned departure from the standard punishment for the offense of conviction, unjustified by any relevant circumstance of aggravation or mitigation. Yet both the elements of an offense, and the circumstances of aggravation and mitigation that are admitted to vary its punishment, are infinitely manipulable. Even as he articulated the principle, Blackstone recognized that levels of punishment could permissibly turn on more than conduct, that some characteristics of identity could enter the calculation. The "duration and quantity" of fines and imprisonment "must frequently vary, from the aggravations or otherwise of the offence, *the quality and condition of the parties*, and from innumerable other circumstances."[200]

Recognizing the Eighth Amendment to protect against

198. *See* AMAR, *supra* note 190, at 279–80.

199. The Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

200. 4 BLACKSTONE, *supra* note 117, at 378 (emphasis added).

discriminatory punishment effectively invites courts to apply equal protection standards against the federal government. The Supreme Court has, of course, done so anyway.[201] Conversely, the Equal Protection Clause of the Fourteenth Amendment is the most obvious engine for incorporating a no-discrimination understanding of the Eighth Amendment as a limitation upon state governments. The Court's finding of incorporation[202] has, by contrast, focused on the Fourteenth Amendment's other "majestic generalities."[203]

What count as unconstitutional reasons for discrimination in punishment? The Eighth Amendment's language has its roots in concern about discrimination based on religious or political opinion. But neither its English drafters nor its American appropriators limited the text to that circumstance, just as the Reconstruction generation did not limit itself to condemning racial classifications. Deciding whether the criteria used to impose a punishment are invidiously discriminatory for purposes of the Eighth Amendment puts a court on open moral-philosophical terrain.[204] It is the same terrain that a court occupies when deciding whether criteria used to take any other government action are invidiously discriminatory for purposes of the Equal Protection Clause. For purposes of this article, it is sufficient to say that the Eighth Amendment's no-discrimination command requires, in relation to punishments, what the Equal Protection Clause requires more generally in relation to all government action. A role for inter-jurisdictional comparison may arise here. When deciding whether the criteria for imposing a punishment are unconstitutionally discriminatory, use of those criteria elsewhere may be a relevant consideration.

Moving beyond the acceptability of criteria used for imposing

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201. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Arguably the administration of punishment is one circumstance in which reading due process to prohibit invidious discrimination is *not*, as John Ely labeled it, "gibberish, syntactically and historically." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 32 (1980).

202. *See* Robinson v. California, 370 U.S. 660, 667 (1962); O'Neil v. Vermont, 144 U.S. 323, 360–64 (1892) (Field, J., dissenting); *id.* at 370 (Harlan, J., dissenting); AMAR, *supra* note 191, *passim*; *see also* Duncan v. Louisiana, 391 U.S. 145, 146–62 (1968) (recognizing incorporation of the Sixth Amendment guarantee of trial by jury); Adamson v. California, 332 U.S. 46, 47–59 (1947) (recognizing incorporation of the Fifth Amendment privilege against self-incrimination); Palko v. Connecticut, 302 U.S. 319, 320–29 (1937) (holding that only those rights that are "of the very essence of a scheme of ordered liberty" are incorporated through the Fourteenth Amendment).

203. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (referring to the broad guarantees in the original Bill of Rights).

204. *See generally* PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE (1990).

punishment, however, the Cruel and Unusual Punishments Clause contains an ambiguity relevant to its application as a no-discrimination principle. Does the clause prohibit not only unusual punishments, but unusual *effects* of punishments? If the facial criteria for imposing a punishment are blameless and if it is in fact applied consistently, can it nonetheless be attacked as cruel and unusual in its application to someone on whom it inflicts *unusual* suffering? What if a court accepts evidence that an invidiously discriminatory motive prompted the whole measure?[205]

Under the pre-realist vision of the common law, uniform punishment of the dissimilarly situated (whether dissimilarly situated in susceptibility to suffering or in culpability) might well have been *cruel*, but it would have been *unusual* only if it failed to observe distinctions drawn in earlier judicial decisions and thus flouted the doctrine of precedent. Unprecedented distinctions drawn for morally sufficient reasons did not violate the prohibition of cruel and unusual punishments, for they reflected evolution in understanding of the common law rather than departure from it. But such unprecedented distinctions were not *required* by the prohibition of cruel and unusual punishments. The Eighth Amendment is plausibly translated as a requirement not to discriminate for morally insufficient reasons. It is not plausibly translated as a requirement *to* discriminate in a new way for morally sufficient reasons. If the Amendment did extend that far, it would embrace all claims of excessive punishment that involve an element of comparison among offenders—in other words, all claims of excessive punishment that are not also vicious methods claims. The Eighth Amendment accomplishes much, but not that much. On the other hand, where evidence is adduced that a legal classification for which morally sufficient reasons may exist was in fact motivated, in whole or in part, by immoral considerations (for example, by racism) then the Eighth Amendment may condemn the punishment that turns on the classification.[206]

XIII. DECIDING *ATKINS* AND *EWING*

To inflict a "cruel and unusual punishment" on a person or persons today is to punish that person or persons more harshly than others for morally insufficient reason. That is the most plausible translation of

205. *See, e.g.*, Ho Ah Kow v. Nunan, 12 F.Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6,546) (Field, J.).

206. *See id.* (finding that an ostensibly innocent rule governing male prison inmates had been adopted in order to exploit a well-understood disparate racial impact).

the old common law concept, which condemned punishments that departed from precedent in the direction of greater severity for morally insufficient reason.[207] How, then, should the Supreme Court have decided *Ewing* and *Atkins*? Would a "no-discrimination" vision of the Eighth Amendment have changed the Court's analysis? Concerning California's "three-strikes" legislation, the Court's inquiry would have turned first to whether being a three-time offender within the meaning of the California statute was a morally insufficient reason for the sentence enhancements imposed. In a famous earlier case, the Court held that being "addicted to the use of narcotics" within the meaning of another California statute was a morally insufficient ground for punishment, and therefore that the offender's sentence violated the Eighth Amendment. [208] Justice Potter Stewart, for the majority, observed: "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[209] *Excess* of punishment was not the constitutional problem. Impropriety of the criterion used for deciding to punish was the problem.

The Court in *Ewing* would doubtless have held that being a serial offender was a morally sufficient reason for sentence enhancements. Inter-jurisdictional comparison would have assisted in reaching that conclusion.[210] The Court's only concern would have been to satisfy itself that no morally improper consideration had contributed to the sentence enhancements at issue.[211] The severity of those enhancements would have supported any claim that a morally improper consideration had contributed to the punishment.[212] But if the only considerations contributing to the sentence were legitimate ones, then the Court would not have second-guessed the judgment of

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207. *See* Lessig, *supra* note 13, *passim*.

208. Robinson v. California, 370 U.S. 660, 665 (1962).

209. *Id.* at 667.

210. "For many years, most States have had laws providing for enhanced sentencing of repeat offenders." Ewing v. California, 538 U.S. 11, 24 (2003) (citing U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING (1996)).

211. *But see* Joshua R. Pater, *Struck Out Looking: Continued Confusion in Eighth Amendment Proportionality Review after* Ewing v. California, 27 HARV. J.L. & PUB. POL'Y 399, 399 (2003) (criticizing *Ewing* for "neglecting to provide lower courts with any coherent guidelines" to employ in reviewing a sentence).

212. "Outside the California three strikes context, Ewing's recidivist sentence is virtually unique in its harshness for his offense of conviction, and by a considerable degree." *Ewing*, 538 U.S. at 47 (Breyer, J., dissenting).

the state of California concerning the appropriate amount of punishment to impose. If reasons for punishment are morally sufficient grounds for distinguishing among persons, and if they fully account for the considerations contributing to a punishment decision, then the Eighth Amendment affords no reason to question that punishment decision. The line between the morality of drawing a distinction, and the morality of the amount of punishment that is made to turn on the distinction, is obviously fine and may sometimes seem merely formal. But it is the line that demarcates the Eighth Amendment's scope. The amount of punishment that is made to turn on a distinction may support an inference that improper motives underlie the distinction and thus may point to a violation of the Eighth Amendment. But if the reasons for drawing a distinction are wholly blameless, then the Eighth Amendment is not violated.

The capital sentence for murder imposed on the mentally retarded offender Atkins faithfully applied a capital sentencing regime that did not facially discriminate against mentally retarded persons, and in respect of which there was no evidence of discriminatory design,[213] nor of systematically discriminatory application.[214] Atkins's sentence did not violate the Eighth Amendment's no-discrimination principle. His claim that mental retardation rendered him less culpable than others subjected to capital punishment was a claim that the State of Virginia had failed to discriminate in a way that it should have done; that is, it was a claim of excessive punishment. That punishment could not be called unusual even using the Court's inapposite inter-jurisdictional inquiry. The Court in *Atkins* held capital punishment of mentally retarded offenders to violate the Eighth Amendment even though such punishment was permitted under the laws of twenty states.[215] Justice Stevens' conclusion for the majority that "a national consensus has developed against" such punishment was premature,[216] even if a plausible prediction of how the laws of the states were likely to change through democratic processes.

In January 2004, the Court agreed to reconsider the 1989 decision in which it upheld state laws that allow capital punishment to be imposed for crimes committed when under eighteen years of age.[217]

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213. *Cf.* Ho Ah Kow v. Nunan, 12 F.Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6,546) (Field, J.) (rejecting an ordinance for its discriminatory motive).

214. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

215. *See* Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting).

216. *Id.* at 316.

217. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, Roper v. Simmons, 124 S.Ct. 1171 (Jan. 26, 2004) (No. 03-633).

The Court heard oral arguments in October 2004. Members of the Court in *Stanford v. Kentucky* acknowledged only "vicious methods" and "excessiveness" visions of the Cruel and Unusual Punishments Clause.[218] The "nondiscrimination" vision of the Clause belongs at the center of the Justices' analysis as they reconsider *Stanford*'s reasoning.

Constitutional meaning is not a creature of linguistic happenstance. Disengaged from history and context, the words "nor cruel and unusual punishments inflicted" may be read to condemn any of three things. First, the words may condemn vicious methods of punishment that have not been used before or have fallen into disuse. Second, the words may condemn punishments that appear excessive when compared with what other jurisdictions impose for like offenses. Third, the words may condemn punishments that are invidiously discriminatory. In the English language, the words "nor cruel and unusual punishments inflicted" are susceptible of all three constructions. But that is hardly sufficient warrant for an interpreter of the United States Constitution to say "We'll have 'em all!" The right interpretation of the Constitution is a creature of context and history. The context in which the phrase appears is a provision that also condemns excessive bail and excessive fines. And history reveals that the provision's combination of condemnations was designed and understood to prevent invidiously discriminatory punishment. The Eighth Amendment is not a chameleon, and its true complexion is much clearer than the Supreme Court has hitherto recognized.

218. 492 U.S. 361, 368 (1989).