# The Original Meaning of "Cruel"

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*This Article demonstrates that the word "cruel" in the Cruel and Unusual Punishments Clause means "unjustly harsh," not "motivated by cruel intent." The word refers to the effect of the punishment, not the intent of the punisher. In prior articles, I have shown that the word "unusual" means "contrary to long usage," and thus a punishment is cruel and unusual if its effects are unjustly harsh in light of longstanding prior practice.*

*This Article solves several important problems plaguing the Supreme Court's Eighth Amendment jusriprudence. First, it clarifies the Eighth Amendment's intent requirement. To violate the Cruel and Unusual Punishments Clause, some government official must possess intent to punish but not necessarily intent to punish cruelly. Second, it demonstrates how to determine whether a given punishment is so harsh that it violates the Eighth Amendment. The question is not whether a punishment is unjustly harsh in the abstract but whether it is unjustly harsh in comparison to the traditional punishment practices it has replaced. Third, it shows how to sort between those unintended effects of punishment that may properly be considered part of the punishment and those that may not. If a given punishment significantly heightens the risk of severe, unjustified harm beyond the baseline risk established by longstanding prior practice, it is cruel and unusual. Finally, this Article establishes that the core purpose of the Cruel and Unusual Punishments Clause is to prevent unjust suffering, not the coarsening of public sensibilities. Historically, governmental efforts to protect public sensibilities by making punishment less*

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*transparent have increased the risk that the offender will experience undetected cruel suffering. When the government undertakes such efforts, it should bear the burden to show that they do not significantly increase this risk.*

*The original meaning of the Cruel and Unusual Punishments Clause calls into question the constitutionality of several current punishment practices, including lengthy prison sentences for certain offenses, long-term solitary confinement, the three-drug lethal injection protocol, and certain prison conditions, to name a few.*

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## INTRODUCTION

In one sense, punishment is less cruel today than it was in the eighteenth century. We no longer take public delight in the suffering of criminal offenders.[1] Crowds no longer gather to watch executions, floggings, castigation, or the pillory.[2] The process of criminal punishment has become less openly condemnatory and more bureaucratic, scientistic, and private.[3]

But, in another sense, punishment may be crueler today than it was in the eighteenth century. Prison sentences are often longer,[4] executions are more complicated and possibly easier to botch,[5] and some offenders are subjected to decades of solitary confinement. In short, both capital and noncapital offenders may be suffering more pain, although this is difficult to determine because the

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1. *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 34 (Alan Sheridan trans., Pantheon Books 1977); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 75 (1993) ("In the nineteenth century, corrections went private. The walled-off penitentiary replaced the pillory and the whipping post; and most states abolished the public festival of hanging."); DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 84–90 (2010).

2. *See* FOUCAULT, *supra* note 1; FRIEDMAN, *supra* note 1; GARLAND, *supra* note 1; *see also* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 24 (2002).

3. *See* FOUCAULT, *supra* note 1; FRIEDMAN, *supra* note 1; GARLAND, *supra* note 1; BANNER, *supra* note 2; *see also* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering Of Death Over The Century*, 35 WM. & MARY L. REV. 551, 676–77 (1994).

4. *See, e.g.*, FRIEDMAN, *supra* note 1, at 411 (describing the movement to create tough mandatory minimum sentences, starting in the 1950s); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 22 (2011).

5. *See, e.g.*, GARLAND, *supra* note 1, at 271; AUSTIN SARAT ET AL., GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 177 (2014) (arguing that lethal injection, the currently dominant mode of capital punishment, is botched at more than twice the rate of traditional punishments); Markus Dirk Dubber, *The Pain of Punishment*, 44 BUFF. L. REV. 545, 565 (1996).

pain they suffer usually occurs out of the public eye.[6] The focus of contemporary punishment seems less on what offenders are due and more on what will neutralize the threat they pose[7] without provoking public outcry.[8]

In short, when it comes to the cruelty of punishment, we live in ambiguous times. If "cruel" refers to the punisher's intent—delight in, or conscious indifference to, the pain of others—our punishment system is probably not crueler than the punishment systems of the past. But, if "cruel" refers to the effect of the punishment, not the intent that motivates it, we may not compare as favorably to the past as we like to think. Indeed, several prominent modern punishment practices, including extraordinarily long prison sentences for certain crimes, long-term solitary confinement for certain offenders, the three-drug lethal injection protocol, and certain types of prison conditions, may be unconstitutional.

What sense of the word "cruel" applies to the Cruel and Unusual Punishments Clause? Does the Eighth Amendment prohibit all punishments whose effects are cruel or only those in which the punisher exhibits cruel intent? The Supreme Court has not explicitly decided this question, but in recent decades it has leaned toward defining "cruel" in terms of the punisher's attitude toward inflicting pain not simply as a description of the pain itself.[9]

The justices who advocate the cruel-intent reading of "cruel" advance four main reasons for this approach, one of which is textual/historical, two of which are instrumental, and one of which is normative.

The textual/historical argument has primarily been advanced by Justices Thomas and Scalia. Looking at eighteenth-century English and American punishment practices, founding era dictionaries, constitutional ratification debates, early legal commentators, and several Supreme Court precedents from the late nineteenth and early twentieth centuries, these justices argue that the word "cruel" in the Eighth Amendment refers only to those punishment methods that were "deliberately" or "purposely" designed to inflict an unjust degree of pain.[10] A plurality of the Supreme Court currently appears sympa-

6. *See, e.g.*, BANNER, *supra* note 2, at 155; FOUCAULT, *supra* note 1; FRIEDMAN, *supra* note 1; Denno, *supra* note 3, at 680.

7. *See, e.g.*, Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 9 (2003).

8. *See generally* JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA (1997); LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865 (1989); PIETER SPIERENBURG, THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION: FROM A PREINDUSTRIAL METROPOLIS TO THE EUROPEAN EXPERIENCE (1984); Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461 (1995).

9. *See infra* Section I.B.

10. *See infra* Section I.B; *see also* Baze v. Rees, 553 U.S. 35, 94 (2008) (Thomas, J., concurring in the judgment) ("[I]n my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . ."); *id.* at 96 (explaining that the "defining characteristic" of historical punishments that are now considered paradigms of cruelty "was that they were purposely designed to inflict pain and suffering beyond that necessary to cause death"); *id.* at 97 ("Embellishments upon the death penalty designed to inflict pain for pain's sake also would have fallen comfortably

thetic to this view.[11]

Justices have also advanced two instrumental rationales for the cruel-intent reading of "cruel." First, they argue that the Supreme Court lacks institutional competence to determine whether a punishment's effects are sufficiently harsh to be considered cruel. By requiring litigants to show that some responsible public official exhibited cruel intent, they argue, the Court can forestall what would otherwise be endless litigation as to whether a given punishment is necessary and whether less harsh alternative methods are available.[12] Second, the Court has used the cruel-intent reading as a means of sorting between unintended harms that can fairly be attributed to an offender's punishment and those that cannot.[13] Punishment sometimes causes harms that were not intended by the government—a botched execution or a rape by a fellow prisoner, for example. Under what circumstances can such harms fairly be called violations of the Eighth Amendment? The cruel-intent reading of "cruel" purportedly solves this problem by holding that only those harms caused by cruel intent—defined as delight in, or conscious indifference to, the suffering of the offender—can be considered part of the offender's punishment.

Finally, the Supreme Court has recently advanced an implicit normative argument for the cruel-intent reading of "cruel."[14] Punishers who delight in, or are indifferent to, the pain of others exhibit a morally unattractive attitude. Cruel intent is morally unattractive, not simply because it often leads the punisher to inflict excessive suffering, but also because it identifies the punisher as a bad person. The more widespread this attitude becomes in society, the more society itself may seem coarse, crude, and morally unattractive. If the core purpose of the Cruel and Unusual Punishments Clause is to reduce or eliminate this attitude, both among punishers and in society as a whole, then governmental efforts to make punishment more impersonal and less transparent may be positively desirable as a constitutional matter—despite the fact that such efforts often increase the risk that the offender will suffer an unjust degree of pain. In *Baze v. Rees*, the Supreme Court endorsed this tradeoff in the context of lethal injection.[15]

This Article demonstrates that the original meaning of the word "cruel" in the Eighth Amendment is "unjustly harsh," not "delighting in, or indifferent to, the pain of others." For ease of reference, I will refer to these alternatives as the

within the ordinary meaning of the word 'cruel.'"); *id.* at 102 ("The evil the Eighth Amendment targets is intentional infliction of gratuitous pain, and that is the standard our method-of-execution cases have explicitly or implicitly invoked.").

11. *See Baze*, 553 U.S. at 35 (plurality opinion). Prior to Justice Scalia's death, five members of the court appeared to embrace the "cruel intent" reading of cruel. *Id.*

12. *See infra* Section I.B.2.

13. *See infra* Section I.B.3.

14. *See infra* Section I.C.2.

15. 553 U.S. 35, 57–58 (2008); *see also infra* Section I.C.2.

"cruel-effect reading" of cruel and the "cruel-intent reading" of "cruel."[16] This Article sets forth evidence as to what a reasonably well-educated reader at the time the Eighth Amendment was adopted would have understood the word "cruel" to mean in this context and as to how courts and attorneys would have interpreted the term using the methods of constitutional interpretation prevailing at that time.[17] Because the phrase "cruel and unusual punishments" would have been recognized as a legal term of art by both the general public and by lawyers and judges, these methods are unlikely to lead to conflicting results. In fact, the evidence displays a remarkable consistency in interpretation of this term across a range of readers and time periods.[18]

This Article also shows how a proper understanding of the word "cruel," read in conjunction with the word "unusual," resolves the instrumental concerns that have pushed the Supreme Court toward a cruel-intent reading of the term.[19] In

16. Defining cruel as either "unjustly harsh" or "possessing a mental state concerning the pain of others" does not fully capture the range of meanings associated with this term, partly because cruel is what the philosopher Bernard Williams calls a "thick ethical concept," containing both descriptive and normative content. *See* BERNARD WILLAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 140 (1985). The implications of this fact are discussed *infra* Parts I, II.

17. Thus, this article remains agnostic as to whether the original meaning of the Constitution is best conceptualized as the original semantic content of the document as enriched by the relevant context or as the original semantic content as determined through original methods of legal interpretation. *Compare* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 480–81 (2013), *with* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 139 (2013). Because the Constitution uses language that would have been both comprehensible to an average reader and instantly recognizable (in context) as part of a legal document subject to interpretation by judges and other government officials, it seems likely that the difference between these two conceptual approaches will rarely lead to conflicting interpretations of the constitutional text. This Article does not make any argument concerning the "original intent of the Framers." Although some scholars still focus on "original intent," it is no longer the dominant approach to original meaning because it is fraught with conceptual and practical difficulties. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 976 (2004); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 708–12 (2009). In a prior article, I argued for a thin conception of original intent called "voter's meaning," which focuses on the ratifiers' and adopters' consent to the fact that the words of the Constitution would be interpreted according to their public meaning. *See* John Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437, 441–42 (2013) [hereinafter Stinneford, *Illusory Eighth*]. In a presidential election, any given voter may have a variety of motivations and intentions that lead her to vote for a given candidate, but the only aspect of her intent that matters is her understanding that, if a sufficient number of people cast the same vote, that candidate will become President. *Id.* at 460–61. The same principle applies when lawmakers vote for a Constitution, a constitutional amendment, or any other law. *Id.*

18. *See infra* Part II.

19. The instrumental and normative benefits of interpreting "cruel" in accordance with its original meaning are not strictly relevant from the perspective of originalism itself, which holds that any proper interpretation of the Constitution must be constrained by the original meaning of the text, even if it leads to results we may not like. *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349 (2015) (arguing that "there is a surprisingly strong case that our current constitutional law is originalism" and that therefore judges and other government officials are oath-bound to interpret the Constitution and act consistently with an "inclusive" form of originalism); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 818 (2015) ("Best understood . . . originalism is . . . a theory of our law: a particular way to understand where our law

prior articles, I have shown that the word "unusual" means "contrary to long usage" and that the Cruel and Unusual Punishments Clause was designed to prohibit cruel innovation in punishment.[20] A punishment is "cruel and unusual" if it is cruel in light of longstanding punishment practice.[21]

The cruel-effect reading of "cruel," in conjunction with the word "unusual," answers the concerns of current Court members about the Court's competence to determine whether a punishment's effects are unduly harsh. When a given punishment is challenged as cruel and unusual, the question is not whether it inflicts pain that is unduly harsh as an abstract and absolute matter, but rather whether it inflicts pain that is unduly harsh in comparison to the traditional punishments it has replaced. The question would not be whether lethal injection, for example, is unduly painful, but whether it is unduly painful in comparison to traditional execution methods such as hanging or the firing squad. This standard

comes from, what it requires, and how it can be changed."); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (arguing that one of the two core ideas of originalism is the "Constraint Principle," which holds that "the original meaning of the constitutional text should constrain constitutional practice"); *cf.* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016) (examining the significance of oath-taking for constitutional interpretation).

But several nonoriginalist approaches to constitutional interpretation, such as Philip Bobbitt's "multi-modal" approach and the implementation rules theory advanced most prominently by Richard Fallon and Mitchell Berman, consider both original meaning and instrumental and normative concerns in deciding how to interpret the Constitution. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). Moreover, those originalists who allow for constitutional construction do concern themselves with the instrumental and normative implications of constitutional rulings, although such concerns are only relevant to the question of how to implement constitutional meaning, not to the question of how to determine meaning in the first place. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 472 (2013) ("[C]onstruction is essentially driven by normative concerns."). Therefore, it is important to spend some time and effort laying out the instrumental and normative implications of my argument as to the original meaning of "cruel," regardless of which theory of constitutional interpretation one espouses.

20. *See* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 536 (2014) [hereinafter Stinneford, *Death, Desuetude*]; John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 901 (2011) [hereinafter Stinneford, *Rethinking Proportionality*]; John F. Stinneford, *The Original Meaning of "Unusual": The Eight Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) [hereinafter Stinneford, *Original Meaning*].

21. The Cruel and Unusual Punishments Clause's focus on longstanding prior practice provides several important instrumental benefits beyond those described in this Article. For example, as I have argued in a previous article, this focus provides a concrete reference point for measuring proportionality in punishment and thus makes it possible for courts to provide much stronger review of prison sentences than they do under current doctrine. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 975–76. Furthermore, some of the Court's recent cases limiting the application of the death penalty would rest on a stronger foundation if the Court compared current practices to longstanding common law practices. *See* Michael Clemente, Note, *A Reassessment of Common Law Protections for "Idiots*," 124 YALE L.J. 2746, 2797–98 (2015) (arguing that longstanding common law practices in effect at the time of the Eighth Amendment's adoption would have prohibited the execution of many people who are on death row today).

is sufficiently determinate to fall within the competence of the judiciary.[22]

This reading also suggests a more reliable means of determining which effects of punishment may properly be considered part of the punishment for Eighth Amendment purposes and which may not. Eighteenth- and nineteenth-century courts held that new punishment practices that violated longstanding common law norms designed to reduce the risk of undeserved punishment were cruel and unusual, even though there was no showing that this increased risk was intended—or even foreseen—by the state.[23] This implies that the best way to sort between punishment-related harms that can fairly be called part of the punishment and those that cannot is to focus on the likelihood that the punishment will cause severe, unjustified harm rather than the punisher's intent to inflict such harm.[24] For example, if the government adopts a new method of execution that significantly increases the risk of extreme suffering beyond the risk created by traditional methods, that method may fairly be called a cruel and unusual punishment—even if no government official actually foresaw the risk. Similarly, if the government adopts new methods of housing prisoners that significantly increase the risk of injury or death in comparison to longstanding prior methods, these new methods are cruel and unusual punishments.

Finally, this reading of the Cruel and Unusual Punishments Clause would refocus the Supreme Court on the proper normative inquiry, which is not whether a given punishment coarsens public sensibilities, but whether it imposes excessive suffering on offenders.[25] As a constitutional matter, transparency in criminal punishment is a goal to which we should aspire, not a sign of cruelty that should be avoided. The question of how much punishment criminal offenders should receive is one that can only be legitimately decided by the people, through their representatives and within the limits imposed by the Constitution. If the people cannot see what happens to those who are thrown into the criminal justice system, they cannot be expected to restrain its tendency toward excess.[26] Finding ways to increase transparency without coarsening public sentiment is not an easy thing to do—but at least we should reject the idea that it is acceptable for the government to take actions that significantly increase the risk of excessive suffering because these actions also shield the public from ugly truths about the criminal justice system. When the government undertakes actions designed to reduce the transparency of punishment, the

22. The argument presented in this paragraph is further discussed *infra* Section III.A.

23. *See infra* Section II.D.3.

24. *See infra* Section III.B; *see also* E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 191–94 (2013) (arguing that under expressive retributivism, foreseeable harms resulting from incarceration should be considered part of the punishment).

25. *See infra* Section III.C.

26. *See* BANNER, *supra* note 2, at 155 ("The notion of hiding punishment from public view would have seemed vaguely tyrannical in the late eighteenth century . . . .").

burden should be on the government to show that such actions do not significantly increase the risk of undetected suffering.

Part I of this Article shows how and why the Supreme Court tends to treat the ambiguous word "cruel" in the Cruel and Unusual Punishments Clause as though it referred to the attitude of the punisher, not the cruel effect of the punishment. Part II shows that "cruel" originally referred to the effect of the punishment, not the intent of the punisher. Part III shows how this reading of the word "cruel," in conjunction with a proper understanding of the word "unusual," answers the Court's instrumental and normative concerns and ameliorates the weaknesses in the Court's current doctrine.

## I. CURRENT DOCTRINE: THE CRUEL-INTENT READING OF "CRUEL"

### A. AMBIGUITY IN THE WORD "CRUEL"

We all know what the word "cruel" means—or at least think we do. It is ubiquitous in everyday speech and popular culture. The Internet Movie Database lists some 200 movies and television shows with the word "cruel" in the title.[27] Elvis Presley begs us not to be cruel,[28] while artists ranging from T.S. Eliot[29] to Bananarama[30] debate which time of the year is cruelest. The word's meaning seems obvious: sadistic, hard-hearted, unempathetic. But on closer inspection, the word is quite ambiguous. When a person is cruel, he might be hard-hearted or sadistic, but a thing cannot be cruel in the same sense. April is not the cruelest month, according to Eliot, because it derives the most satisfaction from causing pain, but simply because it causes the most pain. Although "cruel" might refer to a person's attitude toward pain, it might simply refer to the effect of the pain itself.[31]

This ambiguity is deepened by the fact that "cruel" is what the philosopher Bernard Williams calls a "thick ethical concept."[32] A thick ethical concept is one that expresses "a union of fact and value."[33] It both describes a fact in the world and evaluates it, providing "reasons for action" concerning that fact.[34] As used in the Eighth Amendment, the term "cruel" appears both to describe a factual condition relating to punishment and to evaluate that condition as

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27. *See* Results for "cruel," IMDB, http://www.imdb.com/find?q=Cruel&s=tt&ref_=fn_tt_pop [https://perma.cc/ES4G-7NWW].

28. ELVIS PRESLEY, DON'T BE CRUEL (RCA Records 1956).

29. T.S. ELIOT, *The Waste Land*, *in* SELECTED POEMS 50, 51 (2002) ("April is the cruellest month, breeding / Lilacs out of the dead land, mixing / Memory and desire, stirring / Dull roots with spring rain.").

30. BANANARAMA, *Cruel Summer*, *on* BANANARAMA (London Records 1983).

31. Meghan Ryan has argued that the word "cruel" should be interpreted to mean "either exceptionally brutal or inflicted for a purpose other than punishment." Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 124 (2010).

32. WILLIAMS, *supra* note 16.

33. *Id.* at 129.

34. *Id.* at 129–30.

something to be avoided.[35] To describe a punishment as cruel is to provide a reason it should not be inflicted.[36]

If we want to know what the word "cruel" means in the context of the Eighth Amendment, then, we must identify what kinds of fact the term describes and what kinds of reason it provides for avoiding such facts. The first step is to determine the term's descriptive content because this shapes its normative content. The main descriptive question is whether "cruel" refers to the cruel effect of the punishment or to the cruel intent of the punisher. The second step is to determine the term's normative content. If "cruel" describes a punishment's effect, we must ask why the Constitution forbids such cruel effect. If "cruel" describes the punisher's intent, we must ask why the Constitution prohibits punishments inflicted with such intent.

Determining the meaning of "cruel" is made more difficult still because, in common usage, the term sometimes connotes all of the descriptive and normative possibilities described above. If I accuse a man of committing a "cruel act," for example, my words may simultaneously describe and condemn both the cruel effect of the act and the man's attitude toward the cruel effect. It is possible that the word "cruel" in the Cruel and Unusual Punishments Clause was meant to convey a complex set of meanings like this.

But it is important to remember that we are not searching for all the possible semantic meanings of the word "cruel." We are searching for its legal meaning in the context of the Cruel and Unusual Punishments Clause. Determining the legal meaning of a term is a more specific task than identifying its possible connotations in general usage. For example, consider the Enron scandal. Corporate officers and executives designed an elaborate fraud scheme that destroyed the company and wiped out the entire retirement savings of thousands of employees, some of whom arguably died early as a result.[37] If I were to say "What those Enron guys did was murder," my statement might be a moral claim, a legal claim, or both. The moral claim would be relatively vague. My words would connote moral condemnation and the general sense that the Enron executives were to blame for the harm that befell their employees, but not much more than that. The legal claim, on the other hand, would be relatively determinate. It would be an assertion that the Enron executives committed an act that both actually and proximately caused the deaths of their employees and did so with malice aforethought.[38] As this example shows, determining the legal

35. In this Article, I will refer to the capacity of the word "cruel" to describe a factual condition as its "descriptive content" and its capacity to evaluate a factual condition as its "normative content."

36. U.S. CONST. amend. VIII.

37. *See, e.g.*, Newsweek Staff, *Who Killed Enron*, NEWSWEEK (Jan. 20, 2002, 7:00 PM), http://www.newsweek.com/who-killed-enron-143545 [https://perma.cc/G7RG-7AGY]; Richard A. Oppel, Jr., *Employees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. TIMES (Nov. 22, 2001), http://www.nytimes.com/2001/11/22/business/employees-retirement-plan-is-a-victim-as-enron-tumbles.html [https://perma.cc/6CDA-4W39].

38. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.02(A) (7th ed. 2015).

meaning of a prohibitory term like "murder"—or "cruel"—requires us to identify the minimum factual criteria necessary to establish a legal violation. The focus of this Article is to identify the original, publicly understood criteria for determining that a punishment violates the Cruel and Unusual Punishments Clause.

Sections I.B and I.C describe the Supreme Court's recent efforts to resolve this issue. Part II demonstrates the original legal meaning of the word "cruel," which is quite different than the meaning the Supreme Court has ascribed to it. Part III sets forth the implications of the original meaning of "cruel" for current Eighth Amendment jurisprudence.

### B. DESCRIPTIVE CONTENT—CRUEL EFFECT V. CRUEL INTENT

#### 1. Text, History, and Cruel Intent: The Lethal Injection Cases Part 1

The question of whether "cruel" refers to the effect of the punishment or the intent of the punisher asserted itself in two recent cases challenging the constitutionality of lethal injection protocols.[39] In these cases, two justices took the position that a method of execution can only be considered cruel if it is "purposely designed to inflict pain and suffering beyond that necessary to cause death."[40] A majority of the Court expressed sympathy with this view but did not explicitly adopt it as a holding.[41]

The lethal injection protocol used in most states was first invented in the 1970s.[42] It involves three drugs: a sedative that is supposed to produce unconsciousness; a paralyzing agent that deprives the offender of the ability to breathe (or move at all); and potassium chloride, which stops the heart.[43]

Two of the three drugs involved in this protocol pose a risk of excruciating pain prior to death. The paralyzing agent makes it impossible for an offender to breathe[44] but has no effect on the offender's consciousness.[45] Its use creates the sensation of being asphyxiated or drowned.[46] Potassium chloride, which is supposed to stop the heart, creates an extreme burning sensation that has been compared to having "liquid fire" poured into one's veins.[47] Together, the

39. *See* Glossip v. Gross, 135 S. Ct. 2726 (2015); Baze v. Rees, 553 U.S. 35 (2008) (plurality opinion).

40. *Baze*, 553 U.S. at 96 (Thomas, J., concurring in the judgment); *see also Glossip*, 135 S. Ct. at 2750 (Thomas, J., concurring).

41. *Baze*, 553 U.S. at 48–51 (plurality opinion). With the death of Justice Scalia, that majority is now a plurality.

42. *Id.* at 42.

43. *Id.* at 44.

44. *Id.*

45. *Id.* at 113–14 (Ginsburg, J., dissenting).

46. *Id.*

47. Brief for Petitioner at 2, Glossip v. Gross, 135 S. Ct. 2726 (2015) (No. 14-7955); *see also Glossip*, 135 S. Ct. at 2781 (Sotomayor, J., dissenting) (describing the use of potassium chloride as "the chemical equivalent of being burned at the stake"); *Baze*, 553 U.S. at 114 (Ginsburg, J., dissenting) ("Potassium chloride causes burning and intense pain as it circulates throughout the body.").

paralyzing agent and the potassium chloride would make the offender feel as though he were being simultaneously drowned and burned to death from the inside—a punishment whose cruelty is comparable to the torturous death imposed on murderers and traitors in eighteenth-century England, which the Supreme Court has described as the paradigm of cruel and unusual punishment.[48]

The risk of extreme pain is supposed to be negated by the use of a sedative that makes the offender unconscious before the other drugs are administered.[49] Offenders should go to sleep painlessly and never wake up. But two challenges in recent years have raised questions about whether this is what really happens in all lethal injection cases.

In *Baze v. Rees*, petitioners argued that Kentucky's lethal injection protocol created a constitutionally unacceptable risk of severe pain and suffering because the barbiturate used to sedate the offender would be ineffective if improperly administered.[50] Unlike traditional modes of punishment such as hanging, lethal injection is a medical procedure, the success of which depends on the medical skill and knowledge of those who administer it.[51] If they use an inadequate dosage of barbiturate, or fail to situate the needle properly in the offender's vein, the barbiturate will not be effective in blocking the pain from the other two drugs.[52] Petitioners argued that officials were inadequately trained in the proper procedures and that there was an unacceptable likelihood that they would make a mistake resulting in severe suffering.[53] Petitioners further argued that the risk of pain could be eliminated if Kentucky stopped using the paralyzing agent and the potassium chloride and instead used a massive overdose of barbiturates to execute offenders.[54] This procedure is universally used for animal euthanasia and could reliably eliminate the risk of pain.[55] Because it was feasible to eliminate the risk of pain caused by the three-drug protocol, petitioners argued, this risk was "unnecessary" and hence unconstitutional.[56]

The Supreme Court rejected this argument, albeit without a majority opinion. Justice Thomas wrote an opinion, joined by Justice Scalia, taking the position that the three-drug protocol could not be cruel because it was not "purposely designed to inflict pain and suffering beyond that necessary to cause death."[57] Justice Thomas's opinion noted that Samuel Johnson's 1755 dictionary contained a definition of "cruel" as "[p]leased with hurting others" and that Noah Webster's 1828 dictionary contained a definition of "cruel" as "[d]isposed to

48. *See* Wilkerson v. Utah, 99 U.S. 130, 136–37 (1878).
49. *See Glossip*, 135 S. Ct. at 2736; *Baze*, 553 U.S. at 44 (plurality opinion).
50. 553 U.S. at 41 (plurality opinion).
51. *Id.* at 54.
52. *Id.* at 54–55.
53. *Id.*
54. *Id.* at 56.
55. *Id.* at 58.
56. *Baze*, 553 U.S. at 46.
57. *Id.* at 96 (Thomas, J., concurring in the judgment).

give pain to others, in body or mind."[58] The opinion also noted that several speakers in the constitutional ratification debates argued that a prohibition of cruel and unusual punishments was needed to "disable Congress from imposing torturous punishments"[59] and that several nineteenth-century legal commentators argued that the prevention of torture was a key purpose of the Clause.[60] Finally, the opinion asserted that several Supreme Court cases from the late nineteenth and early twentieth centuries "emphasiz[ed] that the Eighth Amendment is aimed at methods of execution purposely designed to inflict pain."[61]

Writing for a three-justice plurality in *Baze*, Chief Justice Roberts elected not to decide whether the Cruel and Unusual Punishments Clause requires a showing of a cruel intent in all cases. Instead, he denied the petitioners' claim on the ground that they had failed to show that the lethal injection protocol created a "substantial risk of serious harm," and therefore it could not be considered cruel and unusual.[62] That petitioners' proposed one-drug protocol involved less risk of pain than the state's three-drug protocol was irrelevant because the risk posed by the three-drug protocol was not sufficient to make it constitutionally objectionable.[63]

Although this holding was consistent with a cruel-effect reading of the word "cruel," aspects of the plurality opinion suggested that the plurality agreed with Justice Thomas's cruel-intent reading. For example, like Justice Thomas, the plurality read the historical materials and early precedents to indicate that a punishment could only be cruel if it involved cruel intent.[64] Furthermore, although the plurality recognized that prior cases had permitted a finding of cruelty based on unintended harms, it asserted that the circumstances giving rise to such harms must be sufficiently egregious to "suggest cruelty."[65] In sum, after *Baze*, it appeared that five justices were inclined toward the cruel-intent reading of "cruel."

#### 2. Cruel Intent and Judicial Competence: The Lethal Injection Cases Part 2

Justice Thomas's insistence that the Cruel and Unusual Punishments Clause forbids only those punishments that are motivated by cruelty was driven, at least in part, by instrumental concerns over the competence of the judiciary to determine whether the effects of a punishment are cruel. If a cruel punishment

58. *Id.* at 97.

59. *Id.*

60. *Id.* at 98–99.

61. *Id.* at 99. Part II of this Article will demonstrate that Justice Thomas's reading of the original meaning of "cruel" is incorrect because it ignores relevant evidence and fails to situate the evidence it does present in the proper context.

62. *Baze*, 553 U.S. at 50 (plurality opinion) (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

63. *Id.*

64. *Id.* at 48–51.

65. *Id.* at 51.

is one that imposes unnecessary pain or risk of pain, how can a court reliably draw the line between what is necessary and unnecessary?

As noted above, the petitioners in *Baze* argued that the risk of pain arising from lethal injection was unnecessary, and therefore unconstitutional, because there was a less risky means of execution available: a one-drug lethal injection protocol. Justice Thomas responded that this argument had been repeated over the years concerning a variety of execution methods: first electrocution was supposed to be less painful than hanging, then the gas chamber was supposed to be less painful than electrocution,[66] then lethal injection was supposed to be less painful than all previous methods,[67] and finally petitioners were claiming that a one-drug lethal injection protocol created less risk of pain than a three-drug protocol. Is it really the case that a previously acceptable method of execution becomes unconstitutional the moment a less painful method is devised?[68] And when the question of a punishment's riskiness turns on complicated questions of medical judgment, how competent is a court to decide whether the challenged method is more painful than necessary?[69]

Underlying Justice Thomas's instrumental concern was the suspicion that the true purpose of these arguments was to eliminate the death penalty altogether.[70] This suspicion came to the forefront of the Court's thinking seven years later in *Glossip v. Gross*.[71] Like *Baze*, *Glossip* involved a challenge to a state's three-drug lethal injection protocol.[72] But this time the challenge was not based on the risk that the sedative would be improperly administered. Rather, petitioners argued that, even if properly administered, the sedative might be ineffective in blocking the pain caused by the paralyzing and heart-stopping agents.[73] This concern arose because the State of Oklahoma was no longer using barbiturates to sedate offenders, but a medication called midazolam.[74] Midazolam has no analgesic properties and has not been approved for use as a surgical anesthetic.[75] Because its pharmacological operation is different from that of a barbiturate, some experts are concerned that it may produce a shallow state of

66. *See* BANNER, *supra* note 2, at 198–202 (describing advent of the gas chamber).

67. *Id.* at 297; *see also* GARLAND, *supra* note 1, at 117–18.

68. *Baze*, 553 U.S. at 104 (Thomas, J., concurring in the judgment) ("[T]he notion that the Eighth Amendment permits only one mode of execution, or that it requires an anesthetized death, cannot be squared with the history of the Constitution.").

69. *Id.* at 105 (arguing that "comparative-risk standards . . . require courts to resolve medical and scientific controversies that are largely beyond judicial ken").

70. *Id.* at 104–05 ("And it is obvious that, for some who oppose capital punishment on policy grounds, the only acceptable end point of the evolution is for this Court, in an exercise of raw judicial power unsupported by the text or history of the Constitution, or even by a contemporary moral consensus, to strike down the death penalty as cruel and unusual in all circumstances. In the meantime, though, the next best option for those seeking to abolish the death penalty is to embroil the States in never-ending litigation concerning the adequacy of their execution procedures.").

71. 135 S. Ct. 2726 (2015).

72. *Id.* at 2731.

73. *Id.*

74. *Id.*

75. *Id.* at 2741–42; *see also id.* at 2783 (Sotomayor, J., dissenting).

unconsciousness and that the offender may be jolted awake when given the other two, highly painful drugs.[76] As in *Baze*, the Supreme Court in *Glossip* upheld the constitutionality of the lethal injection protocol. More specifically, the Court held that the petitioners had failed to meet their burden of showing that the use of midazolam was "'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'"[77]

Unlike Justice Roberts's and Justice Thomas's opinions in *Baze*, the *Glossip* majority did not focus on the text or history of the Cruel and Unusual Punishments Clause. Rather, it focused on the reason Oklahoma switched from barbiturates to midazolam.[78] During the seven-year gap between *Baze* and *Glossip*, the international death penalty abolition movement put substantial pressure on barbiturate manufacturers to stop selling the drugs to states for use in executions.[79] The movement was so successful that many states, including Oklahoma, could no longer secure a reliable supply of barbiturates and had to cast around for replacement sedatives—settling in this case on midazolam.[80]

The unavailability of barbiturates placed states like Oklahoma in a bind. If lethal injection involving barbiturates set the standard for "unnecessary pain" under the Cruel and Unusual Punishments Clause, so that any method causing greater pain or risk of pain is unconstitutional, the abolition movement could potentially make it impossible to perform any executions constitutionally.[81] Midazolam might not be as effective as a barbiturate in blocking pain, but then again, what is? Without barbiturates, there might not be any more executions at all.

Responding to this concern, the *Glossip* Court placed an unprecedented burden on petitioners seeking to strike down a method of execution under the Cruel and Unusual Punishments Clause. The Court asserted that "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'"[82] Therefore, it held,

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76. *Glossip*, 135 S. Ct. at 2740.

77. *Id.* at 2737 (emphasis omitted) (quoting Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion)). The "sure or very likely" standard for determining whether the risk of unnecessary pain rises to the level of cruelty is inconsistent with historical practice concerning this issue. *See infra* Section III.B.

78. *Id.* at 2733–34.

79. *Id.*; *see also* Deborah W. Denno, *Lethal Injection Chaos Post-*Baze, 102 GEO. L.J. 1331, 1360–71 (2014) (describing the drug shortages that occurred after *Baze* and the risks associated with states' reliance on compounding pharmacies to fill the gap); James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1236 (2015) (arguing that the shortage of barbiturates for lethal injection is largely the result of decisions by European governments to make the drugs unavailable in order to inhibit imposition of the death penalty).

80. *Glossip*, 135 S. Ct. at 2734.

81. *Cf. id.* at 2733–35.

82. *Id.* at 2732–33 (alteration in original) (quoting *Baze*, 553 U.S. at 47). This assertion cannot be correct. The constitutionality of the death penalty has previously been upheld because relatively painless methods of execution were available. *See, e.g.*, In re Kemmler, 136 U.S. 436, 447 (1890) (upholding death by electric chair because the available data indicated that it did not cause much pain

petitioners cannot succeed on a claim that a given method of execution is cruel and unusual unless they can identify an alternate procedure that is "known and available" and that reduces the risk of pain to a constitutionally acceptable level.[83] This was a radical holding. It means that even if the state chose to burn offenders alive or have them torn apart by wild beasts, an offender could not successfully challenge the punishment unless he successfully identified or devised an alternative means for his own execution.

Although this holding appears absurd on its face, it is comprehensible in light of the Supreme Court's doubts about its own competence to determine whether the risk of pain truly is unnecessary. If the Court cannot confidently sort this issue out, perhaps the Court feels that it makes sense to force the defendant to do it. This holding also has the benefit, from the Court's perspective, of foreclosing the possibility that the anti-death penalty movement can eliminate the death penalty by making the least painful methods of execution unavailable. In this sense, it performs the same function as Justice Thomas's "cruel intent" standard. As I will discuss in Part III, there is a better way to deal with this concern, one that is consistent with the original meaning of the Cruel and Unusual Punishments Clause and that does not place absurd obstacles in the way of offenders facing the prospect of a cruel and unusual punishment.

### 3. The Problem of Unintended Pain: Cruel Intent as a Sorting Mechanism

The second instrumental concern that has driven the Supreme Court toward the cruel-intent reading of the term "cruel" is the problem of unintended pain caused by punishment. Although this problem first arose for the Supreme Court in some late-nineteenth- and early-twentieth-century "method of execution" cases,[84] the Court did not use a cruel-intent reading of "cruel" to resolve the problem until the 1970s.[85]

In *Estelle v. Gamble*, the respondent was a prisoner who claimed he had received inadequate medical treatment in prison and had suffered various injuries as a consequence.[86] He brought suit under 42 U.S.C. § 1983, arguing that the inadequate medical care constituted cruel and unusual punishment.[87] The Supreme Court acknowledged that prison officials had a longstanding common law duty to provide adequate medical care to prisoners.[88] This duty

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beyond "the mere extinguishment of life"). If relatively painless methods became unavailable, so that death by torture was the only feasible means of executing offenders, the Court's prior Eighth Amendment cases would not support the proposition that death by torture must be constitutional. *See id.* ("Punishments are cruel when they involve torture or a lingering death . . . ."); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) ("[I]t is safe to affirm that punishments of torture . . . are forbidden by [the Eighth] amendment to the Constitution.").

83. *Glossip*, 135 S. Ct. at 2738.

84. These cases are discussed *infra* Section II.E.

85. *See* Estelle v. Gamble, 429 U.S. 97, 102–03 (1976).

86. *Id.* at 99–101.

87. *Id.* at 101–02.

88. *Id.* at 103–04.

arose because the government has deprived prisoners of their liberty and made it impossible for them to take care of their own medical needs.[89] The Court further held that the violation of this duty could constitute cruel and unusual punishment, but only if the violation involved "unnecessary and wanton infliction of pain."[90] In order to be "wanton," the violation had to involve both cruel effect and cruel intent.[91] The violation had to deny care for the prisoner's "serious medical needs," and the prison official had to display "deliberate indifference" to such needs.[92]

Fifteen years later, in *Wilson v. Seiter*, the Supreme Court extended the holding of *Estelle v. Gamble* to cover all claims that prison conditions are cruel and unusual.[93] But, in so doing, the Court shifted the question from whether the unintended pain caused by punishment could appropriately be called cruel to whether such pain could appropriately be called punishment.[94] More specifically, the Court held that "if the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge,"[95] then it will not be considered punishment unless a prison official acted with a "wanton" state of mind.[96] What constitutes "wantonness" depends on the situation.[97] If an officer uses force against a prisoner in response to a prison riot, for example, the officer is only wanton if he acts "'maliciously and sadistically for the very purpose of causing harm.'"[98] If an officer fails to rectify dangerous prison conditions, on the other hand, he is wanton if he exhibits "deliberate indifference" to the well-being of inmates.[99]

Subsequent cases have made clear that "deliberate indifference" means recklessness. For example, in *Farmer v. Brennan*, the petitioner was a preoperative transsexual who had undergone estrogen treatment, received breast implants, and projected "feminine characteristics."[100] Prison officials placed Farmer in the general male prison population, where Farmer was allegedly subjected to beatings and rape.[101] Farmer brought a *Bivens* suit, arguing that placement in the general prison population constituted cruel and unusual punishment given the high degree of likelihood that a transsexual who exhibits feminine characteristics will be beaten and raped under these circumstances.[102] The Supreme Court held that this claim could be sustained only if the petitioner could show

89. *Id.*
90. *Id.* at 104.
91. *See Gamble*, 429 U.S. at 104.
92. *Id.*
93. Wilson v. Seiter, 501 U.S. 294, 303 (1991).
94. *Id.* at 300.
95. *Id.*
96. *Id.* at 302.
97. *Id.*
98. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 320–21 (1986)).
99. *Seiter*, 501 U.S. at 302 (quoting Estelle v. Gamble, 429 U.S. 97, 302 (1976)).
100. 511 U.S. 825, 829 (1994).
101. *Id.* at 830.
102. *Id.* at 830–31.

that a prison official was actually aware of the risks he or she was imposing on the petitioner and chose to go forward anyway:

> We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[103]

If a responsible prison official is not actually aware that he or she is subjecting an inmate to grave risk of harm, he or she lacks cruel intent—regardless of how foreseeable it is that his or her actions will have cruel consequences.[104]

In sum, since the 1970s the Supreme Court has used the cruel-intent reading of "cruel" to sort between those unintended harms caused by punishment that may fairly be considered violations of the Cruel and Unusual Punishments Clause and those that may not. Section III.B, below, demonstrates that likelihood of severe, unjustified harm is a more workable sorting tool than intent and is far more consistent with the original meaning of the Cruel and Unusual Punishments Clause.

### C. NORMATIVE CONTENT

When we describe a punishment as cruel, what reason or reasons for action does this description imply? This issue is important because it affects which punishments will be judged cruel and which will not.[105] A retributivist would likely give different reasons for prohibiting cruel punishments than a utilitarian, for example, and would thus make different judgments about which punishments are cruel and which are not.[106] Similarly, a person primarily concerned about the coarsening effect of cruel punishments on public sensibilities would sometimes make different judgments about what is cruel than a person primarily concerned about the suffering of offenders.[107]

The Supreme Court has made numerous conflicting statements concerning the normative content of the word "cruel," adding to the confusion of the Court's jurisprudence in this area.[108] In some of its recent cases, the Court has come close to emptying the term of normative content altogether.[109] The two Sections below will briefly describe the various "reasons for action" the Court has ascribed to both the cruel-effect and cruel-intent readings of "cruel."

103. *Id.* at 837.
104. *Id.* at 838.
105. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 913–15.
106. *See id.* at 915–16.
107. *See id.*
108. *See infra* Sections I.C.1, I.C.2.
109. *See infra* Sections I.C.1, I.C.2.

1. Cruel Effect and the Justifications for Punishment

All punishment involves the infliction of physical or psychological pain. Therefore, there must be some standard for differentiating between those inflictions of pain that are permissible and those that are not. Current punishment theorists identify four distinct rationales for punishment that might serve as a basis for assessing whether it is justified: retribution, deterrence, incapacitation, and rehabilitation.[110] Retribution asks whether the punishment matches the offender's culpability.[111] Deterrence, incapacitation, and rehabilitation ask whether the pain caused by punishment is less than the societal pain it averts by deterring other potential criminals, segregating the offender from society, or rendering the offender nondangerous through coercive medical and/or educational procedures.[112] With respect to retribution, a punishment is unjustified if it is greater than the offender deserves.[113] With respect to deterrence, incapacitation, and rehabilitation, a punishment is unjustified if its costs to the offender and to society exceed its benefits.[114]

Traditionally, the Supreme Court held that a punishment is cruel for Eighth Amendment purposes if it is unjustified as a retributive matter.[115] In recent years, however, the Court has muddied this analysis by throwing other potential justifications into the mix, including deterrence, incapacitation, rehabilitation,

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110. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005); *see also* Graham v. Florida, 560 U.S. 48, 71 (2010) (citing Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion)).

111. *See* Frase, *supra* note 110, at 73.

112. *See id.* at 76–77.

113. *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 590–97 (2005).

114. *See id.*

115. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality opinion) ("It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))); Solem v. Helm, 463 U.S. 277, 278 (1983) (stating that the severity of the punishment should be compared to the gravity of the offense "made in light of the harm caused or threatened to the victim or society, and the culpability of the offender"); Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion) ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion) (characterizing the death penalty as an "extreme sanction, suitable to the most extreme of crimes"); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that it is unconstitutional to punish a person for being a narcotics addict because addiction is an illness and noting that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime."); Weems v. United States, 217 U.S. 349, 366–67 (1910) ("Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."); O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting) (noting that the state's power to punish is limited by the severity of the crime and that "[t]he State may . . . make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration").

and even mere regulatory justifications.[116] Sometimes the Court uses this confusion to uphold a punishment that is not justifiable in retributive terms. For example, in *Ewing v. California*, the Court upheld a mandatory sentence of twenty-five years to life for a recidivist convicted of shoplifting on the ground that it furthered the state's interest in incapacitation and deterrence.[117] The Court notably failed to consider whether the punishment was justified as a retributive matter. In other cases, the Court uses the confusion regarding the justifications for punishment to strike down punishments that might be justifiable in utilitarian terms. For example, in *Atkins v. Virginia*, the Court declared that it was cruel and unusual to execute the mentally disabled because this punishment exceeded its justification as a retributive or deterrent matter.[118] The Court failed to address Justice Scalia's argument that the punishment might be justified under the state's interest in incapacitation, given the possibility that violent offenders may continue such violence in prison.[119] The Court currently holds that, in most cases, state legislatures have unfettered power to determine for themselves the normative content of the word "cruel." This means that legislatures have the power to decide what purpose or purposes punishment is supposed to serve[120] and whether a given quantum of punishment is justified in light of those purposes.[121] In short, the Supreme Court currently treats the normative content of the cruel-effect reading of "cruel" in a highly inconsistent manner and often treats it as an empty vessel that may be filled by legislatures as they please.

### 2. Cruel Intent and Nontransparent Punishment

The cruel-intent reading of "cruel" presents a separate issue concerning the normative content of the word. What reasons might there be, as a constitutional

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116. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 71 (2010) ("With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification." (citations omitted)); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."); Ewing v. California, 538 U.S. 11, 25 (2003) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation); Enmund v. Florida, 458 U.S. 782, 798 (1982) (holding the death penalty unconstitutional in certain felony murder cases because it does not "measurably contribute[]" to the goals of retribution and deterrence); *Gregg*, 428 U.S. at 183 ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

117. 538 U.S. at 14, 25–27.

118. 536 U.S. 304, 318–20 (2002).

119. *Id.* at 350 (Scalia, J., dissenting).

120. *See, e.g.*, *Ewing*, 538 U.S. at 25 (plurality opinion) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.").

121. *See id.* at 27–28 (providing that questions about the fit between the punishment and the crime are "appropriately directed at the legislature," not the Court); Harmelin v. Michigan, 501 U.S. 957, 1003–04 (1991) (Kennedy, J., concurring) (upholding mandatory life sentence for narcotics offender with no prior record because there was a "rational basis" for the sentence).

matter, to prohibit individuals from experiencing delight in, or conscious indifference to, the suffering of others?[122] This issue shows itself most clearly in conflicts over the transparency of criminal punishment.

The cruel-intent reading of "cruel" provides a rationale for governmental efforts to make punishment less transparent. When this country was founded, most punishments were inflicted in public: executions, flogging, castigation, and the pillory were all public spectacles.[123] These spectacles might be characterized as cruel in both the cruel-intent and the cruel-effect sense of the word. They encouraged people to take pleasure in the pain of others, arguably fostering a cruel intent in both the officials conducting the punishment and the crowd watching it. Such spectacles also arguably intensified the suffering of the offender. An offender subjected to a public punishment may experience more humiliation, and thus a greater quantity of pain, than an offender whose punishment is not exposed to public view.[124] Over the course of American history, both capital and noncapital punishment has been made less public[125] to reduce both the cruel intent of the punishers and spectators and the cruel effect of the pain experienced by the offender.

There has been a cost to this movement of punishment out of the public eye. The public infliction of punishment in the eighteenth and nineteenth centuries gave rise to political movements to abolish the death penalty and reform noncapital punishment.[126] Such movements are far less powerful today,[127] in large part because the public does not see what happens to criminal offenders. As a result, there is more room today for the imposition of cruel punishments without provoking a public outcry.[128]

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122. *See supra* Section I.A.

123. *See, e.g.*, FRIEDMAN, *supra* note 1, at 75–76; FOUCAULT, *supra* note 1; GARLAND, *supra* note 1; Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 397 (1997).

124. *See, e.g.*, STEVEN WILF, LAW'S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA 89 (2010) ("What made the pillory such a potent punishment was not the immobility, but shame and being subject to crowd anger.").

125. *See, e.g.*, GARLAND, *supra* note 1, at 52, 116 (noting that public executions were eliminated in the United States over a century-long period from 1830 to 1937).

126. Punishment reform movements in the eighteenth and nineteenth centuries successfully convinced the vast majority of legislatures to limit the scope of the death penalty to murder and crimes of similar seriousness and to replace punishments like flogging and bodily mutilation with moderate terms of imprisonment. *See, e.g.*, BANNER, *supra* note 2, at 88–111. The movement also led to the total legislative abolition of the death penalty in several states, particularly in the North. *See id.* at 112–43.

127. Although the death penalty abolition movement had some success in state legislatures during the twentieth century, this success was limited and often short-lived. *See id.* at 221–22. After executions were moved behind closed doors, constitutional litigation replaced democratic action as the primary method for challenging the death penalty. *See id.* at 231–66; *see also* HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994, at 5 (1996) (decrying "the weakness . . . of the anti-death penalty movement . . . in this country").

128. Deborah Denno has shown how state officials have sought, in the wake of the post-*Baze* barbiturate shortage, to keep the source and identity of lethal injection drugs secret so as to prevent popular or legal challenges to the procedure. *See* Denno, *supra* note 79, at 1376–77. Similarly, Corinna Barrett Lain has shown how public officials continue to use nontransparent punishment as a method of social control by, for example, falsely denying the occurrence of botched executions in order to forestall

Recall the three-drug lethal injection protocol discussed above.[129] One question that arises from this protocol—indeed, the question that was just under the surface in *Baze*—is why did the state choose to use the potassium chloride and the paralyzing agent given that these drugs create the risk of excruciating pain and that a massive overdose of barbiturates could kill offenders painlessly all by itself? Although the Supreme Court has now held that it is not unconstitutional to impose this risk of pain,[130] it would seem preferable—at least as a policy matter—to avoid this risk if possible.

The reason for the three-drug protocol appears to be primarily aesthetic.[131] If the state simply used barbiturates, it could take a significant amount of time to kill the offender, causing discomfort to the witnesses and possible public outcry.[132] The potassium chloride eliminates this problem by stopping the heart and ensuring a relatively quick death.[133] But the potassium chloride causes the body to writhe and convulse even if the sedatives have successfully rendered the offender unconscious, making witnesses even more uncomfortable and provoking even more public concern.[134] The paralyzing agent suppresses the writhing and convulsions, making the death appear peaceful.[135]

The problem, of course, is that the appearance of peace may be masking a reality of terrible suffering.[136] The paralyzing agent suppresses the offender's ability to physically respond to pain.[137] If the sedatives have not rendered the offender fully unconscious, either because they were improperly administered or because they lack the pharmacological capacity to induce deep unconsciousness, the offender might suffer extreme pain without anyone ever knowing about it.[138] Like the narrator in Edgar Allen Poe's *The Premature Burial*, the offender subjected to the paralyzing agent would be "buried alive"—not in a

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public outcry against the death penalty. *See* Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 836–37 (2015).

129. *See supra* Sections I.B.1, I.B.2.

130. *See* Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015); Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion).

131. *See* GARLAND, *supra* 1, at 52, 271 (noting that the three-drug lethal injection protocol is designed to create a "therapeutic" appearance for executions and that modern modes of execution generally are designed to create a "civilized aesthetic"); SARAT ET AL., *supra* note 5, at 15 ("The experience of execution by its witnesses—their 'suffering'—fuels the search for painless death."); Denno, *supra* note 123, at 374 (noting the contention of some scholars that "legislatures preferred lethal injection because it made the death penalty appear more humane and palatable in light of an increasing public interest in the possibility of televised executions, as well as prior concerns over botched electrocutions and gassings").

132. *See* GARLAND, *supra* note 1, at 271; Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 67–76 (2007) (describing the invention and adoption of the three-drug protocol for lethal injection).

133. *See* GARLAND, *supra* note 1, at 271; Denno, *supra* note 132, at 75 n.151.

134. *See* Denno, *supra* note 132.

135. *See id.* at 55–56.

136. *See id.*

137. *See id.*

138. *See id.*

grave but in his own body, unable to move or communicate his pain to others.[139]

In *Baze v. Rees*, the Supreme Court specifically approved of the aesthetic rationale for the paralyzing agent, asserting that the state "has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress."[140] The Court's mention of the public's possible "misperception" appears to refer to the state's political interest in avoiding unjustified public outcry. This interest might indeed be legitimate—albeit paternalistic and potentially antidemocratic. But as Justice Stevens pointed out in his concurrence in the judgment, this interest is "woefully inadequate" to justify the use of a drug that risks creating the even more destructive misperception that the offender is dying a peaceful death when he is actually suffering terrible pain.[141]

The Supreme Court's use of the word "dignity" here signals that it sees the use of the paralyzing agent as serving more than a mere political interest. The Court has repeatedly said that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[142] Justices Marshall and Brennan famously argued that the death penalty is unconstitutional because it "has as its very basis the total denial of the wrongdoer's dignity and worth."[143] By asserting that the paralyzing agent preserves the dignity of the procedure, the Court seems to be saying that this drug makes lethal injection less cruel.

If the word "cruel" in the Cruel and Unusual Punishments Clause means delight in, or conscious indifference to, the pain of others, this assertion may be correct. By eliminating the appearance that the offender is suffering, the state may lessen the risk that anyone will delight in this suffering. But if the word means unjustly harsh, it is hard to see how this assertion could be true. Remember that the execution already takes place behind closed doors. There is no mob to cheer or jeer when the offender starts writhing in pain. There are only a few witnesses, and one of their functions is to ensure that the offender's death is not unjustly painful.[144] The paralyzing agent strips the witnesses of their capacity to perform this function, a fact that is likely to increase, not decrease, the offender's suffering.

## II. THE ORIGINAL MEANING OF "CRUEL"

The purpose of this Section is to identify the original, publicly understood criteria for determining that a punishment is cruel within the meaning of the Cruel and Unusual Punishments Clause. In the eighteenth century, as today,

139. *See* EDGAR ALLAN POE, *The Premature Burial*, *in* COMPLETE STORIES AND POEMS OF EDGAR ALLAN POE 261, 266 (1966).

140. 553 U.S. 35, 57 (2008) (plurality opinion).

141. *Id.* at 73 (Stevens, J., concurring in the judgment).

142. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

143. Gregg v. Georgia, 428 U.S. 153, 227–31 (1976) (Brennan, J., dissenting); *id.* at 240–41 (Marshall, J., dissenting).

144. *See* GARLAND, *supra* note 1, at 53–54.

both the descriptive and the normative content of the word "cruel" were ambiguous.[145] Sometimes the term described and condemned a person's cruel intent concerning the pain of others, sometimes it described and condemned the pain itself, and sometimes it did both.[146] The question we must ask, however, is which of these possible meanings were considered criteria for determining that a given punishment violated the Cruel and Unusual Punishments Clause. As discussed below, the evidence shows that pain was a significant part of the equation. In virtually every discussion of cruel and unusual punishments, the main question was whether the punishment caused an unjust degree of suffering.[147] Therefore, our inquiry must focus on the cruel-intent requirement. Does the evidence show that eighteenth- and early-nineteenth-century speakers considered the cruel intent of the punisher to be part of the minimum factual criteria necessary to establish that a punishment is cruel and unusual?

The answer is no. The linguistic and historical evidence demonstrates that a punishment is cruel and unusual within the original meaning of the Cruel and Unusual Punishments Clause if its effects are unjustly harsh in light of longstanding prior punishment practice.[148] Research has revealed no instance in the late eighteenth or early nineteenth century in which anyone claimed that the cruel intent of the punisher was part of the criteria for determining whether a punishment was cruel and unusual.[149] Moreover, in one eighteenth-century case decided under the Virginia Declaration of Rights, the court held that a punishment that caused a greater risk of unjust suffering than was permissible at common law was cruel and unusual, even though there was no showing that the jury that imposed the sentence was even aware of this risk.[150] In other words, there is both an absence of evidence that a public official's cruel intent was part of the original legal meaning of the word "cruel" and affirmative evidence that such cruel intent was not part of this meaning.

That the descriptive content of the word "cruel" in the Cruel and Unusual Punishments Clause includes the punishment's cruel effect and not an official's cruel intent clarifies the normative content of the term. The purpose of the Cruel and Unusual Punishments Clause is to prevent unjust suffering, not to prevent the coarsening of public sensibilities. Part III will discuss the implications of this fact.

Finally, I would like to say a word about this Section's methodology. The Cruel and Unusual Punishments Clause had a pre-existing legal meaning when it became part of the Eighth Amendment in 1791. The English Bill of Rights

145. *See infra* Section II.A.
146. *See infra* Section II.A.
147. *See infra* Section II.D.
148. *See infra* Section II.D.
149. *See infra* Section II.D.
150. See Jones v. Commonwealth, 5 Va. (1 Call) 555, 557–58 (1799), discussed *infra* Section II.D.3.

had prohibited cruel and unusual punishments since 1689,[151] and the Virginia Declaration of Rights had done so since 1776.[152] Both of these statutes were understood as restatements of a longstanding common law prohibition the origin of which was lost in the mists of time.[153]

The Cruel and Unusual Punishments Clause not only had a pre-existing legal meaning, it was publicly understood to have such a meaning. The prohibition of cruel and unusual punishments was part of the lexicon of rights that was familiar to well-informed members of the public in 1789.[154] Indeed, there is little evidence of public discussion of cruel punishments outside of late-eighteenth-century rights talk. For example, a search of the database containing every issue of the Pennsylvania Gazette, one of the most widely circulated eighteenth-century newspapers, found only seventeen instances over the entire eighteenth century in which the word "cruel" modified the word "punishment." Thirteen of these seventeen instances were simple reprints of state or federal constitutional provisions prohibiting "cruel and unusual," "cruel or unusual," or "cruel" punishments.[155] It appears that the Cruel and Unusual Punishments

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151. *See An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne* (1688), *in* 6 THE STATUTES OF THE REALM 142, 143 (1819) [hereinafter *An Act Declareing*].

152. *See* VA. CONST. of 1776, § 9, *in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812, 3814 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

153. *See generally* Stinneford, *Original Meaning*, *supra* note 20, at 1758–59.

154. Eighteenth-century concern about cruel punishments may be seen in the frequent reference to cruel punishments in state-level debates concerning ratification of the United States Constitution. *See infra* Section II.D; *see also* Stinneford, *Original Meaning*, *supra* note 20, at 1800–10 (collecting sources). Such concern may also be seen in the fact that nine of thirteen states chose to prohibit "cruel and unusual punishments," "cruel or unusual punishments," or simply "cruel punishments" prior to the adoption of the United States Constitution. *See* DEL. DECLARATION OF RIGHTS of 1776, § 16, *reprinted in* 2 THE ROOTS OF THE BILL OF RIGHTS 276, 278 (Bernard Schwartz ed., 1980) [hereinafter THE ROOTS]; MASS. DECLARATION OF RIGHTS of 1780, para. XXVI, *reprinted in* THE ROOTS, *supra*, at 339, 343; MD. CONST. of 1776, paras. XIV, XXII, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 152, at 1686, 1687; N.C. DECLARATION OF RIGHTS of 1776, para. X, *reprinted in* THE ROOTS, *supra*, at 286, 287; N.H. BILL OF RIGHTS of 1783, para. XXXIII, *reprinted in* THE ROOTS, *supra*, at 375, 379; N.Y. BILL OF RIGHTS of 1787, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 615 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS]; PA. CONST. of 1790, art. IX, § 13, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 616; VA. CONST. of 1776, *supra* note 152; S.C. CONST. of 1790, art. IX, § 4, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 616. Tom Stacy has observed that "the available evidence indicates that the Founders understood [the formulations 'cruel and unusual,' 'cruel or unusual' and 'cruel'] to capture the same meaning." Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 503 (2005).

155. I conducted my search of the Pennsylvania Gazette database via the Accessible Archives website. I ran searches for the word "cruel" within five words of "punishment" and "punishments." This yielded a total of eighteen results. Of these eighteen results, one involved a sentence in which "cruel" modified a word other than "punishment." As noted above, thirteen of the seventeen remaining results were reprints of state or federal bills of rights. In the remaining four results, it is unclear whether "cruel" is used in the cruel-intent or cruel-effect sense of the word. That over 75% of the instances in which the Pennsylvania Gazette referenced cruel punishment or punishments were simple reprints of constitutional provisions supports the proposition that the public would have recognized the Cruel and Unusual Punishments Clause as a legal term having a pre-existing legal meaning. Professor Randy

Clause would have been recognizable to the late-eighteenth-century American public as a legal prohibition with pre-existing legal meaning.[156]

This means that discussions of cruel and unusual punishments by legally informed speakers in formal legal contexts have particular salience for our inquiry. Such statements carry more interpretive weight than statements by other speakers in other contexts because they are more likely to be intended as statements of legal meaning, and they are more likely to reflect such meaning accurately. As an example, let us return to the hypothetical discussed above. If a prosecutor in a criminal trial argues that certain conduct constitutes murder, this carries more interpretive weight than a layperson's casual assertion that someone he sees on the nightly news—an Enron executive, for example—is a murderer. The prosecutor in this example is more likely than the layperson to know the legal meaning of the term and to be using the term in its legal sense. So, too, with cruel and unusual punishments.

This is not necessarily the case with other constitutional provisions. For example, the Commerce Power listed in Article I, Section 8 of the Constitution may have been a novel attempt to grant only part of the sovereign's ordinary police power to the federal government. If this is the case—that is, if "the Power . . . to regulate Commerce"[157] did not have a publicly recognized, pre-existing legal meaning—then evidence of general public usage would be particularly important because the term would not yet have acquired a legal meaning distinct from its semantic meaning.[158] But where a constitutional term would have been recognized by the public as having pre-existing legal meaning, such legal meaning is an appropriate way to disambiguate a term that may have several meanings in general usage.[159]

This Section starts with a brief discussion of the possible meanings of the word "cruel" in late-eighteenth- and early-nineteenth-century England and America, as demonstrated by the two leading dictionaries of the era—Samuel Johnson's 1755 *Dictionary of the English Language* and Noah Webster's 1828 *American Dictionary of the English Language*. It then discusses the word's relationship to other legal terms contained within the Eighth Amendment: "unusual" and "excessive." Finally, it focuses on the use of the word "cruel" in four formal legal contexts: seventeenth- and eighteenth-century discussions of

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Barnett has previously used this database to find powerful evidence of the original public meaning of "commerce" in the United States Constitution. *See* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–57 (2003).

156. *See* Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 431 (2009) (discussing the status of some constitutional provisions as legal terms of art).

157. U.S. CONST. art. 1, § 8, cl. 3.

158. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 149 (2011); Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce"*, 2012 U. ILL. L. REV. 623, 636 (2012); Barnett, *supra* note 155, at 847; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 107 (2001).

159. *See* Solum, *supra* note 156, at 430 (discussing the role of legal terms of art in constitutional interpretation's "division of linguistic labor").

the English "cruell and unusuall punishments" clause, debates in the state conventions for ratification of the United States Constitution and in the first Congress concerning the need for a prohibition of cruel and unusual punishments, early cases adjudicating claims that a punishment violated the Cruel and Unusual Punishments Clause or a state-law analogue, and early legal treatises discussing cruel and unusual punishments. Taken together, this evidence is remarkably consistent in showing that the word "cruel" in the Cruel and Unusual Punishments Clause referred to the cruel effect of the punishment, not the cruel intent of the punisher. Finally, this Section will discuss several late-nineteenth- and early-twentieth-century Supreme Court cases that are often cited as the origin of the cruel-intent reading of "cruel" and demonstrate that they are better read as a continuation of the traditional cruel-effect reading of the term.

### A. BASIC SEMANTIC AMBIGUITY: JOHNSON'S AND WEBSTER'S DICTIONARIES

Although dictionaries are an imperfect guide to the meaning of legal texts, they do provide evidence as to how terms were understood and used at the time they were written. Two primary dictionaries bracket the time period in which the Eighth Amendment was adopted: Samuel Johnson's *Dictionary of the English Language*, published in 1755, and Noah Webster's *American Dictionary of the English Language*, published in 1828.

In *Baze v. Rees*, Justice Thomas cited these dictionaries as evidence that in the late eighteenth and early nineteenth centuries, the term "cruel" referred to a public official's cruel intent concerning the suffering of another and not merely to the suffering itself.[160] Strangely, Justice Thomas's opinion failed to note that both dictionaries contain two definitions of the term, one of which corresponds to the cruel-intent reading and one of which corresponds to the cruel-effect reading. Johnson's dictionary entry for "cruel" reads: "1. Pleased with hurting others; inhuman; hard-hearted; without pity; without compassion; savage; barbarous; unrelenting. . . . 2. [Of things.] Bloody; mischievous; destructive; causing pain."[161] Similarly, Webster's dictionary reads:

> 1. Disposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness; fierce; ferocious; savage; barbarous; hardhearted; applied to persons or their dispositions. . . . 2. Inhuman; barbarous; savage; causing pain, grief or distress; exerted in tormenting, vexing or afflicting.[162]

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160. 553 U.S. 35, 97 (2008) (Thomas, J., concurring in the judgment).

161. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755).

162. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

In both dictionaries, the first definition concerns a person's attitude toward causing pain and the second concerns the pain itself. This distinction is highlighted by the fact that Johnson's second definition starts with the bracketed modifier "[Of things.]". Things do not have intent.

In short, although the Johnson and Webster dictionaries demonstrate that possessing cruel intent is one possible meaning of the term "cruel," they do little more than that. If anything, they push in the direction of the cruel-effect reading of "cruel." After all, the Eighth Amendment never mentions a punisher, only a punishment: a thing, not a person.

### B. "CRUEL" AND "UNUSUAL"

The original meaning of "cruel" comes more sharply into focus when one considers the word in relation to its syntactic and conceptual partner, "unusual." Much ink has been spilled concerning the relationship between these two terms. Scholars have asked whether "cruel and unusual" should be read in the conjunctive or disjunctive,[163] and both scholars and judges have asked whether the word "unusual" adds anything to the meaning of the Cruel and Unusual Punishments Clause.[164] The Supreme Court has essentially ignored the word "unusual" because there is no clear connection between a punishment's rarity and its cruelty.[165] For example, a law requiring the public torture of all sex offenders would seem crueler both in terms of the intent of the punisher and the cruel effect of the punishment than a law calling upon courts to impose torture only on rare occasions involving the worst offenders.

The decision to ignore the word "unusual" is based on a mistaken understanding of that term's meaning. As I have shown in prior articles, the word "unusual" in the Cruel and Unusual Punishments Clause does not mean rare, but "contrary to long usage."[166] The Clause prohibits punishments that are cruel in light of longstanding prior practice.[167]

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163. *See, e.g.*, Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 572 (2010).

164. For example, Chief Justice Warren has argued that the word "unusual" either has no independent meaning or else means "different from that which is generally done." Trop v. Dulles, 356 U.S. 86, 100–01 n.32 (1958). Justice Scalia concurred in this reading of "unusual," despite his general disagreement with the Warren Court's approach to the Eighth Amendment. *See* Harmelin v. Michigan, 501 U.S. 957, 976 (1991); *see also, e.g.*, RAOUL BERGER, DEATH PENALTIES 41 (1982) (agreeing with Chief Justice Warren's definition of "unusual"); Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 122 (2004) (arguing that "unusual" means "immorally discriminatory"); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (arguing that "cruel and unusual" was "constitutional 'boilerplate'"); Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even if We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867, 880 (2007) (arguing that "unusual" means uncommon or rare).

165. *See Harmelin*, 501 U.S. at 975–76.

166. Stinneford, *Original Meaning*, *supra* note 20, at 1814; *see also* Stinneford, *Death, Desuetude*, *supra* note 20, at 558; Stinneford, *Rethinking Proportionality*, *supra* note 20, at 943.

167. Samuel Bray has recently argued that the phrase "cruel and unusual" is actually an hendiadys, that is, "a figure of speech in which two terms, separated by a conjunction, are melded together to form

In the context of the Eighth Amendment, the word "unusual" is a term of art derived from the common law.[168] Although most lawyers today think of the common law as judge-made law, it was traditionally described as the law of "custom" and "long usage." The basic idea was that a practice or custom could attain the status of law if it were used throughout the jurisdiction for a very long time.[169] These two characteristics—universality and long usage—justified legal enforcement of the practice, despite never being ordered by the sovereign, because these characteristics were thought to guarantee its goodness and practicality.[170] If the practice was not good, it was thought, it would fall out of

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a single complex expression." Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 695 (2016). Bray accepts the proposition that "unusual" means innovative (that is, contrary to long usage) and argues that the word "unusual" modifies the word "cruel." *Id.* at 706. More specifically, he argues that "cruel and unusual" means "innovatively cruel." *Id.* This argument is incorrect to the extent it posits that the word "cruel" is morally and constitutionally neutral and that the Eighth Amendment permits cruel punishments so long as they are not innovative. In fact, the words "cruel" and "unusual" modify each other. As discussed below, the word "cruel" describes the moral category of forbidden punishments, and the word "unusual" provides the concrete reference point for determining whether a punishment falls into that category. By definition, a usual punishment—that is, a traditional punishment that had never fallen out of usage—would not have been considered cruel because its enjoyment of long usage was thought to guarantee that it was just, reasonable, and enjoyed the consent of the people. That the term "cruel" connotes injustice and unconstitutionality, and is thus not morally and constitutionally neutral, is clear from the fact that some founding-era state constitutions simply forbade "cruel punishments" or "cruel or unusual punishments" rather than "cruel and unusual punishments." *See supra* note 154. All of these provisions appear to have been interpreted in a similar manner—that is, in all of these states, judges compared current punishments to longstanding prior practice in order to determine whether they were constitutional. Nonetheless, some legislatures considered it unnecessary to use the word "unusual" to communicate that punishments of unprecedented harshness were forbidden. To call a punishment cruel was to communicate that it was unjust and should not be inflicted.

168. *See generally* Stinneford, *Original Meaning*, *supra* note 20, at 1745.

169. *See, e.g.*, 1 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND (1794), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 577, 701 (Steve Sheppard ed., 2003) [hereinafter SELECTED WRITINGS AND SPEECHES] ("And note that no custome is to bee allowed, but such custome as hath bin used by title of prescription, that is to say, from time out of minde."); 1 WILLIAM BLACKSTONE, COMMENTARIES *67 ("[I]n our law the goodness of a custom depends upon it's [sic] having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary."); 1 JAMES WILSON, *Lectures on Law: Of the Common Law*, *in* 2 COLLECTED WORKS OF JAMES WILSON 423, 435–36 (Mark David Hall & Kermit L. Hall eds., 2007) ("[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law."); 1 JAMES WILSON, *Lectures on Law: Of Municipal Law*, *in* 2 COLLECTED WORKS OF JAMES WILSON, *supra*, at 570 ("Some writers, when they describe that usage, which is the foundation of common law, characterize it by the epithet *immemorial*. The parliamentary description is not so strong. 'Long use and custom' is assigned as the criterion of law, 'taken by the people at their free liberty, and by their own consent.' And this criterion is surely sufficient to satisfy the principle: for consent is certainly proved by long, though it be not immemorial usage.").

170. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1771–92 (describing Edward Coke and William Blackstone's assertions concerning the normative power of long usage); *see also* JOHN DAVIES, *A Preface Dedicatory*, *in* LE PRIMER REPORT DES CASES & MATTERS EN LEY RESOLUES & ADIUDGES EN LES COURTS DEL ROY EN IRELAND *3 (1615) ("And this *Customary lawe* is the most perfect, & most excellent, and without comparison the best, to make & preserue a commonwealth, for the *written lawes* which are made either by the edicts of Princes, or by Counselles of estate, are imposed vppon the subiect before any Triall or Probation made, whether the same bee fitt & agreeable to the nature & disposition of

usage.[171] Thus, the theoretical basis for common law judging was not that judges had the power to make law, but that they had the power to identify and enforce universal, longstanding customs.[172]

The notion of long usage as a basis for law is important because it gave rise to the idea of rights enforceable against the sovereign.[173] Numerous common law thinkers asserted that laws that come into being through long usage are normatively superior to laws ordered by king or parliament.[174] Customs do not become law until multiple generations have used them and found them to be workable and just. Laws ordered by the sovereign, by contrast, become law before they have been used and may turn out to be unjust or unworkable in practice. A growing chorus in England, and especially in America, argued that the sovereign lacked legitimate authority to enact or enforce laws that violate rights established through long usage—particularly rights relating to life, liberty, or property. This complaint was the basis of the American Revolution and was the core argument used by Antifederalists agitating for a Bill of Rights.[175]

The word "unusual" was part of the lexicon of rights used in the debates surrounding the American Revolution and the subsequent ratification of the United States Constitution.[176] To say that something was unusual was to say that it was new and that it violated rights established through long usage.[177] In

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the people, or whether they will breed any inconvenience or no. But a *Custome* doth neuer become a lawe to binde the people, vntill it hath bin tried & approued time out of minde, during all which time there did thereby arise no *inconuenience* . . . .").

171. *See, e.g.*, EDWARD COKE, THE COMPLEAT COPYHOLDER (1630), *reprinted in* 2 SELECTED WRITINGS AND SPEECHES, *supra* note 169, at 563, 564 ("Custome . . . lose[s its] . . . being, if usage faile."); DAVIES, *supra* note 170, at *3 ("[F]or if it had beene found *inconuenient* at any time, it had beene vsed no longer, but had beene interrupted, & consequently it had lost the vertue & force of a lawe.").

172. Because the Cruel and Unusual Punishments Clause draws its meaning strongly from the common law, it is useful to look at the ways in which courts and tribunals treat the meaning of the phrase "cruel and unusual" in common law contexts outside of criminal law. Alexander Reinart recently published an interesting article concerning how the meaning of the phrase developed in cases involving punishment of slaves. *See* Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. Rev. 817 (2016).

173. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1778 (summarizing rights identified by Edward Coke as derivative from the common law); *id.* at 1781–86 (describing seventeenth- and eighteenth-century conflicts in England between those who contended that the sovereign possessed absolute power and those who contended that the sovereign's power was limited by common law rights); *id.* at 1792–800 (describing how the idea that the power of the sovereign was limited by common law rights was the ideological basis for the American Revolution); *id.* at 1800–10 (describing how the same idea led to adoption of the Bill of Rights).

174. *See, e.g.*, 1 BLACKSTONE, *supra* note 169, at *70 (arguing that when a common law rule is abandoned for a new rule, "the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation"); DAVIES, *supra* note 170; *cf.* 1 COKE, *supra* note 169, at 577, 740 ([W]hen any innovation or new invention starts up, . . . trie it with the Rules of the common Law, . . . for these be true Touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, That the rule of the old common Law being soundly . . . applied to such novelties, it doth utterly crush them and bring them to nothing . . . .").

175. *See supra* note 170.

176. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1792–810.

177. *See id.* at 1770 & nn.175–84, 1771 & nn.185–89.

other words, in the context of constitutional debates, the word "unusual" is a thick ethical concept like the word "cruel."[178] It both describes a specific factual condition—"newness," or more specifically, "newness that runs contrary to longstanding common law rights"—and gives reasons to avoid that factual condition. Because rights established through long usage were considered presumptively just and reasonable, new governmental actions that ran contrary to such rights were presumptively unjust and unreasonable. Repeatedly throughout the period of the American Revolution, and again during the ratification of the United States Constitution, critics of governmental action that violated longstanding common law practice would condemn such action by describing it as "unusual," or "unconstitutional," or as an "innovation."[179] These terms were used interchangeably.

The placement of the words "cruel" and "unusual" next to each other in a conjunctive phrase ("cruel and unusual") implies a conceptual relationship between them. Each term, on its own, connotes unconstitutionality. Placed together, they appear to describe a specific kind of unconstitutionality: A punishment that is unjust because it transgresses the limits imposed by longstanding prior practice. Phrased differently, the word "cruel" identifies the moral category into which unconstitutional punishments fall, and the word "unusual" provides the concrete reference point for determining whether a given punishment falls into that category. If a punishment is too harsh in light of longstanding prior practice, it is cruel and unusual.

That the Eighth Amendment directs us to use longstanding prior practice as the measure of a punishment's cruelty indicates that "cruel" likely refers to the effect of the punishment, not the intent of the punisher. We are supposed to ask how a new punishment compares to prior punishments that enjoyed long usage. It makes sense to ask, "How harsh are the effects of this punishment compared to those of the punishment it has replaced?" It makes little sense to ask, "How harsh is the government's current attitude about causing pain compared to the attitudes of those who inflicted punishments in the past?" The latter question is unanswerable and would be a poor basis for a constitutional standard. The Cruel and Unusual Punishments Clause's focus on actual practice makes it likely that "cruel" refers to the pain caused by a given punishment, not the punisher's attitude toward that pain.

### C. "CRUEL" AND "EXCESSIVE"

The Eighth Amendment is comprised of a single sentence listing three types of penalties that the government is forbidden to impose: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[180] The traditional canon *noscitur a sociis* directs that "the meaning of

178. *See* WILLIAMS, *supra* note 16, at 129.
179. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1799–800.
180. U.S. CONST. amend. VIII.

an unclear word or phrase, esp[ecially] one in a list, should be determined by the words immediately surrounding it."[181] Under this canon, the placement of the Eighth Amendment's three prohibitions in a single list implies a conceptual relationship between them.

The most obvious point to make about the prohibitions of excessive bail and excessive fines is that they concern the size of the penalty, not any intent that may lay behind it. For example, Webster's 1828 dictionary defines "excessive" as:

> 1. Beyond any given degree, measure or limit, or beyond the common measure or proportion; as the *excessive* bulk of a man; *excessive* labor; *excessive* wages. 2. Beyond the established laws of morality and religion, or beyond the bounds of justice, fitness, propriety, expedience or utility; as *excessive* indulgence of any kind. Excessive bail shall not be required. 3. Extravagant; unreasonable. His expenditures of money were *excessive*. 4. Vehement; violent; as *excessive* passion.[182]

Unlike the dictionary entries for "cruel," there is no ambiguity as to whether the term "excessive" describes intent. It does not.

If cruel and unusual punishments are conceptually related to excessive bail and excessive fines, it must be through the notion of undue harshness. Just as bail or a fine can be so large as to exceed the bounds of justice, so too can a punishment be so harsh as to exceed those bounds. As Justice Field wrote in *O'Neil v. Vermont*, "[t]he whole inhibition [of the Eighth Amendment] is against that which is excessive."[183]

The conceptual relationship between "cruel and unusual" and "excessive" goes deeper than that. As I have shown in a prior article, the original meaning of the Cruel and Unusual Punishments Clause, like that of the Excessive Bail and Excessive Fines Clauses, includes a prohibition of disproportionate punishments.[184] A punishment might be cruel and unusual because it is too harsh as an absolute matter—for example, the torturous practices condemned in *Wilkerson v. Utah*.[185] But a punishment might also be cruel and unusual because it is too

181. *Noscitur a sociis*, BLACK'S LAW DICTIONARY (10th ed. 2014). This canon was well-established at the time the Constitution was adopted. A search of Westlaw's "ALLCASES" database reveals 6,267 cases using this phrase between 1700 and 1800.

182. *Excessive*, WEBSTER, *supra* note 162.

183. 144 U.S. 323, 340 (1892) (Field, J., dissenting).

184. Stinneford, *Rethinking Proportionality*, *supra* note 20, at 913–14. For a more general discussion of the relationship between proportionality and the United States Constitution, see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

185. 99 U.S. 130, 135–36 (1878) (noting the obvious unconstitutionality of long-defunct English punishments "where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. . . . [Or] public dissection in murder, and burning alive in treason committed by a female"); *cf.* BANNER, *supra* note 2, at 76 (noting that "[b]urning, gibbeting, and dismemberment all dwindled away [in America] toward the end of the eighteenth century").

harsh in relation to its justification.[186] For example, it would be cruel and unusual to impose a life sentence for a parking violation but not for murder.[187] In the first case, the sentence is too harsh in light of its justification; in the second, it is not. Furthermore, the Cruel and Unusual Punishments Clause directs us to measure proportionality in light of longstanding prior punishment practices.[188] If a defendant receives a punishment within the range traditionally given for the same or similar crimes, it is not cruel and unusual. If the punishment is harsher than that range permits, it is cruel and unusual.[189]

That the Cruel and Unusual Punishments Clause prohibits punishments that are disproportionate to the offense indicates that cruel is a measure of the punishment's cruel effect, not a description of the punisher's attitude. A disproportionate punishment is one that inflicts significantly more pain than the punishments that came before it for the same or similar crimes. It is not a punishment based on a relatively more culpable or bloodthirsty attitude.

### D. HISTORICAL USAGE OF THE TERM "CRUEL"

This Section examines the historical usage of the term "cruel" in four contexts relevant to the original public meaning of the Cruel and Unusual Punishments Clause: discussions of the English Bill of Rights' prohibition of "Cruell and Unusuall Punishments"; use of the term "cruel" in the various state conventions for ratifying the United States Constitution and in the debates in the first Congress over adoption of a bill of rights; adjudication of claims involving cruel and unusual punishments in the early case law; and finally, discussion of the term in early legal treatises.

These contexts are salient for several reasons. First, they all involve public statements by well-informed speakers of the English language and are thus good evidence of semantic usage. Second, they all involve statements about the legal meaning of the term, not its meaning in nonlegal contexts, and therefore are more likely to reveal the minimum factual criteria necessary to establish a violation of the Cruel and Unusual Punishments Clause. Third, they are formal contexts in which participants were relatively likely to use terms with some precision. Fourth, the legislative debates and early cases were contested. Participants had varying interests in the outcomes of these debates and cases. If there was a lack of consensus concerning the meaning of these terms, it could be expected to emerge during these debates or cases.

The sources found in these four contexts are remarkably consistent in interpreting a cruel punishment as one whose effects are unduly harsh, not as one

186. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 962.

187. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) (expressing doubt about whether the Cruel and Unusual Punishments Clause prohibits disproportionate punishments, but acknowledging that such a principle may apply in the "extreme example" of a legislature making a parking violation a felony punishable by life imprisonment).

188. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 968–73.

189. *See id.*

imposed with a cruel intent. Although some of these sources discuss governmental motivations to impose cruel punishments, none of them claim that cruel intent is one of the facts that must be shown to establish that a punishment is cruel. In one early case, the Supreme Court of Appeals of Virginia held that a punishment was cruel and unusual because it imposed a greater risk of excessive punishment than was permissible at common law, despite the absence of any showing that the jury was aware of this risk.[190] Late-nineteenth- and early-twentieth-century Supreme Court decisions concerning methods of execution were consistent with this reading of "cruel."[191]

#### 1. Constitutional Background: "Cruell and Unusuall Punishments" in the English Bill of Rights

The English Bill of Rights, adopted in 1689, contains the first known use of the phrase "cruell and unusuall [p]unishments."[192] This provision was the model for the Virginia Declaration of Rights' prohibition of cruel and unusual punishments,[193] and ultimately for the Eighth Amendment's Cruel and Unusual Punishments Clause.[194] As noted above, drafters of all three provisions considered themselves to be restating a longstanding common law prohibition that was common to both England and the United States.[195]

This Section looks at two sources of evidence concerning the original public meaning of the "Cruell and Unusuall Punishments" Clause in the English Bill of Rights: parliamentary debates that occurred shortly after its adoption and William Blackstone's discussion of it in his *Commentaries on the Laws of England*. The parliamentary debates are good evidence of the meaning of the Clause in England because they are public debates in a formal legal context about the meaning of the provision by well-informed speakers of the English language, conducted immediately after its passage. They do not, in and of themselves, demonstrate that Americans of the late eighteenth century shared the same understanding of the Clause as Britons of the late seventeenth century. But, as the evidence presented in Section II.D.2 will show, Americans shared the same common law ideology that animated adoption of the English Bill of Rights, used the same terminology, and saw the Eighth Amendment as entrenching a pre-existing right rather than creating a new one. Moreover, although we do not have evidence that late-eighteenth-century Americans read parliamentary debates concerning the "Cruell and Unusuall Punishments" Clause, we do know that they read Blackstone. Therefore, this Section will also present Blackstone's

190. *See* Jones v. Commonwealth, 5 Va. (1 Call) 555, 557–58 (1799).
191. *See infra* Section II.E.
192. *See An Act Declareing*, *supra* note 151.
193. *See* VA. CONST. of 1776, *supra* note 152.
194. *See* U.S. CONST. amend. VIII.
195. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1758–59.

discussions of cruel punishments, both in relation to the English Bill of Rights and in other contexts.

*a. The Parliamentary Debate over Titus Oates.* The purpose of the English Bill of Rights was to constrain the arbitrary prerogative power of the King within common law bounds.[196] One of the arbitrary practices Parliament wished to forbid was the imposition of what it variously called "cruell and illegall" and "cruell and unusuall" punishments.[197]

We have good evidence of the original meaning of "cruell and unusuall punishments" in England because the same Parliament that drafted the Bill of Rights was called upon to debate the meaning of this prohibition the year after it was adopted. The reason for this debate was a disgraced former Anglican clergyman named Titus Oates.

A few years earlier, Oates had been convicted of perjury for falsely claiming that there was a popish plot to kill the King.[198] Oates had named some fifteen members of this alleged conspiracy, including the queen's physician, and had testified against them at their trials.[199] Oates's story was eventually exposed as false, but not before most members of the alleged conspiracy had already been tried and executed.[200] As a moral matter, Oates was guilty of the worst kind of premeditated, serial homicide. But, as a legal matter, he was convicted only of perjury, a misdemeanor.

At Oates's sentencing, Lord Chief Justice Jeffreys expressed his regret that the law would not allow him to order Oates to be executed, but insisted that "it is left to the discretion of the court to inflict such punishment as they think fit," so long as the punishment "not extend to life or member."[201] Lord Chief Justice Jeffreys then asked Justice Withins to pronounce the sentence.[202] Justice Withins sentenced Oates to be dragged across the City of London while being whipped "from Aldgate to Newgate," and then, two days later, "from Newgate to Tyburn," to pay a fine of 2,000 marks, to be pilloried four times a year for

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196. *See An Act Declareing*, *supra* note 151, at 142–45 (complaining of the purportedly lawless behavior of James II and setting forth legal principles the new monarchs must agree to follow, including respect for common law rights such as the prohibition of "cruell and unusuall [p]unishments"); ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 9 (1991) (arguing that the English Bill of Rights set forth the "supreme law of the land, repeating and sanctifying the fundamental principles of English liberty as Englishmen then conceived them to be").

197. The relationship between the words "illegall" and "unusuall" in the English Bill of Rights is discussed more fully in Stinneford, *Original Meaning*, *supra* note 20, at 1758–65. Justice Scalia's mistaken understanding of this relationship led him to a serious distortion of the original meaning of the American version of the Cruel and Unusual Punishments Clause. *See id.*

198. Titus Oates's perjury trial is recounted in detail in 10 How. St. Tr. 1079, 1079–1330 (K.B. 1685). A more concise summary and critique of the trial may be found in 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 383–404 (London, MacMillan & Co. 1883) and is also discussed in Harmelin v. Michigan, 501 U.S. 957, 969 (1991).

199. *See* STEPHEN, *supra* note 197.

200. *See id.* at 392.

201. Trial of Titus Oates, 10 How. St. Tr. 1079, 1314–15 (K.B. 1685).

202. *Id.* at 1315.

life, to life imprisonment, and to loss of his clerical status.[203] As Justice Scalia has noted, some scholars believe that Lord Chief Justice Jeffreys hoped that Oates would be "scourged to death."[204]

Oates survived the scourging, however, and petitioned Parliament shortly after adoption of the Bill of Rights to suspend the judgment against him on the ground that his punishment was cruel and unusual.[205] According to the debates, virtually every member of Parliament agreed.[206] In fact, representatives from the House of Commons asserted that they had Oates's case specifically in mind when they drafted the prohibition of "cruell and unusuall punishments."[207]

The parliamentary debate focused on the fact that the punishments inflicted on Oates were too harsh for the crime of perjury in light of longstanding prior practice. Members of the House of Lords complained that the punishments were "extravagant," "exorbitant," "contrary to law and ancient practice," "barbarous, inhuman and unchristian," that there was "no precedent" to support them, and that they would serve as a precedent "for giving the like cruel, barbarous and illegal Judgments hereafter."[208] Similarly, members of the House of Commons focused on the unprecedented nature of the punishments and the fact that they would serve as a precedent for cruel punishments in the future. The punishments were of "ill [e]xample," of "ill [e]xample, and illegal," "of ill [e]xample, and unusual," and "illegal, cruel, and of dangerous [e]xample."[209] As these quotations indicate, Parliament considered these punishments cruel and unusual because of their unprecedented harshness for the crime of perjury.

*b. Blackstone and Cruel Punishments.* William Blackstone's *Commentaries on the Laws of England* was a highly influential legal treatise in late-eighteenth- and early-nineteenth-century America and is often described as providing part of the ideological foundation for the American Revolution.[210] Because Blackstone was so widely read in America, his discussions of cruel punishments are relevant to the public understanding of the meaning of this term in America, particularly because Americans saw themselves as entrenching a pre-existing common law right.

203. *Id.* at 1316–17.

204. See Harmelin v. Michigan, 501 U.S. 957, 970 (quoting 2 T. MACAULAY, HISTORY OF ENGLAND 204 (1899)). It is fair to say that Lord Chief Justice Jeffreys himself possessed cruel intent, a fact that members of Parliament noted in their debates over Oates's sentence. *See* 10 HC Jour. 246–49 (1689); 14 HL Jour. 228 (1689). But, as discussed immediately below, the members of Parliament appear to have treated the unprecedented harshness of the punishment itself, not the intent that motivated it, as the criterion for judging its constitutionality.

205. *See* 10 HC Jour. 246–47, 249 (1689); 14 HL Jour. 228 (1689).

206. *See* 10 HC Jour. 246–47, 249 (1689); 14 HL Jour. 228 (1689).

207. *See* 10 HC Jour. 247 (1689).

208. *See* 10 HC Jour. 246–51 (1689); 14 HL Jour. 228 (1689).

209. *See* 10 HC Jour. 246–47, 249 (1689).

210. The actual relationship between Blackstone and America was more complex than this description implies. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1786–87 (describing Blackstone's "dual status as friend and foe of the American Revolution").

Blackstone's *Commentaries* discuss cruel punishments in three different contexts. First, Blackstone uses the word "cruel" to criticize the "excessive severity" of the Bloody Code, under which Parliament had vastly expanded the list of capital offenses beyond those that existed at common law.[211] Blackstone writes:

> [S]anguinary laws are a bad symptom of the distemper of any state, or at least of it's [sic] weak constitution. The laws of the Roman kings, and the twelve tablets of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.[212]

This passage equates the cruelty of a punishment with its cruel effect. It uses the words "cruel," "severe," and "sanguinary" interchangeably. The passage says nothing about the intent of the punisher.

Second, Blackstone uses "cruel" to describe the effect of ex post facto laws. He writes: "Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust."[213] In this instance, Blackstone argues that ex post facto laws are cruel simply because they inflict undeserved pain. A person who performs an act that is subsequently declared illegal is morally innocent. Any punishment inflicted for such an act is unjust and therefore cruel. Once again, the passage says nothing about the intent of the punisher.

Finally, Blackstone references the English Bill of Rights' prohibition of cruel and unusual punishments as part of a larger discussion of the judicial power to determine the length of a prison sentence or the size of a fine. Blackstone argues that although English statutes did not state limits on fines and prison sentences, such punishments were nonetheless "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) . . . ."[214]

Blackstone's discussion of the English prohibition of cruel and unusual punishments, although brief, is interesting for three reasons. First, it demonstrates that the most influential eighteenth-century legal writer in both England and America did not consider the phrase "cruel and unusual punishments" to prohibit only gruesome modes of torture but also excessive or disproportionate fines and prison sentences. Such fines and sentences were "regulated by law"

211. 5 BLACKSTONE, *supra* note 169, at *17–18.
212. *Id.*
213. 1 BLACKSTONE, *supra* note 169, at *46.
214. 5 BLACKSTONE, *supra* note 169, at *378.

through the prohibition of cruel and unusual punishments. Second, Blackstone's discussion makes clear that the focus of this provision is cruel effect, not cruel intent. The Cruell and Unusuall Punishments Clause regulates the size of fines and the length of prison sentences, not the intent that lays behind them. Finally, Blackstone obliquely references long usage as a touchstone for measuring cruelty when he says that the English prohibition of cruel and unusual punishments was adopted because of "some unprecedented proceedings in the court of king's bench, in the reign of king James the second."[215] This appears to be a reference to Titus Oates, discussed above, who was tried in the reign of James the Second, and whose punishment gave rise to the first parliamentary debate over the meaning of "cruel and unusual punishments." The key word Blackstone used to sum up Oates' sentencing—"unprecedented"—mirrors Parliament's complaint that his punishments were cruel because they were too harsh for the crime of perjury in light of longstanding prior practice.

2. "Cruel" in the Constitutional Ratifying Conventions and the First Congress

As discussed in Section II.B and elsewhere, the idea of common law rights—rights established through custom and long usage—was central both to the American Revolution and to Antifederalist resistance to ratification of the Constitution.[216] Practices that enjoyed long usage were thought to be just and reasonable, whereas governmental innovations—particularly in the area of rights—were considered presumptively unjust and unreasonable.[217]

In the state conventions for ratification of the United States Constitution, Antifederalists developed a particular story about the danger that Congress would impose cruel and unusual punishments.[218] They noted that the proposed constitution gave Congress the power to create new crimes and to define the punishments for those crimes.[219] They further noted that Congress was not bound by traditional common law limits in this area.[220] The Antifederalists predicted that, as a result, Congress would use unduly harsh criminal punishment as a means of furthering government interests.[221]

Patrick Henry and George Mason were particularly adept at this sort of argument. Mason predicted that the lack of common law constraints in the new Constitution would permit Congress to create "new crimes, inflict unusual and severe punishments, and extend their power."[222] Similarly, Patrick Henry argued that Congress would use "unusual and severe" punishments to exert

215. *Id.*
216. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1792–810.
217. *See id.*
218. *See id.* at 1800–10.
219. *See id.* at 1771, 1801–02.
220. *See id.* at 1771.
221. *See id.*
222. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 640 (Max Farrand ed., 1911).

control over the militia;[223] that the President and the Senate would use the Treaty Power to authorize ex post facto criminal prosecution for conduct that was not criminal when committed, thus "giving away [the People's] rights, and inflicting unusual punishments" on them;[224] and that even in ordinary criminal cases, Congress would authorize "cruel and unusual punishments" in order to "strengthen[] the arm of government"[225] Both Henry in Virginia and Abraham Holmes in Massachusetts predicted that if the federal government was not kept within traditional common law bounds, it might start employing the torturous punishments associated with continental Europe.[226]

In each of these examples, the speaker hypothesized that the federal government would make an intentional decision to use unduly harsh punishment. This is not surprising because all punishment involves intent. What these examples do not tell us, however, is whether it is the intent of the punisher or the cruel effect of the punishment that makes the punishment cruel.

An important exchange between Patrick Henry and Governor Edmund Randolph during the Virginia ratifying convention indicates that the Antifederalists were concerned about the cruel effect of punishment and not the intent behind it. Randolph argued that there was no need for a constitutional prohibition of cruel punishments because legislators and judges would have no motive to impose them. If legislators authorized or judges imposed cruel punishments, "[t]his 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."[227]

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223. Patrick Henry, Speech to the Virginia Ratifying Convention for the United States Constitution (June 14, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 412 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott & Co. 2d ed. 1881) [hereinafter ELLIOT'S DEBATES].

224. Patrick Henry, Speech to the Virginia Ratifying Convention for the United States Constitution (June 14, 1788), *in* ELLIOT'S DEBATES, *supra* note 223, at 503.

225. *Id.* at 447–48.

226. *See* Abraham Holmes, Speech to the Massachussets Ratifying Convention for the United States Constitution (January 30, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 223, at 111 ("What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress 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."); Henry, *supra* note 223, at 447–48 ("Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.").

227. Edmund Randolph, Speech to the Virginia Ratifying Convention for the United States Constitution (June 15, 1788), *in* ELLIOT'S DEBATES, *supra* note 223, at 468.

Patrick Henry agreed that legislators and judges would not wish to impose punishments that violate the rights of the people: "If you will, like the Virginian government, give them knowledge of the extent of the rights retained by the people, and the powers of themselves, they will, if they be honest men, thank you for it. Will they not wish to go on sure grounds?"[228] But without a Bill of Rights, "they will not know how to proceed; and, being in a state of uncertainty, they will assume rather than give up powers by implication."[229] More specifically, legislators "may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime," because they believe it is necessary for "strengthening the arm of government."[230]

In this exchange, neither Randolph nor Henry implied that legislators and judges might act with cruel intent. Randolph argued that government officials would not want to violate the rights of the people because this could cost them their jobs. Henry agreed that they would not want to violate any rights of which they have knowledge, but asserted that they would naturally seek an increase of their own power and might use cruel punishments to attain this goal if there were no provision in the Constitution prohibiting them. Both men assumed that legislators and judges would be motivated by rational self-interest, not cruelty. They only differed as to the likelihood that rational self-interest would lead to cruelly harsh punishments. Neither man asserted that a punishment inflicted without cruel intent could not be cruel and unusual—nor did anyone else in the conventions to ratify the Constitution.

Once the states ratified the Constitution, James Madison fulfilled his promise to the Antifederalists and submitted to the first Congress a list of proposed constitutional amendments guaranteeing the protection of certain rights. One of the rights in this list was a prohibition of cruel and unusual punishments.[231] Only one substantive comment was made about the Cruel and Unusual Punishments Clause during the debate over these amendments, but it points toward the cruel-effect reading of "cruel."[232]

When the Cruel and Unusual Punishments Clause was proposed, Samuel Livermore remarked:

> 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. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and

228. Henry, *supra* note 223, at 448. The grant of knowledge Henry is referring to is the Virginia Declaration of Rights, which already prohibited cruel and unusual punishment. *See* VA. CONST. of 1776, *supra* note 152.

229. Henry, *supra* note 223, at 448.

230. *Id.* at 447–48.

231. *See* 1 ANNALS OF CONGRESS 439 (Joseph Gales ed., Washington, Gales & Seaton 1834); *see also* RUTLAND, *supra* note 196, at 202.

232. *See* ANNALS OF CONGRESS, *supra* note 231, at 754.

> perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?[233]

As I have shown elsewhere, this comment demonstrated Livermore's limited understanding of the Cruel and Unusual Punishments Clause and particularly of the meaning of the word "unusual."[234] He appeared to be unaware that a punishment like hanging could not be considered unusual because it was a traditional punishment that had never fallen out of usage.[235] His discussion of the clause was also idiosyncratic in that he—alone among the participants in the ratification debates and the debates in the first Congress—seemed to think that a punishment can be both "cruel" and "deserved."[236] Nonetheless, Livermore did share the understanding that "cruel" refers to the pain caused by punishment, not the intent that lays behind it. By definition, a necessary hanging and a deserved whipping are not based upon cruel intent; rather, they are designed to inflict pain in furtherance of the legitimate purposes of the criminal law.

### 3. "Cruel" in the Early Case Law

There are relatively few cases in the late eighteenth and early nineteenth centuries in which a court was asked to consider whether a punishment was unconstitutionally cruel. Prior to 1878, the United States Supreme Court did not decide any such cases on the merits.[237] The most salient case law in the early period thus concerns state law analogues to the federal prohibition of cruel and unusual punishments.

As I have shown in prior articles, in virtually every instance in which a court considered the merits of the case during this period it employed the same analysis: It compared the punishment to those that enjoyed long usage for the same or similar crimes.[238] If a challenged punishment was of the kind traditionally employed for such crimes, it was upheld. For example, in *Barker v. People*, the Supreme Court of New York upheld disenfranchisement as a punishment for dueling because it had traditionally been the "consequence of treason, and of infamous crimes" and therefore the legislature had the discretion to extend it to this crime.[239]

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233. *Id.* at 782–83.

234. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1809.

235. *See id.*

236. *See id.*

237. *See* Wilkerson v. Utah, 99 U.S. 130, 136–37 (1878). The Supreme Court did consider one prior Eighth Amendment case but dismissed it on the ground that the Eighth Amendment did not apply to the states. *See* Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 479–80 (1866).

238. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 947–55.

239. 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823). For additional examples, see Whitten v. State, 47 Ga. 297, 301 (1872) (upholding six months' imprisonment for knife attack, noting that at the time the constitution was ratified "larceny was generally punished by hanging; forgeries, burglaries, etc., in the same way, for, be it remembered, penitentiaries are of modern origin, and I doubt if it ever entered into the mind of men of that day, that a crime such as this witness makes the defendant guilty of deserved a

On the other hand, courts invalidated punishments that were too harsh in light of long usage, either as an absolute matter or in relation to the crime. Significantly, courts not only struck down punishments with direct effects that were unduly harsh but also those that created an undue risk of harm compared to the risks entailed by prior common law practice. This fact can be seen by comparing two cases from the period, *Commonwealth v. Wyatt*[240] and *Ely v. Thompson*.[241]

In *Wyatt*, the defendant was convicted of violating an illegal gaming statute that permitted the court to impose a sentence of up to six months imprisonment and gave the court discretion to order that the defendant be flogged on one or several occasions, so long as he was not given more than thirty-nine stripes at a time.[242] Wyatt argued that this sentencing provision violated Virginia's prohibition of cruel and unusual punishments because it would allow a judge "to direct the party convicted to be subjected to thirty-nine stripes every day of the six months, which would inevitably terminate in death; a death produced by the most *cruel torture*."[243] The General Court of Virginia acknowledged that the

less penalty than the Judge has inflicted"); Garcia v. Territory, 1 N.M. (Gild., E.W.S. ed.) 415, 418 (1869) ("In many of the states the practice of whipping criminals convicted of theft has prevailed for over fifty years, without any doubt as to its constitutionality."); People v. Potter, 1 Edm. Sel. Cas. 235, 245 (N.Y. Sup. Ct. 1846) ("[T]he governor may grant a pardon on a condition which does not subject the prisoner to an unusual or cruel punishment. Banishment is neither. It is sanctioned by authority, and has been inflicted, in this form, from the foundation of our government."); Commonwealth v. Hitchings, 71 Mass. (5 Gray) 482, 486 (1855) (upholding ten-dollar fine for the unlawful sale of liquor because this was "the lightest punishment[] known to our law; and ha[s] been constantly applied to similar offences").

Justice Scalia has argued that cases like *Barker* demonstrate that the legislature was originally thought to have absolute authority to determine how much punishment to impose for a given crime and that therefore the Cruel and Unusual Punishments Clause contains no proportionality principle. *See* Harmelin v. Michigan, 501 U.S. 957, 983. Although some early cases, including *Barker*, contain language about legislative discretion to define the punishments for crimes, they do not claim that legislatures have absolute discretion. In virtually every case throughout this period, the court compared the challenged punishment to prior common law practice before deciding whether to uphold it. Thus, the best reading of these cases is that the legislature has discretion to define the punishment for crimes so long as it stays within the broad boundaries defined by longstanding prior practice. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 947–52. This conclusion is bolstered by the fact, discussed immediately below, that courts in the late eighteenth and early nineteenth centuries actually did strike down some punishments as cruel and unusual despite them not involving inherently barbaric methods. The only case from this period that is inconsistent with this reading is Aldridge v. Commonwealth, 4 Va. (2 Va. Cas.) 447, 447–50 (Va. Gen. Ct. 1824), in which the court upheld a new amendment to the larceny statute instructing the court to sentence free African-Americans to flogging, reenslavement, transportation, and banishment. The court held that the "free person of colour" had no rights under the Virginia Declaration of Rights. *Id.* The court then stated in dicta that, even if the defendant had such rights, the Virginia Cruel and Unusual Punishments Clause did not constrain the discretion of the legislature to order any punishment it wished. *Id.* This dictum was not only inconsistent with the general run of cases during this period but contradicted holdings of Virginia courts both before and after *Aldridge* was decided. *Id.* As I have argued elsewhere, *Aldridge* is better understood as an expression of racial hatred than a statement of law. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 951.

240. 27 Va. (6 Rand.) 694 (Va. Gen. Ct. 1828).

241. 10 Ky. (3 A.K. Marsh.) 70, 74–75 (Ky. 1820).

242. 27 Va. (6 Rand.) at 698.

243. *Id.* at 700 (emphasis added).

statute created a risk of cruel punishment by giving the trial judge discretion to decide how much flogging to give a defendant, but it noted that such discretion was "of the same character with the discretion always exercised by Common Law Courts to inflict fine and imprisonment, and subject to be restrained by the same considerations."[244] If the judge abused this discretion and imposed a cruel quantum of flogging, "he might and would be impeached."[245] Because the risk entailed by judicial discretion was consistent with longstanding prior practice, and was mitigated by rules designed to deter abuse of discretion, the statute did not violate the Cruel and Unusual Punishments Clause of the Virginia Bill of Rights.

The Court of Appeals of Kentucky reached a different conclusion regarding the risks entailed by a penal statute in *Ely v. Thompson*.[246] In *Ely*, the plaintiff was a "free person of colour" who had previously been punished under a statute ordering that any black person who "lift[s] his or her hand in opposition" to a white person should be given "thirty lashes on his or her bare back, well laid on" and was now suing the judge and constable responsible for the punishment.[247] Although the act was similar to other statutes prohibiting assault and battery, the Court of Appeals noted that:

> Its expressions, "lift his or her hand in opposition to any person," includes many acts which will not be either an affray or assault or battery. It is not necessary, according to the letter of the act, that this lifting of "hand in opposition," should be so directly against the person as to commit either. It is not necessary that it should be done in an angry or threatening manner. It may be done in self defence, or in warding off injury, or in repelling attempts on the virtue of the female of color, by an intended ravisher. Another remarkable feature exists in the act. The proof is pointed out. The oath of the party complaining is conclusive, and the justice must inflict the punishment, although the proof may be untrue, and he disbelieves it.[248]

Because this statute created an unacceptable risk that innocent people would be punished—either because their conduct fell within traditional self-defense doctrine or because they were convicted by incontestable lies—the Court of Appeals found it to be "cruel indeed" and held it unconstitutional.[249]

Why the different outcome in these two cases? Both statutes created the risk that government officials would impose undeserved and even cruel punishments. The statute in *Wyatt* failed to state an upper limit on the amount of flogging that could be ordered by the judge, creating the risk that the judge

244. *Id.* at 701.
245. *Id.*
246. 10 Ky. (3 A.K. Marsh.) at 74–75.
247. *Id.* at 70–71.
248. *Id.* at 73.
249. *Id.* at 74.

might order a person flogged to death for a minor offense. The statute in *Ely* deprived defendants of the right to self-defense and to the benefits of an impartial trial, creating the risk that morally innocent African-Americans would be flogged. Why was the former statute acceptable and the latter not, particularly given that the former statute permitted a far greater quantum of flogging than the latter?

The difference between these statutes lay in their relation to longstanding prior practice. The discretion in *Wyatt* was consistent with the sentencing discretion traditionally given common law judges in similar cases. The statute in *Ely*, on the other hand, was filled with innovations. It redefined traditional common law crimes, taking away longstanding substantive and procedural protections from African-American defendants. Because the risk of unjust punishment was significantly greater than prior practice would permit, the punishment was unconstitutionally cruel.

That these early cases used longstanding prior practice as the measure of a punishment's cruelty supports the cruel-effect reading of "cruel," but it is not necessarily conclusive. The courts in these cases appeared to focus on the risk of unjustified pain entailed by these statutes, not the intent behind them. But, at the same time, it seems likely that the risk of unjust pain in both *Wyatt* and *Ely* would be actualized only in cases where some government official possessed cruel intent. A judge who abused his discretion to impose an excessive flogging on a defendant would almost certainly possess cruel intent. Similarly, a prosecutor who chose to charge a defendant for engaging in legitimate self-defense would also likely possess cruel intent. Thus, it is at least conceivable (although unlikely) that the courts in these cases were applying an implicit cruel-intent reading of "cruel."

The case of *Jones v. Commonwealth*, decided in 1799 by the Supreme Court of Appeals of Virginia, clarifies that early courts did, in fact, use the cruel-effect reading of "cruel."[250] In *Jones*, three men were convicted of assaulting a magistrate, and the jury imposed upon them a joint fine of £106.[251] Under Virginia law, a person who failed to pay his fine could be imprisoned in lieu of payment.[252] Therefore, if one of the codefendants failed to pay his share of the fine, the other codefendants could suffer a longer period of imprisonment or be forced to pay a disproportionate share of the fine.[253] The Supreme Court of Appeals struck down this punishment as unconstitutional.[254] Judge Carrington's opinion noted that the punishment violated a longstanding common law rule against joint fines in criminal cases.[255] The purpose of this rule was to eliminate the risk that one defendant's failure to pay would result in disproportionate

250. 5 Va. (1 Call) 555 (1799).
251. *Id.* at 555.
252. *Id.* at 556.
253. *Id.* at 556–58.
254. *Id.* at 557.
255. *Id.* at 558.

punishment for other defendants.[256] Therefore, Judge Carrington held, the joint fine constituted both an excessive fine and a cruel and unusual punishment in violation of the Virginia Constitution and Virginia statutory law.[257]

This case is instructive for two reasons. First, like the statute in *Wyatt*, it did not involve actual harm but a risk of harm. Because the joint fine created a greater risk of disproportionate punishment than was permissible at common law, it was cruel and unusual. Second, this case did not involve even a hint of cruel intent. There was no indication that the jury was aware of what would happen if one of the codefendants defaulted, nor did anyone involved in the case seem to have raised this issue. This fact demonstrates the distinction between intent to punish and cruel intent. The jury intended to impose the fine, and therefore the fine was a punishment. The fine created an undue risk of disproportionate pain, and therefore it was cruel and unusual. Whether the jury was aware of the risk was not relevant because the cruelty of a punishment depends upon its effect, not the intent with which it is imposed.

#### 4. "Cruel" in Legal Treatises

The description of cruel punishments in nineteenth-century American legal treatises was more mixed than in legislative debates or cases. In some ways, this is not surprising. Treatises are written for a variety of reasons: to explicate the law, to trace its history, and to argue for reform. As a result, their language is sometimes less focused on the legal meaning of terms like "cruel" than the language we find in other formal legal contexts.

To the extent nineteenth-century treatises set out to describe what characteristics made a punishment cruel and unusual, they were mostly consistent with the cruel-effect reading of "cruel." Thomas Cooley, for example, recognized that the Cruel and Unusual Punishments Clause prohibited not only torture but any punishment that was unduly harsh in light of the common law:

> 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.[258]

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256. 5 Va. (1 Call) at 558.

257. *Id.* at 557–58. Judge Roane appeared to agree with Judge Carrington's reasoning, holding that the risk of disproportionate punishment created by the joint fine was contrary to "an article of *magna charta*" and "principles of natural justice" and stating that "even if an act of Assembly should pass authorizing it, in express terms, I should most probably be of opinion that the one should be exploded and the other declared unconstitutional and not law." *Id.* at 556–57.

258. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 329–30 (Boston, Little, Brown, & Co. 1868).

Blackstone's American editor, St. George Tucker, argued that a punishment was cruel if it was harsher than necessary to advance the legitimate purposes of the criminal law.[259] Joseph Story also used the word "cruel" to describe the cruel effect of punishment—writing, for example, that "[t]he criminal code of every country partakes so much of necessary severity, that, without an easy access to exceptions in favour of unfortunate guilt, justice would assume an aspect too sanguinary and cruel."[260]

On the other hand, when discussing the historical reasons the prohibition of cruel and unusual punishments was needed, some treatises employed colorful language that has been used to support the Supreme Court's current inclination toward the cruel-intent reading of "cruel." Justice Story, for example, asserted that the English prohibition of "cruell and unusuall punishments" was necessitated by the "violent" and "vindictive" punishments the Stuart kings inflicted on their enemies and speculated that this prohibition "would seem to be wholly unnecessary in a free government."[261] Similarly, Benjamin Oliver wrote, "Breaking on the wheel, flaying alive, rending asunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution."[262] Finally, James Bayard asserted that the Cruel and Unusual Punishments Clause "marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion."[263]

Such descriptions implied that cruel punishments were the tools of tyrants and were wholly inconsistent with life in a democratic society. It is important to note, however, that such passages did not purport to describe the factual criteria for determining that a punishment is cruel, but merely described the authors' views as to the historical reasons for the prohibition. Indeed, Justice Story's assertion that a prohibition of cruel and unusual punishments was "wholly unnecessary in a free government"[264] was inconsistent with the Framers' decision to include the prohibition in the federal and most state constitutions and with the tradition of enforcing that prohibition in state court.[265] In short, the colorful language used in these treatises does not provide the support for the cruel-intent reading of "cruel" that some modern Supreme Court opinions imply.

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259. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 58 n.* (Philadelphia, William Young Birch & Abraham Small 1803).

260. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 772 (Carolina Acad. Press 1987) (1833).

261. *Id.* § 1006.

262. BENJAMIN OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (Books for Libraries Press 1970) (1832).

263. JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (Philadelphia, Hogan & Thompson 1840).

264. STORY, *supra* note 260, § 1006.

265. *See supra* Section II.D.3.

### E. EARLY METHOD OF EXECUTION CASES: BASELINES AND AMBIGUITIES

The final set of historical sources several justices have drawn upon to support the cruel-intent reading of "cruel" is comprised of three late-nineteenth- and early-twentieth-century cases involving challenges to methods of execution: *Wilkerson v. Utah*,[266] *In re Kemmler*,[267] and *Louisiana ex rel. Francis v. Resweber*.[268] In these cases, the Court held that a method of execution could only be considered cruel and unusual if it met two conditions: (1) it was new or innovative (and was thus unusual), and (2) it involved a certain quantum of unnecessary pain (and was thus cruel). The Court, however, left two key questions unresolved. It did not specify how much unnecessary pain was sufficient to make a punishment cruel, and it created ambiguity about whether the Eighth Amendment required a showing that government officials had cruel intent. As described above, these questions continue to dog the Supreme Court's Eighth Amendment jurisprudence.

In *Wilkerson v. Utah*, the defendant was convicted of murder and sentenced to death by firing squad.[269] He appealed his sentence, arguing that the firing squad was a violent and painful method of execution and was thus cruel and unusual.[270] The Court rejected this claim because death by firing squad was not a new method of punishment. Numerous authorities described the firing squad as a traditional method of execution that had not fallen out of usage, a fact that was "quite sufficient" to show that it did not violate the Eighth Amendment.[271] The implicit basis for this holding seems to have been that only a new or nontraditional punishment can be unusual. The firing squad did not fall into that category.

The *Wilkerson* court then considered, in dicta, whether the violence and pain associated with death by firing squad necessarily made it cruel. The Court used as a baseline the horrific methods of execution Blackstone described as being employed against murderers and traitors in eighteenth-century England, in which "terror, pain, or disgrace were sometimes superadded" to the execution.[272] These included cases "where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female."[273] The Court asserted that such practices, which were no longer used in England or America,[274] constituted cruel and unusual punishments: "[I]t is safe to affirm that

266. 99 U.S. 130 (1878).
267. 136 U.S. 436 (1890).
268. 329 U.S. 459 (1947).
269. 99 U.S. at 130.
270. *Id.* at 133.
271. *Id.* at 134–35.
272. *Id.* at 135.
273. *Id.*
274. *See* BANNER, *supra* note 2, at 76.

punishments of torture, such as those mentioned . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."[275] Beyond these paradigmatic examples of cruelty, the *Wilkerson* court said, it is difficult to "define with exactness" the line between cruel and noncruel punishments; wherever that line may be, however, the Court was satisfied that the firing squad lay on the noncruel side of it.[276]

The *Wilkerson* court set a baseline for permissible punishment methods: Methods of execution that "superadded" "terror, pain, or disgrace" to the execution, such as the methods that had once been used against English murderers and traitors, were forbidden. The Court did not specify whether those methods were forbidden because they exhibited a cruel attitude on behalf of the state or because they imposed an unjust level of pain. This ambiguity was apparent in the Court's assertion that "punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden."[277] Is the problem the intent to torture or that the pain level is unnecessary? The Supreme Court's use of the phrase "unnecessary cruelty" implied that it was using "cruel" as a measure of the pain caused by the punishment. Some level of pain is necessary in all punishment, therefore, it makes sense to differentiate between necessary and unnecessary pain. The same cannot be said for bloodthirstiness or hard-heartedness. Still, the Court did not answer the question with absolute clarity.

The *Wilkerson* court also left open the question of how much pain is permissible as part of an execution. The pain caused by a firing squad is permissible, the pain caused by torture is not—but there is a wide space between these two alternatives. The Court could not define exactly the point at which the pain imposed by punishment crosses the threshold into cruelty, although it did implicitly recognize that the pain might do so even if it is not as severe as the torture imposed on murderers and traitors in eighteenth-century England.

Twelve years after *Wilkerson*, the Supreme Court was asked to decide whether electrocution was a cruel and unusual method of punishment.[278] Prior to the invention of the electric chair, hanging was the dominant mode of execution in the United States. Toward the end of the nineteenth century, an increasing number of people raised questions about whether hanging was still an acceptable method of punishment. Some critics objected to the risk of excruciating pain caused by hanging.[279] Although, in theory, hanging was supposed to sever the spinal cord instantly and cause a painless death, in reality the process was sometimes botched and the offender struggled for several

275. *Wilkerson*, 99 U.S. at 136.
276. *Id.* at 135–36.
277. *Id.* at 136.
278. In re Kemmler, 136 U.S. 436 (1890).
279. *See* BANNER, *supra* note 2, at 170; GARLAND, *supra* note 1, at 118.

minutes while being asphyxiated.[280] On rare occasions, the rope actually broke and the offender had to be hung a second time. A botched hanging was a very painful thing, indeed. Some critics, on the other hand, raised what may be called an aesthetic objection to hangings.[281] Whether a hanging caused pain or not, it always appeared violent and sometimes even gruesome.[282] An increasing number of people found such spectacles unbecoming and even uncivilized.[283] Finally, some people raised questions about the crowd watching the hanging.[284] These critics mixed the cruel-effect and cruel-intent ideas of cruelty together, with a dose of aesthetic disdain. They argued that public executions coarsened public sensibilities, encouraging the crowd to enjoy the pain of others and intensifying the suffering of the condemned person by forcing him or her to undergo public ridicule.[285]

In 1885, the Governor of New York sent a message to the legislature asking it to examine whether the new science of electricity could provide a better way to impose capital punishment:

> The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner.[286]

The legislature appointed a commission to study "the most humane and practical method known to modern science" for executing criminals, and the commission recommended electrocution.[287] In 1888, the New York legislature passed a statute requiring that "[t]he punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be

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280. *See* BANNER, *supra* note 2, at 170; GARLAND, *supra* note 1, at 118. By the end of the nineteenth century, however, the "science" of hanging had progressed to the point where it could be imposed in a manner that reliably resulted in nearly instantaneous death. *See* GARLAND, *supra* note 1, at 109–10, 117.

281. *See* BANNER, *supra* note 2, at 146 ("In the nineteenth century . . . the public representation of capital punishment became embroiled in issues of class and taste. For members of a self-conscious elite, particularly in the North, sights that had been thought educational in 1800 were too shocking for display by 1850."); *id.* at 153 ("The genteel no longer wished to see death, and they began to feel contemptuous of those who did. Once they had viewed the spectators at executions as fellow citizens; now the crowd became a vulgar mob."); *see also* FRIEDMAN, *supra* note 1, at 76; MASUR, *supra* note 8, at 96.

282. *See* BANNER, *supra* note 2, at 146.

283. *See id.*

284. *See id.*

285. *See id.*

286. In re Kemmler, 136 U.S. 436, 444 (1890).

287. *Id.* The commission rejected the reliably quick and effective guillotine because "the profuse effusion of blood which it involves . . . must be needlessly shocking to the necessary witnesses." BANNER, *supra* note 2, at 179. The commission rejected improved methods of hanging for similar reasons. *Id.* at 180.

continued until such convict is dead."[288] Kemmler was subsequently convicted of murder and sentenced to death by electrocution.[289] He appealed the sentence, arguing that electrocution was a cruel and unusual method of punishment.[290]

As in *Wilkerson*, the Court first focused on whether the punishment was "unusual." The Court cited, with apparent approval, the New York court's determination that electrocution "might be said to be unusual because it was new."[291] As to the cruelty of the method, the *Kemmler* court repeated *Wilkerson*'s baseline: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,—something more than the mere extinguishment of life."[292] Electrocution could not be said to be cruel because the evidence in the record indicated "that this act was passed in the effort to devise a more humane method" of executing offenders and that "the legislature had attained by the act the object had in view in its passage."[293] In other words, the punishment involved neither cruel intent nor cruel effect. As in *Wilkerson*, the Court's phraseology implied that the Court considered the word "cruel" to refer to the pain caused by the punishment. In particular, the *Kemmler* court asserted that the word cruel means "something inhuman and barbarous,—something more than the mere extinguishment of life."[294] This "something" appears to refer to additional pain imposed on the offender, not the intent with which that pain is imposed. But once again, the Court did not answer the question with absolute clarity.

In *Louisiana ex rel. Francis v. Resweber*, the Supreme Court was asked to decide whether pain that is unintentionally imposed on an offender as the result of a botched execution attempt transformed any subsequent efforts at execution

288. *Kemmler*, 136 U.S. at 444–45.

289. *Id.* at 445.

290. *Id.* at 441. At the time Kemmler's case was decided, the Cruel and Unusual Punishments Clause had not yet been incorporated into the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660 (1962) (incorporating the Clause into the Fourteenth Amendment). However, the Court did recognize that deprivations of life, liberty, or property that were fundamentally unfair constituted due process violations under the Fourteenth Amendment. *See Kemmler*, 136 U.S. at 448–49. Thus, Kemmler argued that he was being denied due process because he was being subjected to a cruel and unusual punishment.

291. *Kemmler*, 136 U.S. at 447.

292. *Id.*

293. *Id.* In determining that the legislature had met its goal of devising a more humane method of execution, the Supreme Court gave great deference to the legislative determination that electrocution was more humane than hanging and held that Kemmler had not met his burden of proof in showing that electrocution would cause increased pain. The Supreme Court does not appear to have made its own determination as to the relative painfulness of hanging and electrocution. As it turns out, the Supreme Court's deference to the legislature does not appear to have been well-placed. Kemmler's actual execution appears to have been prolonged, gruesome, and possibly very painful. *See* BANNER, *supra* note 2, at 186 (describing Kemmler's execution). Several other early electrocutions appear to have been similarly objectionable. *See id.* at 186–92. These botched executions do not appear to have caused great public concern, possibly because they were conducted completely out of public view. *See id.*

294. *Kemmler*, 136 U.S. at 447.

into cruel and unusual punishments.[295] Unlike *Wilkerson* and *Kemmler*, this case directly raised the question of whether a cruel and unusual punishment necessarily involves cruel intent—but, as in those cases, the Court failed to resolve this question.

Willie Francis was convicted of murder and sentenced to death.[296] On May 3, 1946, Louisiana state prison officials placed him in the electric chair and attempted to electrocute him.[297] When they threw the switch, "Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath. [sic]'"[298] The electric current was not sufficient to kill Francis, and so state officials stopped the execution.[299] The execution was postponed six days to give the state sufficient time to fix the malfunction.[300] Francis applied for a stay of execution on the ground that forcing him to undergo the mental and physical anguish of a second execution attempt constituted cruel and unusual punishment.[301]

Francis's core argument was that subjecting him to a second execution attempt was cruel in the same way that the punishments imposed on murderers and traitors in eighteenth-century England were cruel.[302] Like those defendants, Francis was subjected to "torture or a lingering death" because he was forced to go through the psychological and physical torment of execution twice.[303]

The *Francis* court began its analysis in the same way as the *Wilkerson* and *Kemmler* courts, by asking whether this case presented a new (and thus unusual) situation or one that had been faced by defendants in the past.[304] The Court concluded that the effort to execute Willie Francis twice was entirely new, but rejected the argument that it was cruel.[305] The *Francis* court was unable, however, to coalesce around a rationale for this ruling.

A four-justice plurality appeared to take the position that a punishment could only be cruel if a responsible government official had cruel intent:

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295. 329 U.S. 459 (1947).
296. *Id.* at 460.
297. *Id.*
298. *Id.* at 480 n.2 (Burton, J., dissenting).
299. *Id.* at 460 (majority opinion).
300. *Id.* at 461.
301. *Francis*, 329 U.S. at 464.
302. *Id.*
303. *Id.* at 476 (Burton, J., dissenting).
304. *Id.* at 462 (majority opinion).
305. *See id.* ("So far as we are aware, this case is without precedent in any court."); *Id.* at 479 (Burton, J., dissenting) ("It exceeds any punishment prescribed by law. There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful?"). In fact, there was precedent for repeated attempts to execute an offender after a botched execution attempt, although perhaps not judicial precedent. Sometimes, attempts to hang offenders went awry when the weight of the condemned person broke the rope without killing the person. On such occasions, officials appear to have obtained new rope and hanged the offender a second time. *See, e.g.*, BANNER, *supra* note 2, at 176 (describing one such incident).

> The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.[306]

Four justices took the opposite position, arguing that a punishment was cruel if it caused an unjustified degree of pain and that there was no requirement that government officials have cruel intent: "The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself. Electrocution has been approved only in a form that eliminates suffering."[307] In response to the plurality's argument that the double execution could not be considered cruel because prison officials lacked cruel intent, the dissenters asserted that the only intent that matters for Eighth Amendment purposes is the intent to punish, not the intent to punish cruelly.[308] When officials chose to make a second attempt at executing Willie Francis after exposing him to the first, abortive attempt, their conduct was intentional.[309] The mere fact that some of the pain they caused was unintentional did not make the pain suffered by Willie Francis any less cruel:

> If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake. Although the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional. How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment?[310]

Unable to decide between these opposing views, Justice Frankfurter wrote a separate concurrence arguing that a single, good faith, abortive execution attempt was insufficient to make a second attempt unconstitutional.[311] This "does not mean," Justice Frankfurter asserted, "that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single,

306. *Francis*, 329 U.S. at 464.
307. *Id.* at 474 (Burton, J., dissenting).
308. *Id.* at 477 ("Lack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result.").
309. *Id.* at 476.
310. *Id.*
311. *Id.* at 470–71 (Frankfurter, J., concurring).

cruelly willful attempt, would not raise different questions."[312] According to Justice Frankfurter, if the punishment *either* reaches a certain threshold of painfulness *or* demonstrates cruel intent, it might be considered cruel and unusual.[313]

In sum, four justices on the *Francis* court appeared to think the word "cruel" in the Cruel and Unusual Punishments Clause refers to the intent of the punisher; four thought it refers to the effect of the punishment; and one could not—or would not—make up his mind.

### F. CONCLUSION CONCERNING THE ORIGINAL MEANING OF "CRUEL"

The linguistic and historical evidence indicates that the word "cruel" in the Cruel and Unusual Punishments Clause originally referred to the effect of the punishment, not the intent underlying it. The conceptual relationship between "cruel" and "unusual" and between "cruel" and "excessive" indicates that the Cruel and Unusual Punishments Clause originally prohibited punishments that are unduly harsh in light of longstanding prior practice. Research into four relevant legal contexts has revealed no instance in which an eighteenth- or nineteenth-century speaker claimed that a showing of cruel intent was part of the minimum factual criteria necessary to show a violation of the Cruel and Unusual Punishments Clause. In at least one instance, an eighteenth-century American court struck down a punishment as cruel and unusual even though there was no evidence of cruel intent because it imposed a greater risk of disproportionate effects than was permissible at common law. By the time the Supreme Court decided its three late-nineteenth- and early-twentieth-century method of execution cases—particularly *Louisiana ex rel. Francis v. Resweber*—it appeared uncertain about whether a showing of cruel intent was necessary to establish a violation of the Cruel and Unusual Punishments Clause. But *Francis* was decided more than 150 years after the adoption of the Cruel and Unusual Punishments Clause and is thus not strong evidence of original meaning. Even in *Francis*, the same number of justices supported the cruel-effect reading as the cruel-intent reading. Thus, the case does not have the precedential force that is sometimes claimed for it.

## III. IMPLICATIONS OF THE ORIGINAL MEANING OF "CRUEL"

The word "cruel" in the Cruel and Unusual Punishments Clause means unjustly harsh, not motivated by cruel intent. This fact clarifies the Eighth Amendment's intent requirement: To violate the Cruel and Unusual Punishments Clause, some government official must intend to punish but not necessarily intend to punish cruelly.[314] Moreover, as discussed below, judicial recognition

312. *Francis*, 329 U.S. at 471.

313. *Id.*

314. The Eighth Amendment's intent requirement discussed here is consistent with the Supreme Court's recent ruling in *Kingsley v. Hendrickson*, which held that when a prison official purposely or

of the original meaning of both "cruel" and "unusual" will solve several problems associated with the Court's current Eighth Amendment jurisprudence. First, it will provide a workable standard for determining whether a punishment violates the Eighth Amendment: comparison with longstanding prior practice. Second, it will allow courts to effectively sort between the unintended effects of punishment that may properly be considered part of the punishment and those that may not. If a given punishment heightens the risk of severe, unjustified harm significantly beyond the baseline risk established by longstanding prior practice, it is cruel and unusual, even if no government official actually foresaw the harm. Third, it will allow courts to focus on the core purpose of the Cruel and Unusual Punishments Clause, which is to prevent unjust suffering, not the coarsening of public sensibilities. Given the strong connection between nontransparency and increases in suffering, courts should cast a skeptical eye at governmental efforts to hide punishment from public view.

### A. JUDICIAL COMPETENCE TO DETERMINE WHETHER A PUNISHMENT'S EFFECTS ARE CRUEL

In *Baze v. Rees*, Justice Thomas argued that a punishment could only be cruel and unusual if it was "designed to inflict pain for pain's sake."[315] His embrace of the cruel-intent reading of the word "cruel" was driven, at least in part, by the concern that judges lack competence to determine whether the pain inflicted by a given punishment crosses the line into cruelty.[316]

This problem has at least three dimensions. The first concerns neutral principles of adjudication. How can a court reliably determine whether a given punishment has crossed the line between just and unjustly harsh punishments? This aspect of the Supreme Court's Eighth Amendment jurisprudence is almost completely incoherent.[317] Sometimes the Court purports to ask whether there is a current "societal consensus" that a punishment causes too much pain,[318] an approach in line with the Court's assertion that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[319] But the Court has been unable or unwilling to

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knowingly uses force against a pretrial detainee, such force violates due process if it is "objectively unreasonable." 135 S. Ct. 2466, 2473 (2015). There is no requirement that the official have any particular state of mind concerning the excessiveness of the force. Similarly, there is no requirement under the original meaning of the Cruel and Unusual Punishments Clause that a public official have a particular state of mind concerning the cruelty of a punishment. Shortly after *Kingsley* was decided, Richard Re noted that the case had implications for the Supreme Court's Eighth Amendment jurisprudence, although he did not discuss the issue in terms of original meaning. *See* Richard M. Re, *Opinion analysis: Supporting excessive force claims in jails—and prisons?*, SCOTUSBLOG (June 22, 2015, 5:20 PM), http://www.scotusblog.com/2015/06/opinion-analysis-supporting-excessive-force-claims-in-jails-and-prisons/ [https://perma.cc/MDY4-JNP4].

315. 553 U.S. 35, 97 (2008) (Thomas, J., concurring in the judgment).

316. *See supra* Section I.B.2.

317. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 917–26.

318. *See id.*

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

announce a consistent methodology for determining the existence or absence of a societal consensus.[320] More generally, the Court has been unable to reconcile this standard with the fact that public opinion sometimes turns toward greater cruelty, not greater leniency.[321] Given the deficiencies of the evolving standards of decency test, the Court sometimes merely pretends to search for societal consensus but actually uses its own independent judgment to decide whether a punishment is cruel and unusual.[322] In exercising such judgment, the Court usually draws upon some combination of the four most commonly offered purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.[323] Once again, however, the Court draws upon these rationales in an inconsistent manner and has shown little capacity for using them as an actual measure of a punishment's cruelty.[324] As a result, the Court typically resolves Eighth Amendment cases through the use of a strong presumption of unconstitutionality or (much more commonly) a strong presumption of constitutionality.[325] The Court has been less than transparent in articulating when one or the other presumption should apply.[326]

In other words, the Court currently has no workable legal standard for determining whether a punishment inflicts an unjust level of pain.[327] The Court's Eighth Amendment decisions in recent decades have been almost wholly subjective, and legal doctrine has been used as a kind of window dressing to give the Court's opinions the appearance of legality.[328] Justices Thomas and Scalia have understandably been unhappy about this fact and have proposed the cruel-intent requirement as a way to rein in judicial subjectivity.

The second dimension might be thought of as a fine tuning problem. In *Baze v. Rees*, and again in *Glossip v. Gross*, the petitioners asked the Court to strike down a three-drug execution protocol on the ground that it created an "unacceptable risk of severe pain."[329] In *Baze*, the petitioners argued that a protocol involving a barbiturate-based sedative, a heart-stopping agent, and a paralyzing agent involved an unnecessary "risk of harm" in comparison to a one-drug protocol involving only barbiturates.[330] In *Glossip*, the petitioners argued that a three-drug protocol using a Midazolam-based sedative involved an unnecessary risk of pain in comparison to a three-drug protocol using a barbiturate-based

320. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 919, 922.
321. *See id.* at 919.
322. *See id.* at 921.
323. *See id.* at 917.
324. *See id.*
325. *See* Stinneford, *Illusory Eighth*, *supra* note 17, 482–89.
326. *See id.*; *see also* William W. Berry III, *Eighth Amendment Presumptions A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, 73–77 (2015) (arguing for a more explicit, principled approach to Eighth Amendment presumptions).
327. *See* Stinneford, *Rethinking Proportionality*, *supra* note 20, at 922–23.
328. *See id.*
329. Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015); Baze v. Rees 553 U.S. 35, 47 (2008) (plurality opinion).
330. 553 U.S. at 44, 51.

sedative.[331] To resolve these claims, the Court would have had to make fine distinctions between complicated medical procedures, the effects of which were not completely understood even within the scientific community.[332] This sort of analysis does not lend itself easily to constitutional decision making.[333]

The third dimension is what is sometimes called the "one-way ratchet" problem.[334] If a method of execution becomes unconstitutional the moment a less painful way of accomplishing the same goal appears, there may be endless litigation over this evolving standard, and the final result may be that capital punishment itself becomes impossible. As noted above, over the course of the twentieth century there were a series of movements to make capital punishment less painful.[335] States replaced hanging with the electric chair,[336] then the gas chamber,[337] then lethal injection.[338] Because this process was driven by legislation, rather than judicial decisions concerning the Eighth Amendment, the change from one method to another was sometimes gradual or incomplete. Various methods were considered permissible.[339] Had this process been driven by judicial decisions under the Eighth Amendment, however, each change would have been instantaneous, all-encompassing, and virtually irreversible.[340] The moment the Supreme Court decided the electric chair was less painful than hanging, hanging would become unconstitutional, and so with the gas chamber and with lethal injection.[341] The petitioners in *Baze* and *Glossip* appeared to ask the Court to adopt this methodology of invalidating punishments as soon as less painful ones become available, using the Eighth Amendment to refine the process of lethal injection itself.[342]

This methodology would have the potential to make capital punishment itself impossible, as *Glossip* demonstrates. If three-drug execution protocols using barbiturates set the constitutional ceiling for permissible pain, then a person or movement that wanted to stop capital punishment could do so by making

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331. 135 S. Ct. at 2731, 2735.

332. *See Baze*, 553 U.S. at 105 (Thomas, J., concurring in the judgment) (asserting that petitioners' approach to the Eighth Amendment would ask courts "to resolve medical and scientific controversies that are largely beyond judicial ken").

333. *See id.* at 106.

334. *See* Kennedy v. Louisiana, 554 U.S. 407, 469 (2008) (Alito, J., dissenting) ("[T]his Court has previously rejected the proposition that the Eighth Amendment is a one-way ratchet that prohibits legislatures from adopting new capital punishment statutes to meet new problems . . . ."); Harmelin v. Michigan, 501 U.S. 957, 990 (1991) ("The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.").

335. *See Baze*, 553 U.S. at 104 (Thomas, J. concurring in the judgment).

336. *See* BANNER, *supra* note 2, at 177–98.

337. *See id.* at 196–202.

338. *See id.* at 295–99; *see also* GARLAND, *supra* note 1, at 117.

339. *See Baze*, 553 U.S. at 42 (plurality opinion).

340. *See id.* at 104 (Thomas, J., concurring in the judgment) (describing efforts to have various modern methods of execution declared unconstitutional).

341. *See id.*

342. *See id.*

barbiturates unavailable.[343] This is one of the reasons Justice Thomas has advocated a cruel-intent requirement,[344] and it is the sole reason the *Glossip* majority imposed the absurd requirement that defendants are not permitted to challenge a method of execution as unconstitutional unless they identify a feasible, constitutional, alternative method.[345]

All three dimensions of this problem are resolved—or at least ameliorated—by recognizing the original meaning of both "cruel" and "unusual."

First and foremost, such recognition will provide neutral principles of adjudication that will allow the Court to resolve Eighth Amendment problems in a more reliable fashion.[346] As shown above, a punishment is cruel and unusual if it is unjustly harsh in light of longstanding prior punishment practice. The question is not whether a given punishment is unnecessarily painful in an absolute sense but whether it is significantly more painful than the punishments it replaces. Rather than asking whether a punishment is just or necessary in the abstract—which is often tantamount to asking whether the punishment violates the justices' own private sensibilities—the Court can compare the pain caused by a given punishment to the pain caused by traditional punishments for the same or similar crimes. There will still be some subjectivity to the analysis, but it will be confined to a much narrower scope than the Court's current approach.

Second, this approach will not ask the Court to engage in the nearly impossible task of fine tuning methods of punishment to meet an abstract standard of necessity or justice. A punishment is constitutionally acceptable if it falls within the relatively broad range of reasonableness defined by longstanding prior practice. Only if a punishment falls outside that range can it appropriately be called cruel and unusual. For example, when we ask whether lethal injection is constitutionally permissible, the question is not whether it imposes the least pain or risk of pain possible but whether it causes greater pain or risk of pain than traditional methods of execution such as hanging or the firing squad.[347]

Finally, such recognition would effectively eliminate the one-way ratchet problem. I have shown in a prior article that once-traditional punishments can become unusual, but only when they fall out of usage for a long time—normally

343. Glossip v. Gross, 135 S. Ct. 2726, 2733–34 (2015) (describing efforts of death penalty abolition movement to make barbiturates unavailable for use in executions).

344. *See Baze*, 553 U.S. at 104–05 (Thomas, J. concurring in the judgment).

345. *See Glossip*, 135 S. Ct. at 2738.

346. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275 (2006).

347. Hanging has been the dominant mode of execution throughout most of American history, and the firing squad has also been a traditional mode of execution. Although these methods have mostly been replaced by lethal injection, their use has continued up to the present time. *See, e.g.*, GARLAND, *supra* note 2, at 118; SARAT ET AL., *supra* note 5, at 10 ("Today, . . . five methods of execution are legally available: firing squad, hanging, lethal gas, electrocution, and lethal injection."); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 69 (2002). Therefore, such methods are still part of our tradition for constitutional purposes.

a century or more.[348] Therefore, legislatures are free to look for more humane methods of punishment without having to worry that if the new method does not work out, they can never go back to the old one. But when culture really does change in a lasting way, once-traditional punishments that have fallen out of usage for multiple generations can appropriately be declared cruel and unusual.[349]

### B. SORTING BETWEEN PUNISHMENTS AND ACCIDENTS

The second instrumental rationale for the cruel-intent reading of "cruel" is that the reading is supposed to help sort between those unintended harms that can appropriately be called punishment and those that cannot.[350] Punishment often results in the infliction of pain that is neither authorized nor intended. Officials may botch an execution, causing an offender to suffer terribly before dying.[351] Prisons may be overcrowded, poorly heated, or may provide unhealthy food or inadequate medical care.[352] There may be a fire in the cell block, killing or injuring prisoners who are unable to escape.[353] When can such harms appropriately be considered part of an offender's punishment? The punishment is a but-for cause of all these harms, but this is not enough to show that the harms are part of the punishment. Every event has nearly infinite but-for causes and is the but-for cause of nearly infinite effects.[354] How do we draw the line between effects of punishment that may appropriately be considered part of the punishment and those that may not?

As described in Part I above, the Supreme Court has attempted to solve this problem by using "wantonness"—a synonym for cruel intent—as a sorting mechanism.[355] In some circumstances, wantonness requires a showing that a government official acted "maliciously and sadistically for the very purpose of causing harm,"[356] whereas in other cases it requires only "deliberate indiffer-

348. See Stinneford, *Death, Desuetude*, *supra* note 20, at 590.

349. *See id.* Therefore, Justice Scalia's famous admission that he would be likely to strike down any attempt to revive eighteenth-century punishment practices such as branding or flogging stood on firmer constitutional ground than Justice Scalia himself realized. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging."). *But see* Jennifer Senior, *In Conversation: Justice Scalia*, NEW YORK MAGAZINE, Oct. 6, 2013 ("[W]hat I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional.").

350. *See* Wilson v. Seiter, 501 U.S. 294, 300 (1991); *cf.* Baze v. Rees, 553 U.S. 35, 94 (2008) (Thomas, J., concurring in the judgment).

351. *See, e.g.*, Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES (Apr. 29, 2014), http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html [https://perma.cc/3H5G-J2DB] (describing botched execution of Clayton Lockett).

352. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 517 (2011).

353. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947).

354. *See* DRESSLER, *supra* note 38, § 14.02.

355. *See supra* Section I.B.3; *see also* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

356. *See* Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320–21 (1986)).

ence" to the risk of harm.[357] But in every case, wantonness requires, at a minimum, that a responsible government official be actually aware of the risk of severe harm entailed by some government action and deliberately choose to perform the action anyway.[358] If no government official has a wanton intent in creating or tolerating the risk, the resulting harm is not part of the offender's punishment.[359]

This standard does not work particularly well under the reality of modern punishment. There may once have been a time when jails were small and jailers were intimately familiar with the risks offenders faced, but this is not the case today.[360] Modern prison systems are large bureaucracies in which job functions are highly compartmentalized.[361] Those who make prison budgetary decisions may be separate from those who make decisions about where to house and how to care for specific prisoners.[362] These decision makers, in turn, may be separate from the guards, doctors, and other workers who have direct contact with prisoners.[363] Even the guards themselves may circulate through various parts of a large prison without developing intimate knowledge of the risks facing a given inmate.[364] As a result, no person in the system may have actual awareness of an unjustifiable risk of harm.

For example, take a hypothetical case based on the *Farmer v. Brennan* decision discussed in Part I.[365] Imagine that a preoperative transsexual with breast implants, who has undergone hormone therapy and displays highly feminine characteristics, is convicted of a crime and sentenced to prison. Imagine that the court clerk who handles the initial processing of the case identifies the offender as male because the offender's penis has not yet been removed but never thinks about the implications of this categorization for the offender's prison placement after sentencing. The official in charge of placing offenders in prison housing never meets the offender but looks at a form on which the gender box is marked male. This official places the offender in the general male population of the prison, which is overpopulated and understaffed. The various guards and other workers who come into contact with this offender make sure the offender is safe while they are there, but there are significant periods of time when no guards are present. During some of these gaps, the offender is beaten and raped.

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357. *See Estelle*, 429 U.S. at 104.

358. *See* Wilson v. Seiter, 501 U.S. 294, 294 (1991).

359. *See id.*

360. *See* Brown v. Plata, 563 U.S. 493, 502–03 (2011) (describing overcrowded and overburdened California prison system); *see also* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 86–90 (Norval Morris & David J. Rothman eds., 1998).

361. *See Brown*, 563 U.S. at 501.

362. *See id.* at 525, 530.

363. *See, e.g.*, Dirk van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME & JUST. 503 (2010).

364. *See id.*

365. 511 U.S. 825 (1994).

Anyone looking at this situation as a whole would see that placing a preoperative transsexual in a male prison population creates a significant risk of beatings and rape. But it may be that, in our highly bureaucratized and compartmentalized prison system, no one is in a position to see the big picture.

Similarly, lethal injection protocols are often highly compartmentalized such that numerous officials play relatively small roles in the execution.[366] The purpose of this compartmentalization is to prevent any one official from feeling solely responsible for killing the offender.[367] But, once again, this compartmentalization enhances the risk that no one person will have sufficient knowledge to understand the risk that an execution might go wrong.[368] For example, during the recent execution of Clayton Lockett, officials inserted the intravenous needle for delivering the lethal drugs into a vein in the groin area, then covered the insertion point with a cloth to prevent witnesses from seeing Lockett's groin.[369] As a result, the attending physician was unaware that Lockett's vein had collapsed until after a sufficient quantity of drugs had seeped into the surrounding muscle tissue and caused him to groan, speak, and writhe in apparent pain.[370] By the time the physician realized what had happened, it was too late.[371] Lockett took forty minutes to die.[372] He was apparently tortured to death, but no public official displayed cruel intent, wantonness, or deliberate indifference.

With respect to lethal injection, the compartmentalization problem is compounded by the use of a paralyzing agent in many lethal injection protocols.[373] This agent is a more powerful concealer than any sheet placed over the offender or blinds that may be closed.[374] Once the paralyzing agent does its job, no one other than the offender himself has any way of knowing what pain he suffers.[375] It will often be impossible to identify a public official who possesses cruel intent concerning an offender's pain when the lethal injection protocol itself is designed to conceal this pain from such officials.[376]

In addition to the compartmentalization problem, the cruel-intent standard creates arbitrary distinctions between offenders who suffer the same harm as a

366. *See* STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 106 (1992) (describing lethal injection device with a mix of real and "dummy" controls, so that no official knows whether he or she pulled the lever that delivered the lethal chemicals).

367. *See id.* The effort to protect public officials from feeling responsible for carrying out executions is not a new one. *See, e.g.*, BANNER, *supra* note 2, at 174 (describing various gadgets invented in the late nineteenth century to allow the condemned person to hang himself so that no public official would be directly responsible for the consequences).

368. *See* TROMBLEY, *supra* note 366, at 106.

369. *See* Eckholm, *supra* note 351.

370. *See id.*

371. *See id.*

372. *See id.*

373. *See* Denno, *supra* note 132, at 55–56.

374. *See id.*

375. *See id.*

376. *See id.*

result of their punishments.[377] If two preoperative transsexuals are placed into the same type of prison setting, and suffer the same beatings and rape, but one was "lucky" enough to have a demonstrably malevolent or reckless jailer while the other was simply caught in the maw of a mindless bureaucracy, only the former could establish an Eighth Amendment violation.

Finally, as Sharon Dolovich has shown, requiring offenders to show that responsible officials were actually aware of the risk gives officials a powerful incentive to bureaucratize and compartmentalize in order to defeat Eighth Amendment claims.[378] In other words, the Supreme Court's current cruel-intent approach to the Eighth Amendment encourages public officials to avoid learning about the risks of harm facing criminal offenders, thus increasing the likelihood that such harms will actually occur.[379]

Recognition of the original meaning of the Cruel and Unusual Punishments Clause provides a better way to draw the line between those unintended harms that may properly be called punishment and those that may not. The basic problem in unintended harm cases is not whether the harm is the result of an intentional act by a government official. In all prison-condition and botched-execution cases, government officials intentionally inflict a punishment and that punishment causes an additional, unintended harm. The question is whether the connection between the intentional act and the unintended harm is sufficiently direct to attribute the harm to the act as a legal matter.

This question is best answered by reference to longstanding prior practice. Recall *Jones v. Commonwealth*[380] discussed in Section II.D.3. A jury convicted three men of assaulting a magistrate and imposed a joint fine on them.[381] This sentence violated a longstanding common law rule that joint fines should not be imposed in criminal cases because such fines create the risk that a default by one defendant could cause excessive punishment of his codefendants.[382] Thus, the Supreme Court of Appeals of Virginia found the sentence cruel and unusual.[383] *Jones* was one of several late-eighteenth- and early-nineteenth-century

377. *Cf.* Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQUIRIES L. 97 (2008) (discussing "parallel moral luck problems," where, for example, persons avoid prosecution not because they had no ill intent but rather because by sheer luck their ill intent did not result in harm).

378. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 892 (2009) ("This, at its core, is the problem with *Farmer*'s recklessness standard: It holds officers liable only for those risks they happen to notice—and thereby creates incentives for officers *not* to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse."). The danger of structuring rules in a way that provides inappropriate incentives to public and private actors is an important issue that cuts across a wide range of substantive legal areas. *See, e.g.*, D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 785 (2013) (discussing the need to design antitrust rules to incentivize actors within firms to prevent cartel formation).

379. *See* Dolovich, *supra* note 378, at 892.

380. 5 Va. (1 Call) 555 (1799).

381. *Id.* at 555.

382. *Id.* at 557.

383. *Id.*

cases implying that if the government inflicts a punishment that poses a significantly greater risk of unjustified harm than longstanding prior practice would permit, it is cruel and unusual.

The significance of using this standard becomes apparent if we consider the current dispute over the three-drug lethal injection protocol. Under the original meaning of the Cruel and Unusual Punishments Clause, the constitutional question is whether the risk of unjustified pain posed by lethal injection significantly exceeds the risk posed by traditional punishments, such as hanging. Such risk would best be measured in terms of the likelihood of a botched execution and the degree of pain associated with such an accident. As discussed above, a botched lethal injection can be horrifyingly painful, making the offender feel as though he were being simultaneously drowned and burned to death from the inside. Then again, a botched hanging could be horrifyingly painful as well, involving torn muscles and ligaments and gradual asphyxiation lasting an hour or more.[384] Because the pain caused by a botched lethal injection appears to be in the same ballpark as the pain caused by a botched hanging, the question is whether the likelihood of a botched lethal injection is significantly higher than the likelihood of a botched hanging. If so, lethal injection may be unconstitutional.

In fact, the risk of botched lethal injections appears to be more than double the risk associated with the other methods of execution used in the twentieth and twenty-first centuries, including traditional methods like hanging. Austin Sarat recently studied the rate of botched executions between the years 1900 and 2010.[385] He found that the overall rate of botched executions during that time period was about 3%, but that the rate of botched executions by lethal injection is around 7%.[386] If Sarat's findings are correct, lethal injection appears to be an example of cruel and unusual punishment, particularly given the likelihood that a botched lethal injection will cause extreme suffering. If lethal injection poses more than twice the risk of excruciating pain that traditional modes of execution such as hanging pose, it is unjustly harsh in light of longstanding prior practice. In other words, it is cruel and unusual.

The same principle would apply in cases involving challenges to prison conditions. If officials create or permit conditions that significantly enhance the risk of severe harm, as compared to longstanding prior practice, the resulting punishment may appropriately be called cruel and unusual.[387] Putting 2,000 prisoners in a facility traditionally used for 1,000 prisoners, for example, can appropriately be called cruel and unusual when it predictably results in higher rates of assault and rape. Placing prisoners in solitary confinement for much longer periods of time than was traditionally permissible, which predictably

384. *See* BANNER, *supra* note 2, at 46–47, 170; GARLAND, *supra* note 1, at 118.
385. *See* SARAT ET AL., *supra* note 5, at 177.
386. *See id.*
387. *See* Brown v. Plata, 563 U.S. 493, 493 (2011).

causes severe psychological and sometimes physical harm, may also be called cruel and unusual.[388] Placing a person with strong feminine physical characteristics in a general male population, a practice also traditionally avoided, can be called cruel and unusual when that person is assaulted and raped.[389] The key issue is not the public officials' cruel intent regarding this issue, but the likelihood and severity of the harm as compared to longstanding prior practice.

This approach is consistent with the key concern of the plurality in *Louisiana ex rel. Francis v. Resweber*, which argued that it did not make sense to call an "unforeseeable" electrical malfunction resulting in a botched execution cruel.[390] This may be true, but it is worth asking whether it truly was unforeseeable that the electric chair would result in a higher rate of botched executions than hanging, and whether this risk remained unforeseeable as the electric chair continued to be used over time.[391] It may be the case that the reliability of

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388. *See, e.g.*, Craig Haney, "*Infamous Punishment": The Psychological Consequences of Isolation*, 8 NAT'L PRISON PROJECT J. 3, 4 (1993); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 542–43 (1997); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8, 14–16 (1988); Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 EMORY L.J. 1089, 1091 (1996); R. George Wright, *What (Precisely) Is Wrong with Prolonged Solitary Confinement?*, 64 SYRACUSE L. REV. 297, 305–06 (2014).

The constitutional status of prolonged solitary confinement requires more analysis than can fit in this Article because it appears to have been repeatedly tried and abandoned in this country starting in the early nineteenth century. *See, e.g.*, ADAM JAY HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 19, 31 (1992). One could argue that long-term solitary confinement is now a traditional punishment because its first use was so long ago. But it does not appear to enjoy the continuity and universality required to be considered a usual punishment. *See* Stinneford, *Original Meaning*, *supra* note 20, at 1788 (describing common law requirement that legal practice be universally accepted throughout jurisdiction for a very long time before it could enjoy the presumption of reasonableness accorded to "usual" practices). Indeed, the pattern seems to be that jurisdictions that initally adopted this practice abandoned it once its horrifying effects came to light. It reemerged within the past thirty years after many had forgotten these effects, which are becoming clear to us once again. *See* Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 745–53 (2015) (discussing the history of long-term solitary confinement in the United States). Because long-term solitary confinement looks more like a repeated (failed) experiment than a traditional punishment, a strong argument could be made that it is cruel and unusual. *Cf.* CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 146–47 (John S. Whitley & Arnold Goldman eds., Penguin Books 1972) (1842) ("In the outskirts, stands a great prison, called the Eastern Penitentiary: conducted on a plan peculiar to the state of Pennsylvania. The system here, is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong. In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. . . . I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay."); *see also* FRIEDMAN, *supra* note 1, at 80–81 (describing the reaction of Dickens and others to the solitary confinement imposed in early American penitentiaries).

389. *See* Farmer v. Brennan, 511 U.S. 825, 825–26 (1994); *supra* Section I.B.3.

390. 329 U.S. 459, 464 (1947).

391. *See generally* Denno, *supra* note 3.

electrocution increased over time so that it became comparable to hanging.[392] However, that has not been the case with lethal injection, if Sarat's conclusions are correct.[393]

This approach also answers Justice Thomas's concerns about the workability of comparative risk analysis.[394] The relevant reference point for determining whether a punishment is cruel and unusual is not some abstract and absolute notion of unnecessary pain, but rather the range of pain (or risk of pain) caused by traditional punishment practices that have been used within the last one hundred years. States are free to experiment in order to find more humane methods of punishment without worrying that the moment they adopt a new practice, the old one becomes unconstitutional. Judges do not have to make fine distinctions between minute gradations in the pain spectrum but can simply determine whether the pain caused by a given punishment is within the mainstream of practice over the past one-hundred years. Perhaps for these reasons, in *Baze*, Justice Thomas himself indicated that a comparison of new punishment practices to traditional ones could be acceptable to him.[395]

### C. TRANSPARENCY IN PUNISHMENT

Finally, recognition that the word "cruel" in the Cruel and Unusual Punishments Clause means unduly harsh, not bloodthirsty or sadistic, may encourage greater transparency in punishment. Such transparency, in turn, may thwart the tendency of hidden punishment to creep upward toward cruelty.

The history of punishment in America, from the eighteenth century onward, has involved a movement from public spectacle to hidden ordeal.[396] Noncapital offenders who might once have been publicly flogged, castigated, or placed in the pillory are now locked in prisons where no one can see them.[397] Capital offenders were moved from a public scaffold to a private one and then to the electric chair, gas chamber, or lethal injection, all located behind closed doors inside prisons and all with few witnesses.[398] Even the appearance of violence has disappeared from executions, with the rise of a lethal injection protocol designed to make it appear that offenders are peacefully going to sleep.[399]

The stated rationale for these changes has been to reduce the cruelty of punishment in both the cruel-effect and cruel-intent senses of the word.[400]

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392. *See id.*

393. *See* SARAT ET AL., *supra* note 5, at 177.

394. *See* Baze v. Reese, 553 U.S. 35, 105–06 (2008) (Thomas, J., concurring in the judgment).

395. *See id.* at 106 ("To the extent that there is any comparative element to the inquiry, it should be limited to whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad.").

396. *See* FOUCAULT, *supra* note 1.

397. *See* FOUCAULT, *supra* note 1; FRIEDMAN, *supra* note 1; GARLAND, *supra* note 1.

398. *See* FRIEDMAN, *supra* note 1; GARLAND, *supra* note 1.

399. *See* GARLAND, *supra* note 1, at 117; Denno, *supra* note 132.

400. *See, e.g.*, FOUCAULT, *supra* note 1; FRIEDMAN, *supra* note 1; GARLAND, *supra* note 1; Denno, *supra* note 3, at 676.

Offenders no longer suffer public humiliation and ridicule, and in this sense their punishment is less harsh. Society no longer seems to take pleasure in inflicting humiliation and ridicule, and in this sense there is a reduction in cruel intent concerning the infliction of pain.

But the reduction of cruelty was not the only purpose of moving punishment behind closed doors. It was also done to enhance social control.[401] The change from public to hidden punishment has weakened social movements advocating for punishment reform.[402] The action—to the extent there is any action—is in the courts, not the legislature, and certainly not the street.

The hidden nature of punishment has also led to an exponential increase in its cruel effect in a way that has gone almost unnoticed by the public at large. The number of incarcerated people in the United States has grown from around 300,000 in 1970 to 2.25 million today.[403] Nearly 160,000 prisoners are currently serving life sentences,[404] many of which are for nonviolent offenses.[405] Over 500,000 prisoners are serving sentences of twenty years or more.[406] More than forty states opened supermax prison facilities, which hold inmates in long-term solitary confinement, between 1989 and 2005.[407] As of 2005, such facilities housed 25,000 prisoners.[408] Just as the paralyzing agent used in lethal injection masks from public view any pain the execution may cause, the walls surrounding American prisons hide from public view the suffering represented by the statistics above.

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401. *See, e.g.*, BANNER, *supra* note 2, at 148; BESSLER, *supra* note 8, at 25; GARLAND, *supra* note 1, at 135 (arguing that the movement of executions into nonpublic spaces "is best viewed as the ongoing effort of government officials to exert ever-tighter control over a fraught undertaking and to manage the meanings that it put into circulation"); MASUR, *supra* note 8, at 53; Madow, *supra* note 8, at 467. *But see* HIRSH, *supra* note 388, at 46 (arguing that "the penitentiary ended community involvement in punishment" by moving it behind closed doors "because such involvement no longer seemed constructive" and that, in a time of increasing urbanization and population dispersal, "neither humiliation nor terror could be instilled through the old media of public participation").

402. Madow, *supra* note 8, at 557.

403. *See* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 164 (2014) (citing LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011 (2012), http://www.bjs.gov/content/pub/pdf/cpus11.pdf).

404. *Id.* at 164 (citing ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE OF LIFE SENTENCES IN AMERICA 2, 5 (2013), http://www.sentencingproject.org/doc/publications/inc_Life%20Goes%C20On%202013.pdf).

405. *See* AM. CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 2, 22 (Nov. 2013), https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf [https://perma.cc/M9WW-VKEJ] (finding 3,278 prisoners serving life imprisonment for drug, property or other nonviolent crimes in the United States as of 2012).

406. *See* Berman, *supra* note 403, at 164 (citing MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 11 (2004)).

407. *See* Elizabeth Alexander, *"This Experiment, So Fatal": Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. IRVINE L. REV. 1, 11 (2015) (citing DANIEL P. MEARS, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 1, 40 (2006)).

408. *See id.* at 10 n.67.

As discussed above, "cruel" represents a thick ethical concept that both describes a fact in the world and evaluates it, providing reasons for action concerning that fact. The reason it provides for prohibiting cruel punishments is that they are undeserved and therefore unjust. If reducing the transparency of punishment increases the likelihood of undeserved punishment, efforts to reduce transparency should be constitutionally disfavored.[409] When government officials perform an act designed to reduce the transparency of criminal punishment, the burden should be on them to demonstrate that this action does not significantly increase the defendant's likelihood of severe pain. This change in approach would encourage states to eliminate the paralyzing agent from lethal injection and make the public more aware of the effect of long prison sentences and particularly prolonged solitary confinement. To the extent the increase in transparency creates a spectacle, there is a risk that some may degrade themselves by enjoying it. Such people would be cruel in the sense that they would possess a cruel intent, but this is not the kind of cruelty the Cruel and Unusual Punishments Clause is designed to protect against.

## CONCLUSION

The original meaning of the word "cruel" in the Cruel and Unusual Punishments Clause is unjustly harsh. Under this reading of the term, courts can determine whether a punishment is cruel by comparing it to other punishments traditionally imposed for the same or similar crimes. Courts can also sort between those unintended harms that may properly be considered part of one's punishment and those that may not by asking whether the government inflicted a punishment that caused a greater risk of harm than longstanding prior practice would permit. Finally, this reading would require the courts to be skeptical of governmental efforts to make punishment less transparent. The burden should be on the government to show that any effort to reduce punishment transparency does not significantly increase the risk that an inmate will experience severe suffering.

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409. *See* Paul Litton, *On the Argument that Execution Protocol Reform is Biomedical Research*, 90 WASH. L. REV. ONLINE 87, 92 (2015) (arguing that the true purpose of states' ongoing experimentation with lethal injection is to hide the reality of capital punishment from the public and that this experimentation is immoral because it does not advance any legitimate public values).