

METHODOLOGY, PROPORTIONALITY, EQUALITY: WHICH MORAL QUESTION DOES THE EIGHTH AMENDMENT POSE?

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The words of the Eighth Amendment have a history much longer than the life of the Amendment itself. When the First Congress chose to include those words in the United States Constitution's Bill of Rights, the assembled legislators were appropriating an artifact of their English heritage. At that moment, the language was celebrating its centenary, having first been drafted and adopted by the English Parliament in the Bill of Rights of 1689.¹

Parliament enacted the 1689 Bill of Rights to articulate limitations on what future monarchs could do. A century later, Congress included the Eighth Amendment's historic language among limitations on what the new American nation's government could do. Many of the Revolutionary American states had already employed the words to limit their own governments, starting with Virginia in 1776.² Those states had, in the wake of independence, created bills of rights that recited the historic prohibition of excessive bail, excessive fines, and cruel and unusual punishments.³ But the deliberations on whether to include that prohibition, both in the national Bill of Rights and in those of the states, were rather perfunctory. This suggests that in adopting the language, the American Founders were reflexively claiming part of their English heritage, part of what they had fought for, part of what they alleged had been denied them by a monarch and an unrepresentative Parliament in the pre-Revolutionary period. That conclusion invites an inference that

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1. For an elaborated account of evidence and arguments presented in this Essay, see Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004).

2. *See id.* at 124, 127.

3. *See id.* at 133.

the American Founders meant the Amendment's language to fulfill the function that it had historically fulfilled for the English.⁴

The strategy of adopting seriatim lists to allege political wrongdoing and to assert political entitlements is embedded in the English political tradition, going back to Magna Carta.⁵ The very use of the phrase "bills of rights" in popular parlance to describe the new documents that the Revolutionary American states adopted was an allusion to the English Bill of Rights. Likewise, the American Declaration of Independence imitated the seriatim listing of wrongs that opened the English Declaration of Rights, as the English Bill of Rights had been called prior to its passage through Parliament in 1689.

The English Declaration recited wrongs committed by government under the just-ousted King James II. Among those wrongs, complained the authors of the English Declaration, were "excessive Bail," "excessive Fines," and "illegal and cruel punishments."⁶ Corresponding to the recited wrongs, the declarants listed rights that future monarchs would have to respect. Among these was the assertion "[t]hat excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."⁷

Thomas Jefferson seized on the English Declaration's format when drafting the Declaration of Independence. His list of wrongs substituted George for James, reminding the English that they, too, had rebelled against an oppressive monarch who had not accorded them the historic rights of Englishmen. This strategy for alleging wrongs and for asserting entitlements continued as the newly-independent states adopted "bills of rights." It was manifested again in the First Congress's choice to mirror the English format and to propose such a list of entitlements for inclusion in the national Constitution.

The Eighth Amendment's history invites inquiry as to what its language of excessive bail, excessive fines, and cruel and unusual punishments meant to the English. That language had

4. *See id.* at 124–35.

5. *See* English Declaration of Rights, 1 W. & M., sess. 2, c. 2 (1689) (Eng.) (precursor to U.S. CONST. amend. VIII); Petition of Right, chs. 6, 10 (1628) (Eng.) (precursor to U.S. CONST. amend. III); Magna Carta, c. 39 (1215) (Eng.) (precursor to the U.S. Constitution's Due Process Clause).

6. English Declaration of Rights, *supra* note 5.

7. *Id.*

been conceived in reaction to ways in which courts in the 1680s, especially during the reign of James II, had treated the King's political and religious enemies. The words were meant to establish an objective inquiry. They did not purport to authorize a clash of subjective impressions. *Excessiveness* was prohibited only in respect of bail and fines, not in respect of punishments generally, because excessiveness in bail and fines could be measured objectively. Bail and fines were excessive if they were *more than the accused could pay*. Bail and fines were excessive if they were deployed to impose indefinite imprisonment, a strategy that James II's judges had adopted to silence his political and religious detractors.⁸ In the cases of politically disfavored individuals, the King's courts had often set unreachably high bail and imposed unpayable fines for comparatively minor offenses which, under the Habeas Corpus Act of 1679, warranted bail before conviction, and for which the legally proper punishments were fines.⁹ By setting bail and imposing fines at levels higher than defendants could pay, the King's judges were able to circumvent the protections of the Habeas Corpus Act and to lock up the King's opponents indefinitely. Parliament's 1689 prohibition of excessive bail and fines was designed to prevent such practices in the future.¹⁰

Cruel unusualness in other punishments was likewise an ostensibly objective criterion for identifying judicial sentencing behavior that deserved to be prohibited. Cruel unusualness was constituted by departure from the common law in the direction of greater severity without the kinds of morally sufficient reasons that would indicate an evolved understanding of the common law. The punishments targeted by the prohibition of "cruel and unusual punishments" were punishments beyond what the common law provided for offenses of conviction, imposed on the legally and morally irrelevant ground that the offender was a political or religious adversary of the King. In the year that it enacted the English Bill of Rights, Parliament also responded to particular instances of the punishments that it meant to prohibit, and provided redress to the affected individuals. The concept with which Parliament worked was effectively one of invidiously discriminatory treatment. The com-

8. See LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 87, 90–92 (1981).

9. See *id.*

10. See *id.* at 90–91.

mon law provided ranges of acceptable punishments for defined offenses, and Parliament could see that particular persons had been targeted for punishments that improperly discriminated by being harsher than the common law allowed for what those persons had allegedly done. That discrimination in the direction of greater severity was what made punishments cruel and unusual.¹¹

Now we have these words in a constitution that we must apply in the twenty-first century. Article III of the Constitution extends the judicial Power of the United States to “all Cases, in Law and Equity, arising under this Constitution,”¹² and a constitutional provision concerning punishments seems an obvious one for courts to expound and to apply. Yet the prohibition of “cruel and unusual punishments” invites a moral inquiry. Now that we are realists about the nature of law, the Eighth Amendment seems to invite judges to supplant legislators’ moral reasoning and intuitions with their own. But accepting that reality still leaves a critical question unanswered: what is the nature of the moral inquiry for which the Eighth Amendment calls? The word “cruel,” when applied to punishment, is linguistically susceptible of three quite distinct connotations, and each of these invites a distinct moral inquiry.

Candidate number 1: proportionality of amount. Is this punishment immorally too much? Is it excessive?

Candidate number 2: viciousness of method. Is this punishment immoral in its method? Is it a *kind* of punishment that is morally unacceptable? This conception of the prohibition is Justice Scalia’s candidate.

Candidate number 3: invidious discrimination in application. Is this punishment immorally more than is imposed on others for comparable conduct, and in that sense, cruel and unusual?

Candidate number 3 best fits the constitutional language’s pre-adoption history and satisfies both elements of the Eighth Amendment’s proscription. The Eighth Amendment proscribes

11. See Claus, *supra* note 1, at 136–44; see also John F. Stinneford, *The Original Meaning of ‘Unusual’: The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. REV. (forthcoming 2008) (presenting a detailed historical case for understanding “unusual” to mean “contrary to long usage”).

12. U.S. CONST. art. III, § 2, cl. 1.

only punishments that are both cruel and *unusual*. An antidiscrimination conception most closely translates the historic text into a modern context.¹³

The Supreme Court's current Eighth Amendment jurisprudence embraces all three conceptions of cruelty in punishment. The Court's decisions combine to say: "We'll have 'em all! If a punishment suffers from any of these features—if we think it's immorally too much,¹⁴ if we think the method is immorally vicious,¹⁵ or if we think that it's being applied in an immorally discriminatory fashion¹⁶—we'll say that it's 'cruel and unusual.'" The Eighth Amendment has become a prime exemplar of the approach to constitutional interpretation that Henry Paul Monaghan critiqued in his famous essay, *Our Perfect Constitution*.¹⁷ Focus in recent cases has been on a proportionality inquiry. Is a punishment immorally too much? Is the punishment excessive in the view of the Court? Judicial desire to engage in that inquiry is understandable enough. A Court confined to policing a "no discrimination" inquiry could condemn distinctions in punishment, both new and old, on the ground that those distinctions had been drawn for morally insufficient reasons. But if the Court could not also condemn excessiveness per se, then it could not reach claims that those imposing punishments had failed to draw new, moral distinctions.

The linguistic difficulty with holding the phrase "cruel and unusual" to invite a pure proportionality inquiry is that although disproportionality might indeed be called cruel, it is not intrinsically unusual. The same goes for vicious methods. Unless an amount or method of punishment is new or newly revived, there may be no linguistically plausible basis for calling that amount or method *unusual* within the jurisdiction in which the punishment is imposed. An antidiscrimination conception of "cruel and unusual punishment" more assuredly fits both elements of the constitutional conjunction. If one has identified an invidiously discriminatory application of a punishment, then, *ipso facto*, that is unusual. If the morally unjustified

13. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 *passim* (1993).

14. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564, 573–75 (2005); *Solem v. Helm*, 463 U.S. 277, 289 (1983).

15. See, e.g., *In re Kemmler*, 136 U.S. 436, 446–47 (1890).

16. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 256 (1972).

17. 56 N.Y.U. L. REV. 353 (1981).

discrimination is in the direction of greater severity, then it may plausibly be called cruel too.

To pursue a pure proportionality inquiry under the Eighth Amendment—to seek to say that a punishment violates the Amendment’s prohibition of cruelty whenever the Supreme Court thinks that the punishment is excessive—the Court has felt the need to find a way to allege an accompanying unusualness. The way identified has been inter-jurisdictional comparison. Contrast that with the original connotation of the language, which concerned *intra*-jurisdictional comparison. The language was written to combat punishments that were novel when compared with what like offenders received *within* the jurisdiction, not when compared with what offenders were receiving in other jurisdictions. Note also that the Court, while invoking inter-jurisdictional comparison in the context of pure proportionality analysis, has not treated inter-jurisdictional comparison as *indispensable* to such proportionality analysis under the Eighth Amendment. Justice Stevens’ majority opinion in *Atkins v. Virginia* emphasized that if the Court thought a punishment excessive, the Court would strike the punishment down even if an inter-jurisdictional survey did not reveal the punishment to be, on the Court’s own terms, unusual.¹⁸

Justice Scalia’s advocacy of a “vicious methods” understanding of cruel unusualness,¹⁹ on the other hand, draws support from nineteenth-century American case law. The language in its English origins did not concern vicious methods at all; the notorious punishments that Parliament called cruel and unusual were targeted, novel combinations of wholly accepted methods.²⁰ As William Blackstone made clear to lawyers in the American Founding era, the English Bill of Rights did not condemn *methods* of punishment²¹—not even the grotesque practice of drawing and quartering traitors.²² The interpretive tra-

18. See *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002).

19. See, e.g., *Ewing v. California*, 538 U.S. 11, 31–32 (2003); *Atkins*, 536 U.S. at 339–40 (Scalia, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 961–94 (1991) (Scalia, J., concurring in the judgment).

20. See *Claus*, *supra* note 1, at 136–44.

21. See 4 WILLIAM BLACKSTONE, COMMENTARIES *370–73 (1769).

22. Some of the participants in Bonnie Prince Charlie’s eighteenth-century uprising were later drawn and quartered. See Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839, 856 (1969). Formal elimination of these official methods of punishment in Britain had

jectory of nineteenth-century American courts toward condemning vicious methods as “cruel and unusual” seems to have been guided by two developments. First, nineteenth-century American legislatures used, in a range of statutes regulating punishment, the phrase “cruel and unusual” divorced from its historic linkage to excessiveness in bail and fines.²³ Second, the era was one of strengthening societal consensus against methods of punishment that inflicted acute physical suffering. Influenced by cases in which they had interpreted the phrase “cruel and unusual punishments” without having to account for its relation to prohibitions of excessiveness in bail and fines, courts naturally rode the zeitgeist of penological reform and held the phrase to condemn vicious methods of punishment.²⁴ Such methods had mostly fallen into disuse and were contemporaneously being repealed from the statute books if they had not been already,²⁵ so could plausibly be called unusual.²⁶ Leading nineteenth-century cases that accorded the phrase a “vicious methods” connotation did so in the course of explaining why the prohibition had not been violated—that is, in the course of dismissing what were essentially

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

23. In some states the phrase became the test for unlawful treatment of slaves. *See, e.g.,* Turnipseed v. The State, 6 Ala. 664, 665 (1844); Scott v. Mississippi, 31 Miss. 473 (1856); Dowling v. Mississippi, 13 Miss. (5 S. & M.) 664, 687 (1846). Under federal law, officers of American ships were prohibited from inflicting “any cruel or unusual punishment” with malice upon crew members. *See, e.g.,* United States v. Winn, 28 F. Cas. 733, 733 (Story, Circuit Justice, C.C.D. Mass. 1838) (No. 16,740); Charge to Grand Jury, 30 F. Cas. 981, 981 (Curtis, Circuit Justice, C.C.D.R.I. 1853) (No. 18,249); United States v. Collins, 25 F. Cas. 545, 545 (Curtis, Circuit Justice, C.C.D.R.I. 1854) (No. 14,836).

24. *See* Claus, *supra* note 1, at 152–57.

25. *See, e.g., Ex parte Wilson*, 114 U.S. 417, 427 (1885).

26. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 329–30 (1868) (“But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held to be forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping-post and the pillory in States where they were never recognized as instruments of punishment, or in States whose constitutions, revised since public opinion had banished them, had forbidden cruel and unusual punishments.”).

discrimination or disproportionality claims.²⁷ The prohibition of “cruel and unusual punishments” that restricts state governments through the Fourteenth Amendment might for this reason be held to prohibit both invidious discrimination *and* vicious methods. But proportionality analysis did not achieve prominence as a way to apply the Eighth Amendment’s words until the end of the nineteenth century.²⁸

The resort to inter-jurisdictional comparison in recent Eighth Amendment cases has contributed to a widespread lament, heard even in the chambers of Congress, about the Court’s reliance on foreign law.²⁹ That lament has been somewhat mistargeted. If the right translation into a modern context of the phrase “cruel and unusual punishments” were actually “punishments disproportionate and more than what other jurisdictions are imposing for like behavior,” then those seeking to answer the question whether a punishment is relevantly “unusual” might be constitutionally *compelled* to inquire into the content of foreign law.

27. See *Barker v. People*, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823) (upholding disenfranchisement as not relevantly unusual, treating unusualness as pertaining to method of punishment). (Compare plaintiff’s argument on appeal in the Court for the Correction of Errors. *Barker v. People*, 3 Cow. 686, 694 (N.Y. 1824). The appellate court, however, disposed of the issue on the ground that the Eighth Amendment did not apply to state action. *Id.* at 702. New York’s Constitution did not proscribe cruel and unusual punishments until 1846, although the proscription had been included in the state’s 1787 statutory bill of rights.) See also *Commonwealth v. Wyatt*, 27 Va. (6 Rand.) 694, 700–01 (1828) (upholding a broad discretion to impose whipping as not relevantly unusual because unusualness pertained to method of punishment); *State v. Manuel*, 20 N.C. (4 Dev. & Bat.) 20, 35–37 (N.C. 1838) (upholding a racially discriminatory requirement to work off unpaid fines, treating unusualness as pertaining to method of punishment); *United States v. Collins*, 25 F. Cas. 545, 545 (Curtis, Circuit Justice, C.C.D.R.I. 1854) (No. 14,836) (upholding flogging on the basis that unusualness pertained to method of punishment); *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482, 486 (1855) (upholding a large fine and mandatory imprisonment for a first offense of selling liquor on the basis that unusualness pertained to method of punishment).

28. See *O’Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting). The Supreme Court endorsed and applied proportionality analysis in *Weems v. United States*, 217 U.S. 349, 371, 380–82 (1910).

29. See Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (2005). (“In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.”) (introduced in the U.S. House of Representatives on Mar. 3, 2005, as H.R. 1070).

Under a pre-realist view of the common law as a higher body of shared principle that courts in multiple jurisdictions were striving to apply, the concepts of intra-jurisdictional and inter-jurisdictional novelty would not have been so readily distinguishable as they are today. Under the vision of law that prevailed at the American Founding, there was a sense in which, for purposes of the common law, the common law world was one big jurisdiction. As Justices Oliver Wendell Holmes and Felix Frankfurter each memorably discussed, that vision of law was reflected in the old treatises, which cited case law from England and from other common law jurisdictions interchangeably.³⁰ But now the distinction between intra-jurisdictional novelty and inter-jurisdictional novelty is sharp, and for a reason that suggests intra-jurisdictional novelty is the most faithful translation of the Eighth Amendment's historic inquiry into a modern context. The historic prohibition of cruel and unusual punishments never invited a general inquiry into how governments around the globe were treating people. It did not even involve comparison to the penal regimes of continental Europe. It was about what the common law required in places where the common law applied.

The most substantial basis for complaint about use of foreign law in the recent Eighth Amendment cases is not the mere fact of use, but rather the character of the judicial inquiries that led to that use.³¹ The strong reason to complain about the Court's recent Eighth Amendment decisions is that the Justices ask the wrong question. They ask: "What's excessive?" If the Justices were only asking the questions that the Constitution most plausibly invites, namely, "What's immorally discriminatory?" and perhaps, "What's immorally vicious?", then the Court's discovery of some value in considering the laws and practices of other jurisdictions when answering those questions could readily be defended.

Inter-jurisdictional comparison is uniquely controversial when undertaken in a quest for multi-jurisdictional *consensus*, as if mere existence of punishment policies elsewhere deserves

30. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 101–02 (1945) (Frankfurter, J., opinion of the Court); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

31. Cf. Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223, 228–29 (2006).

to influence decisions about punishment policies in the United States.³² The Court has slid smoothly into treating what other jurisdictions do as intrinsically relevant to what the Constitution requires because it has been using inter-jurisdictional comparison to answer the question whether punishments are unconstitutionally *unusual*. The Court has needed to do that only because it has wished to condemn punishments simply for being immorally too much, and has had no ground for calling those punishments unusual other than inter-jurisdictional comparison.

If the Court were to confine its attention under the Eighth Amendment to invidiously discriminatory punishments, and perhaps to new or newly revived vicious methods, then the Court would not need inter-jurisdictional comparison to establish the *unusualness* of those punishments. Judges engaged in any inquiry into cruelty, whether cruelty be conceived as invidious discrimination, viciousness, or disproportionality, may nonetheless choose to engage in inter-jurisdictional comparison when deciding what is *cruel*—that is, in deciding which distinctions in punishment are immoral, or which methods are too vicious, or which amounts are too much. But considering foreign law and practice in the course of deciding what is *cruel* need not fixate on a search for foreign *consensus* at all. Considering foreign law and practice in the course of deciding what is cruel might simply seek to identify reasons and to notice experience that would assist American courts in deciding which punishments deserve to be called cruel.

When Article III of the Constitution vests the judicial Power of the United States in “one supreme Court” and extends the judicial Power to “all Cases . . . arising under this Constitution,” Article III invests the Court with discretion to consider whatever reasons and evidence the Court finds relevant to deciding constitutional questions. Congress can no more prohibit the Court from relying on reasons and evidence found abroad than on reasons and evidence found in any other source, including the Court’s own precedents, the opinions of other

32. Cf. Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007); Eric A. Posner & Cass R. Sunstein, *On Learning from Others*, 59 STAN. L. REV. 1309 (2007); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281 (2007); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

American courts, and, indeed, the writings of scholars in journals like this one. Nor are there sound prudential reasons for disregarding reasoning and evidence based merely on the geographic location of their source.

The Eighth Amendment indisputably invites a moral inquiry. The Court has, however, treated the Amendment's words as describing a conceptual chameleon and inviting multiple, distinct moral inquiries. That conclusion, absent historical evidence to support it, resembles holding that the Second Amendment protects both gun possession and upper limbs. Such an exploitation of linguistic happenstance seems a dubious way to apply any law, let alone a constitution.