DOES THE EIGHTH AMENDMENT PUNISHMENTS CLAUSE PROHIBIT ONLY PUNISHMENTS THAT ARE BOTH CRUEL *AND* UNUSUAL?

MEGHAN J. RYAN[*]

ABSTRACT

There is a great struggle in the United States between proponents of the death penalty and death penalty abolitionists who believe that the practice is cruel and even unconstitutional. Although the punishment of death is enshrined in the Fifth and Fourteenth Amendments of the Constitution, the Supreme Court seems to have followed its moral compass in chipping away at the death penalty because of the cruelty of the practice. The Court's struggle between the text of the Constitution and its moral inclinations in the death penalty context has resulted in an inconsistent and confusing Eighth Amendment Punishments Clause jurisprudence. While attempting to maintain neutrality on the topic and thus relying almost exclusively on assessing the unusualness of a practice through a purportedly objective assessment of state legislative action, the Court seems to have covertly injected into the equation its subjective views as to what punishments are unconstitutionally cruel. This tension between an objective measure of unusualness and a subjective assessment of cruelty has led the Court to make inconsistent statements about whether the Punishments Clause prohibits only punishments that are both cruel and unusual, or rather prohibits both cruel punishments and unusual punishments. This Article goes where no other has, identifying and exploring this important question. After tracing the history of the Eighth Amendment, analyzing the Court's early interpretations of the prohibition on "cruel and unusual punishments," and parsing the text of the Punishments Clause, the Article concludes that the Clause prohibits only punishments that are both cruel and unusual and that each of these

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∗ Assistant Professor of Law, Southern Methodist University, Dedman School of Law. The author thanks Guy-Uriel Charles, Richard Frase, Kristin Hickman, Heidi Kitrosser, Alexandra Klass, William McGeveran, Kevin Reitz, Dan Schwarcz, Michael Tonry, and the rest of the University of Minnesota Law School faculty for their helpful comments and suggestions. The author also thanks the faculty of the SMU Dedman School of Law for their assistance and support, as well as Loren Wells and the rest of the *Washington University Law Review* editorial board and staff for their helpful comments and editorial assistance.

components of the Clause should thus be independently assessed. While this interpretation may narrow the scope of the Amendment, it allows for further innovations in humane methods of punishment and revives the federalist foundation of this nation that the Court's current jurisprudence has stifled.

INTRODUCTION

With the Supreme Court's recent decisions in the child rape case of *Kennedy v. Louisiana*[1] and the lethal injection case of *Baze v. Rees*,[2] the Eighth Amendment has received profuse attention.[3] Perhaps Court watchers are intrigued by the brutality of the death penalty or particularly interested because so much is at stake when the death penalty is at issue. Indeed, the Eighth Amendment and the death penalty are contentious topics because many peoples' notions of decency preclude the use of the death penalty altogether,[4] yet the U.S. Constitution seems to enshrine the practice.[5] The Court appears to struggle with the tension that exists between the language of the Constitution and the Court's own moral beliefs or what it postulates are the beliefs of American society. While in *Baze* the Court reaffirmed the principle that capital punishment, by the text of the Constitution, does not violate the Eighth Amendment,[6] in *Kennedy*, the Court revealed its revulsion with the practice, stating that "[w]hen the

1. 128 S. Ct. 2641 (2008).

2. 128 S. Ct. 1520 (2008).

3. *See, e.g.*, Linda Greenhouse, *Justices Bar Death Penalty for the Rape of a Child*, N.Y. TIMES, June 26, 2008, at A1 (reporting on the Court's opinion in *Kennedy*); Linda Greenhouse, *Justices to Enter the Debate Over Lethal Injection*, N.Y. TIMES, Sept. 26, 2007, at A24 (reporting on the Court's grant of certiorari in *Baze*).

4. *See* Paul Marcus, *Capital Punishment in the United States and Beyond*, 31 MELB. U. L. REV. 837, 850 (2007) ("The broad anti-death penalty view can be stated concisely: *it is morally wrong to kill*."); *see also, e.g.*, Howard Ball, *Thurgood Marshall's Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty:* The McCleskey Cases, *1987, 1991*, 27 MISS. C. L. REV. 335, 336 (2008) ("For Thurgood Marshall, the death penalty was—categorically—immoral and unconstitutional."); Nat Hentoff, Op-Ed., *The Machinery of Death: Where Are Supreme Court Liberals in Georgia Case?*, WASH. TIMES, Oct. 27, 2008, at A23 (quoting the Southern regional director of Amnesty International regarding his views on the immorality of the death penalty); Anthony Ramirez, Metro Briefing, N.Y. TIMES, Dec. 12, 2000, at B8 (reporting that a New Jersey group of Christians, Jews, and Muslims called "for a moratorium on capital punishment, saying the death penalty was 'immoral in principle and unjust in application.'").

5. *See* U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *see also infra* note 6.

6. *Baze*, 128 S. Ct. at 1529 (referencing *Gregg v. Georgia*, 428 U.S. 153, 177–78 (1976), which premised its conclusion that the death penalty is not *per se* unconstitutional on the long history of the death penalty in the United States and the text of the Fifth and Fourteenth Amendments, which provide that no person shall be deprived of "life, liberty, or property, without due process of law").

law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[7]

The Court has attempted to simultaneously satisfy its moral inclinations and the text of the Constitution, but these efforts have resulted in an inconsistent and confusing Eighth Amendment Punishments Clause jurisprudence. Endeavoring to maintain its neutrality in addressing Punishments Clause cases, the Court relies primarily on its "evolving standards of decency" approach of tallying the number of state legislatures that have prohibited a particular punishment.[8] While thus purporting to focus on the prevalence of state practices, however, the Court has not been able to resist injecting its own value judgments into the analysis to determine the constitutionality of a particular practice. But while attracting some criticism,[9] this infusion of moral values is not at odds with the text of the Constitution. Instead, the language of the Eighth Amendment affirmatively contemplates an assessment of the cruelty of a practice by prohibiting "*cruel and* unusual punishments."[10] While the Court acts appropriately, then, in assessing cruelty, it is the balancing of the cruelty and unusualness components of the Eighth Amendment that has led to some confusion. For example, the Court has at times stated that a punishment must be both cruel and unusual before it is prohibited under the Eighth Amendment,[11] but, at other times, the Court has indicated that punishments that are, in the Court's opinion, cruel are prohibited regardless of the unusualness of the punishment.[12]

Although the prohibition on cruel and unusual punishments has been the focus of many a scholarly article,[13] neither the Court nor legal scholars

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7. Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008).

8. *See infra* text accompanying notes 107–11.

9. *See, e.g.*, *infra* note 176 and accompanying text.

10. U.S. CONST. amend. VIII (emphasis added).

11. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 967 (1991) (explaining that, "[a]s a textual matter," the Punishments Clause prohibits only punishments that are both cruel and unusual); *see infra* text accompanying notes 144–49.

12. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 284 (1983) (stating that the Punishments Clause prohibits "barbaric punishments," as well as punishments "disproportionate to the crime committed"); Coker v. Georgia, 433 U.S. 584, 591–92 (1977) (stating that the Punishments Clause bars "barbaric" punishments and those that are "excessive"); Weems v. United States, 217 U.S. 349, 368 (1910) (suggesting that the Punishments Clause prohibits "inhuman and barbarous" punishments such as torture); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment].").

13. *See, e.g.*, Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149 (2006) (arguing that resort to judicial discretion in the context of the Eighth Amendment is at odds with the text and structure of the Constitution); Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63

have carefully examined how the cruelty and unusualness components of the Clause relate to each other.[14] The answer to this question, though, is important in understanding the meaning of the prohibition, which could, in turn, lend greater clarity to Punishments Clause jurisprudence. Narrowly interpreting the Clause to prohibit only punishments that are both cruel and unusual could render decisions that even torturous punishments, if frequently used, are constitutional. Broadly construing the Clause to prohibit both cruel punishments and unusual punishments alike suggests that cruelty, alone, is a basis on which to find a practice unconstitutional.[15] While this interpretation could breathe new life into the arguments of death penalty abolitionists by allowing them to effectively debate the cruelty of the death penalty despite the fact that thirty-five states, as well as the federal government and the military, currently authorize capital

(2007) (arguing that international consensus should not carry any persuasive weight in determining whether a practice such as the juvenile death penalty is unconstitutional under the Punishments Clause); Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context*?, 85 N.C. L. REV. 847 (2007) (suggesting that the doctrine of stare decisis applies in a unique manner when lower courts confront Eighth Amendment death penalty issues that the Supreme Court has previously decided based on the "evolving standards of decency"); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) (examining the original meaning of the term "unusual" as used in the Punishments Clause).

14. *But see* Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. MEM. L. REV. 465, 468 (2008) (assuming that the Punishments Clause is a "two-part equation" and explaining that the unusualness component of the Clause is often unexamined).

15. Regardless of whether the phrase "cruel and unusual punishments" is construed as meaning that punishments must be both cruel and unusual to be prohibited or that both cruel punishments and unusual punishments are prohibited, in any case, the challenged practices must constitute "punishment" before they are prohibited by the Clause. *See* U.S. CONST. amend. VIII. While whether a practice constitutes "punishment" is a difficult question and one that goes beyond the scope of this Article, there are at least four possible definitions of "punishment": (1) "punishment" is limited to the terms of the penal statute and the sentence ("structural definition"); (2) in addition to the terms of the penal statute and the sentence, "punishment" includes "those conditions or events in prison that are attributable to the punitive intent of the government in its role as monopolist over the machinery of punishment" ("governmentalist definition"); (3) "punishment" includes the terms of the penal statute and the sentence, as well as the conditions or events in prison that are attributable to the subjective intent of any governmental agent ("subjectivist definition"); and (4) "punishment" includes all that a prisoner experiences, including all prison conditions and all uses of force regardless of any governmental agent's intentions ("experiential definition"). Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1610 (1996). In the recent political and legal climate of enemy combatants being tortured and held indefinitely by the federal government at Guantanamo Bay without the right to a typical criminal trial, the question of what constitutes "punishment" has been of particular interest. *See, e.g.*, Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1. For example, in a television interview on April 27, 2008, *60 Minutes*'s Lesley Stahl asked Justice Scalia whether torture violates the Punishments Clause of the Eighth Amendment. *60 Minutes: Episode 33* (CBS television broadcast Apr. 27, 2008), *available at* http://www.cbsnews.com/video/watch/?id=4448191n&tag=related;photovideo. Justice Scalia stated that torture clearly does not constitute punishment when a person tortures a prisoner for information because "what's he punishing you for?" *Id.*

punishment,[16] this interpretation would also limit humane innovations in punishment. Innovations in punishment may seem like a morbid concept, but improving the conditions under which an individual is put to death is important in a society like ours in which capital punishment is prevalent. Without such innovations, governments would be left with only archaic methods of punishment, such as hanging and death by firing squad.[17] Indeed, the punishment of death was liberally used at the time of the Founders, serving as punishment for crimes such as forgery and counterfeiting[18]—crimes that are generally considered less serious than crimes for which death is imposed today. Perhaps grasping the drawbacks of both interpretations, the Court and scholars have seemed to travel down a third path of, at least in substance, focusing primarily on the cruelty component of the Clause and neglecting the unusualness component, going so far as to state that all cruel punishments are unconstitutional without giving any similar status to unusual punishments.[19] While this construction has significant allure, it is entirely at odds with the text of the Punishments Clause.[20]

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16. *See* DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2009), http://www.deathpenaltyinfo.org/documents/factsheet.pdf (listing the jurisdictions that employ the death penalty).

17. In certain circumstances, New Hampshire and Washington still permit executions by hanging, and Oklahoma and Utah still permit executions by firing squad. *See* N.H. REV. STAT. ANN. § 630:5 (2007) ("[I]f for any reason the commissioner finds it to be impractical to carry out the punishment of death by administration of the required lethal substance or substances, the sentence of death may be carried out by hanging . . . ."); REV. CODE OF WASH. ANN. § 10.95.180 (West 2002) ("The punishment of death . . . shall be inflicted by [lethal injection], or, at the election of the defendant, by hanging by the neck until the defendant is dead."); OKLA. STAT. ANN. tit. 22, § 1014 (West 2003) (stating that if lethal injection and electrocution are found unconstitutional, "then the sentence of death shall be carried out by firing squad"); UTAH STAT. § 77-18-5.5 (Supp. 2008) (stating that "the method of execution shall be a firing squad" if lethal injection is found unconstitutional or "a court holds that a defendant has a right to be executed by a firing squad").

18. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 112–19 (1790).

19. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 284 (1983) (stating that the Punishments Clause prohibits "barbaric punishments," as well as punishments "disproportionate to the crime committed"); Coker v. Georgia, 433 U.S. 584, 591–92 (1977) (stating that the Punishments Clause bars barbaric punishments and those that are excessive); Wilkerson, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]"); Owen Fiss, *The Example of America*, 119 YALE L.J. 1, 2 (Supp. 2009) ("The Eighth Amendment prohibits cruel and unusual punishments, and torture would surely meet the standard of cruel and unusual."); 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, 881–82 (2007); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 538 (2005) ("Although a punishment's 'unusual' nature may furnish relevant evidence of cruelty, it is neither a necessary nor a sufficient condition of unconstitutionality.").

20. *See infra* Part V.

This Article examines the question of whether the Punishments Clause prohibits both cruel punishments and unusual punishments, just cruel punishments, or only punishments that are both cruel and unusual. Part I traces the history of the Eighth Amendment from the time when the phrase "cruel and unusual punishments" first appeared in the English Bill of Rights in 1688 until the time when the phrase was included as part of the Eighth Amendment, which was ratified over a century later in 1791. Part II reviews the Supreme Court's Eighth Amendment jurisprudence, particularly its "evolving standards of decency" framework developed in *Trop v. Dulles*.[21] It explains that, while the Court's early decisions interpreting the Punishments Clause focused on the specific text of the provision, its more recent cases have instead employed an amorphous "evolving standards of decency" test to determine whether a practice violates the Punishments Clause. Part III explains how both the Supreme Court and contemporary legal scholars have failed to disentangle the elements of cruelty and unusualness, and Part IV asserts that cruelty and unusualness were originally viewed as distinct components of the Eighth Amendment.[22] Part V examines the specific text of the Punishments Clause and determines that, for every element of the text to be given significance, the Punishments Clause must be interpreted to prohibit only punishments that are both cruel and unusual. It further concludes that the Court's earliest Eighth Amendment cases buttress this interpretation. Part VI explains that, because both cruelty and unusualness are required by the Punishments Clause, each concept must be independently assessed so that each may be given meaning. This Part, while provisionally accepting the Court's examination of state legislative action as a method by which to assess unusualness, briefly explores some new ways in which courts could approach the question of how to assess cruelty independent of unusualness. Part VII examines the consequences of interpreting the

21. 356 U.S. 86 (1958); *see infra* Part II.B.

22. This Article focuses primarily on the text of the Punishments Clause. Certainly, any form of originalism is hotly debated in the legal academy, but there is little disagreement that the text of the Constitution and Bill of Rights matters in interpreting these documents. In discussing the history of the Punishments Clause, this Article refers to the original intent of the drafters of the 1689 English Bill of Rights and how the drafters of the Eighth Amendment understood this document. This brief focus on intent, though, should not be understood as support of intentionalism, which has, for the most part, been rejected even by originalists. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003) (outlining the evolution of originalist interpretation and suggesting that the intentionalist approach has for the most part been abandoned by the academy). In examining the text of the Punishments Clause, this Article is more interested in the original public meaning of the prohibition on "cruel and unusual punishments." U.S. CONST. amend. VIII.

Punishments Clause to prohibit only punishments that are both cruel and unusual and of independently assessing these two components of the Clause. It points out that while interpreting the Clause to prohibit both cruel punishments as well as unusual punishments may be captivating, this would undercut the principle of federalism and prevent humane innovations in punishment, ultimately disadvantaging criminal defendants. This Part further explains that independently assessing cruelty and unusualness will lend greater predictability to the Court's jurisprudence in this area. The Article concludes that courts and scholars should seriously consider whether the Punishments Clause requires that a punishment be both cruel and unusual before it is prohibited and suggests that, both because of the original understanding of the language "cruel and unusual punishments" and the importance of clarity, federalism, and innovation, this question should be answered in the affirmative.

I. THE HISTORY OF THE EIGHTH AMENDMENT

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[23] Congress adopted the Amendment with little debate in 1789.[24] During the congressional session in which the proposed Amendment was discussed, only two congressmen commented on the topic of the Punishments Clause.[25] First, Representative Samuel Livermore of New Hampshire asked whether the language of the Clause would prohibit the punishments of hanging, whipping, and cutting off a criminal's ears "because [these punishments] are cruel."[26] Second, Representative William Smith of South Carolina opined that the language of the Clause was "too indefinite."[27] Despite the limited nature of these remarks, some additional comments were made on the Clause during the debates in the state ratifying conventions. At the Massachusetts ratifying convention, Abraham Holmes indicated that "cruel and unheard-of punishments," which include racks and gibbets, should be prohibited by the Bill of

23. U.S. CONST. amend. VIII.

24. *See* 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1834).

25. *Id.*

26. *Id.*

27. *Id.* Professor Raoul Berger has noted that Livermore's and Smith's opinions should bear little weight because they were both opponents of the Eighth Amendment. RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 45 (1982). Further, Livermore is said to have been outside the mainstream of eighteenth-century legal thought because he reportedly refused to recognize the authority of precedent in deciding cases as a New Hampshire Supreme Court Justice. Stinneford, *supra* note 13, at 1809.

Rights.[28] Similarly, at the Virginia ratifying convention, Patrick Henry referred to the "interdiction of cruel punishments" as a "sacred right" that must be secured by the Bill of Rights.[29] He reasoned that one thing that distinguished our English ancestors was "[t]hat they would not admit of tortures, or cruel and barbarous punishment,"[30] and, without a Bill of Rights, Congress could inflict "unusual and severe punishments."[31] In contrast to this support for the Amendment, Virginia's Governor Randolph opposed including a prohibition on cruel and unusual punishments because he believed that one would have to "presume corruption . . . before . . . cruel punishments [could be] inflicted" and that the constitutional numerical requirements for passing laws and the independence of the judiciary are "enough to prevent such oppressive practices."[32] Finally, when questions arose at the Virginia ratifying convention regarding the true meaning of the Punishments Clause, George Mason opined that the Punishments Clause certainly prohibited torture.[33]

In light of the sparse documentation surrounding the proposal and ratification of the Eighth Amendment, scholars have looked to the Amendment's progenitors to determine its meaning.[34] It seems that the Framers imported the language of the Amendment from the 1776 Virginia Declaration of Rights, which similarly provides "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[35] This language is identical to that in Article 10 of the 1688 English Bill of Rights[36] and was supposedly copied verbatim from the English document.[37] This uniformity in language has

28. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881).

29. *Id.* at 462.

30. *Id.* at 447.

31. *Id.* at 412.

32. *Id.* at 468.

33. *Id.* at 452.

34. *See, e.g.*, Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 49 (2008) (referencing the history of the Eighth Amendment for the proposition that the Punishments Clause prohibits excessive punishments); Stacy, *supra* note 19, at 503–04 (drawing on history of the English Bill of Rights to determine the meaning of the Eighth Amendment); *cf.* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 853 (1969) (examining the history of the Eighth Amendment and stating that, due to "the obvious linguistic link between the Virginia Declaration of Rights and the English Bill of Rights, legal historians have searched for the types of punishments which the drafters of the latter document sought to prohibit.").

35. VA. DECLARATION OF RIGHTS OF 1776, § 9; *see* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776–1791, at 202 (1955); Granucci, *supra* note 34, at 840.

36. *Compare* VA. DECLARATION OF RIGHTS OF 1776, § 9, *with* ENG. BILL OF RIGHTS (1689).

37. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1065 (2004);

led scholars to examine the meaning of the phrase in the English Bill of Rights when interpreting the Eighth Amendment.[38]

There is no clear evidence as to what Parliament intended to prohibit by the language of Article 10.[39] The preamble of the English Bill of Rights denounces King James II's subversion of English laws and liberties by, among other things, suspending laws without Parliament's consent, prosecuting prelates for petitioning the King, and prosecuting individuals for ecclesiastical offenses.[40] The document also charges that "excessive fines have been imposed; and illegal and cruel punishments inflicted."[41] Historically, scholars have disagreed whether the document prohibited cruel methods of punishment or cruel and illegal punishments,[42] but they seem to agree that, whatever the meaning of the document, it was enacted "to prevent a recurrence of recent events" in England.[43]

Some commentators believe that Article 10 was drafted to prevent the recurrence of cruel methods of punishment used during the Bloody Assize of 1685.[44] The Bloody Assize refers to the treason trials that ensued after

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Granucci, *supra* note 34, at 840; Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 673–74 (2004).

38. *See* Granucci, *supra* note 34, at 853.

39. *See* RUTLAND, *supra* note 35, at 11 (explaining that it is unclear what exactly this prohibition on cruel and unusual punishments prohibited).

40. *See* ENG. BILL OF RIGHTS pmbl. (1689).

41. *Id.*

42. *See* Granucci, *supra* note 34, at 853–60 (disagreeing with "[m]ost historians" who believe that the document was intended to prevent the reoccurrence of the cruel punishments used during the Bloody Assize). Some scholars also believe that Article 10 prohibits excessive punishments. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 285 (1983) (asserting that the English Bill of Rights reiterated the long-established English interdiction of excessive punishments); Brian R. Gallini, *Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life Without Parole?*, 87 OR. L. REV. 29, 48 n.104 (2008) ("The English Bill of Rights reiterated the principle of proportionality and, when the Framers based the language of the Eighth Amendment on the English Bill of Rights, they too incorporated this concept."). They adopt this belief because, "by the year 1400, [there was a] 'long standing principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.'" Granucci, *supra* note 34, at 846 (footnote omitted).

43. DAVID OGG, ENGLAND IN THE REIGNS OF JAMES II AND WILLIAM III 241 (1957); Rumann, *supra* note 37, at 670; *see generally* ENG. BILL OF RIGHTS (1689).

44. *See* SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 419–20 (2d ed. 1973); Granucci, *supra* note 34, at 853 ("Most historians point to the treason trials of 1685—the 'Bloody Assize'—which followed the abortive rebellion of the Duke of Monmouth, and the opinion that the cruel and unusual punishments clause was directed to the conduct of Chief Justice Jeffreys during these trials is still in vogue."). *But see* Granucci, *supra* note 34, at 855–86 (arguing that the weight of the evidence is against the connection between Article 10 and the Bloody Assize because the "cruel" punishments employed in the Bloody Assize continued to be used after Article 10 was ratified, the chief prosecutor of the Bloody Assize was a leading member of the English Bill of Rights drafting committee, and the Bloody Assize is mentioned just once in the Commons debate).

King James II defeated his nephew, the Duke of Monmouth, at the Battle of Sedgemoor following Monmouth's June 1685 advance and proclamation that he was King.[45] The captured rebels were tried, and, for those found guilty, "[m]ere death was considered much too mild . . . ."[46] The offenders were drawn "on a cart to the gallows, where [they were] hanged by the neck, cut down while still alive, disembowelled and [their] bowels burnt before [them], and then beheaded and quartered."[47] Scholars' belief that such punishments were prohibited by Article 10 seems to stem from the broad publicity that the Assize received by Puritan pamphleteers during the time Article 10 was drafted.[48]

The more commonly accepted view among scholars today is that Article 10 was instead drafted to prevent courts from doling out cruel and illegal punishments or severe punishments that are "unauthorized by statute and not within the jurisdiction of the court to impose," such as occurred during the events of the Popish Plot of 1678 and 1679.[49] Setting

45. *See* Granucci, *supra* note 34, at 853.

46. Furman v. Georgia, 408 U.S. 238, 254 (1972) (Douglas, J., concurring) (quoting IRVING BRANT, THE BILL OF RIGHTS 154–55 (1965)) (stating that execution was to be by beheading, and the culprits' heads and quarters were to be boiled in a furnace or cauldron).

47. *See* Granucci, *supra* note 34, at 854 (explaining that this was the punishment for treason at the time); Furman v. Georgia, 408 U.S. 238, 254 (1972) ("The directions to a high sheriff were to provide an ax, a cleaver, 'a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters' along the highways.") (quoting IRVING BRANT, THE BILL OF RIGHTS 154–55 (1965)); *see also, e.g.*, SIR EDWARD PARRY, THE BLOODY ASSIZE 243 (1929) (noting that "[t]he horrid business of hanging and quartering took several hours" and that some "corpses were cut in quarters, and then dropped in cauldrons of pitch, and later on carried away and hung in appropriate localities"). The chief prosecutor for the special commission, Sir Henry Pollfexen, "let it be known that no one who pleaded guilty would suffer the death penalty." Granucci, *supra* note 34, at 854. But he did not keep this promise and later had about two hundred persons who had pleaded guilty executed. *Id.* In toto, approximately three hundred suspected insurgents were executed. *See* PARRY, *supra* note 47, at 262–63 (1929). For further discussion of punishments doled out during the Bloody Assize, see RUBIN, *supra* note 44, at 419–20.

48. Granucci, *supra* note 34, at 854; *see also, e.g.*, RUBIN, *supra* note 44, at 419–20 (failing to explain his conclusion that the prohibition of "cruel and unusual punishments" found in Article 10 was directed at the punishments doled out during the Bloody Assize).

49. Granucci, *supra* note 34, at 859*; see, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 968 (1991). In *Harmelin v. Michigan*, Justice Scalia asserted that "the vicious punishments for treason decreed in the Bloody Assizes (drawing and quartering, burning of women felons, beheading, disembowling, etc.) were common in that period—indeed, they were specifically authorized by law and remained so for many years afterwards" and "the best historical evidence suggests, that it was not Jeffreys' management of the Bloody Assizes that led to the Declaration of Rights provision, but rather the arbitrary sentencing power he had exercised in administering justice from the King's Bench, particularly when punishing [Titus Oates for perjury]." *Harmelin*, 501 U.S. at 968. Justice Scalia refers to history to support his conclusion that the phrase "cruel and unusual punishments" focuses on the illegality of sentences rather than their disproportionality to the crimes committed. *Id.* at 969. Note, however, that this assertion by Justice Scalia is in the portion of the opinion to which only Chief Justice Rehnquist signed on. *Id.* at 961.

into motion the tragic events in 1678, Titus Oates falsely proclaimed under oath that there was a plot to assassinate King Charles II.[50] This untruth caused fifteen innocent people to be convicted and executed, and after it was discovered that these undeserved executions were the result of Oates's perjury, Oates was sentenced to a 2,000-mark fine, life imprisonment, whippings, quarterly pillorying, and defrocking.[51] After the English Bill of Rights was enacted, Oates petitioned both houses of Parliament for a release from the judgment, but the House of Lords rejected the petition.[52] A minority of the Lords dissented, however, stating that "the said judgments are barbarous, inhuman, and unchristian"; "there is no precedent to warrant the punishments of whipping and committing to prison for life, for the crime of perjury"; maintaining the judgment would "be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter"; the "judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed"; and the judgments were contrary to Article 10 of the English Bill of Rights.[53] The House of Commons concurred with the dissenting Lords.[54]

The understanding that Article 10 prohibits such punishments unauthorized by statute and not within the jurisdiction of the court to impose derives from the complaint in the English Bill of Rights that "illegal and cruel punishments [have been] inflicted" and the simultaneous prohibition in Article 10 of "cruel and unusual punishments."[55] Scholars such as Anthony Granucci have argued that "illegal" and "unusual" were used interchangeably in the document, that the use of "unusual" was merely the product of sloppy drafting,[56] and that the term "unusual" was used to mean "illegal" in seventeenth-century England.[57] These scholars

50. *See The Trial of Titus Oates*, D.D. at the King's Bench, for Perjury: 1 James II. A.D. 1685, *reprinted in* 10 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1316–17 (1811) [hereinafter *The Trial of Titus Oates*]; Granucci, *supra* note 34, at 857.

51. *See The Trial of Titus Oates*, *supra* note 50, at 1316–17; Granucci, *supra* note 34, at 857–58.

52. *See The Trial of Titus Oates*, *supra* note 50, at 1325 ("Then the main question was put, Whether to reverse the two judgments given below against Titus Oates, in relation to the two perjuries? It was resolved in the negative."); Granucci, *supra* note 34, at 858.

53. *The Trial of Titus Oates*, *supra* note 50, at 1325; Granucci, *supra* note 34, at 858. Fourteen Lords—Bolton, Macclesfield, J. Bridgewater, Stamford, Oxford, Bolingbrooke, Bathe, Herbert, Grey, Vaughan, Newport, Cornwallis, R. Eure, and P. Wharton—joined in this dissent. *The Trial of Titus Oates*, *supra* note 50, at 1325.

54. Granucci, *supra* note 34, at 858–59.

55. ENG. BILL OF RIGHTS (1689); *see* Granucci, *supra* note 34, at 855.

56. Granucci, *supra* note 34, at 855.

57. Furman v. Georgia, 408 U.S. at 318 (Marshall, J., concurring) (explaining that an earlier draft of the English Bill of Rights prohibited "illegal" instead of "unusual" punishments and that the change "appears to be inadvertent"); Granucci, *supra* note 34, at 855 (stating that earlier drafts of the English

buttress this argument with the fact that the subsequent language of the dissenting Lords in response to Oates's petition for release from judgment similarly referred simultaneously to "cruel, barbarous, and illegal judgments" and "cruel and unusual punishments."[58]

There are several reasons why most scholars adopt the understanding that Article 10 was intended to prevent the reoccurrence of events such as the Popish Plot over the understanding that it was enacted to prevent the reoccurrence of events such as the Bloody Assize.[59] First, the allegedly cruel methods of punishment employed during the Bloody Assize continued in use after the passage of Article 10.[60] Second, the chief prosecutor of the Bloody Assize was a leading member of the committee that drafted the English Bill of Rights, and it is unlikely that he would have drafted a document condemning his own actions.[61] And finally, the Bloody Assize is barely mentioned in the debate regarding the passage of Article 10.[62] Scholars adopting this position that Article 10 was intended to prevent the reoccurrence of events such as the Popish Plot then conclude that Article 10 does not prohibit particular cruel methods of punishment. This is because, first of all, "[n]one of the punishments inflicted upon Oates amounted to torture."[63] Additionally, life imprisonment was probably not excessive in this case, because a number of innocent people were executed as a result of Oates's scheme.[64] Further, the 2,000-mark fine may have been excessive and the defrocking unusual, but they were not considered cruel.[65] Accordingly, most scholars conclude

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Bill of Rights spoke of "illegal and cruel punishments" and that "[t]he final phraseology, especially the use of the word 'unusual,' must be laid simply to chance and sloppy draftsmanship"). One scholar has argued that while "illegal" and "unusual" were used interchangeably, "in adopting the Bill of Rights, the English Parliament sought to condemn only punishments that departed from the common law in the direction of greater severity" because it required that punishments must also be "cruel" to be prohibited. Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 121–22 (2004). In other words, the English Bill of Rights condemned, and the Eighth Amendment similarly condemns, "punishments that [are] harsher than the common law allowed." *See id.* at 122.

58. *See* ENG. BILL OF RIGHTS (1689); *The Trial of Titus Oates*, *supra* note 51, at 1325; Granucci, *supra* note 34, at 855, 858–60; *supra* text accompanying note 53.

59. *See infra* text accompanying notes 60–62.

60. *See* Granucci, *supra* note 34, at 855–56; *see also, e.g.*, Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 43 (2000) ("The English [Bill of Rights] provision was motivated by the Titus Oates affair."); Stacy, *supra* note 19, at 510 ("The [English Bill of Rights] was evidently inspired by objections to Titus Oates's punishments.").

61. Granucci, *supra* note 34, at 856.

62. *Id.*

63. *Id.* at 859.

64. *Id.*

65. *Id.*

that, in the context of the English Bill of Rights, "cruel and unusual" seems to have meant simply "cruel and illegal."[66]

Although most scholars believe, then, that Article 10 was intended to prevent cruel and illegal punishments, they conclude that this meaning was lost on the drafters of the Virginia Declaration of Rights and the Eighth Amendment, who believed that Article 10 was indeed intended to prevent cruel methods of punishment.[67] This belief by scholars is rooted in colonists' fears of torture and barbarous punishments, which are exhibited in the few statements made by the Framers and Ratifiers regarding cruelty and the Eighth Amendment.[68] This belief also stems from the colonists' limited access to English legal resources.[69] Of the legal treatises available to the colonists, only Blackstone's *Commentaries* addressed the topic of punishment.[70] It states that, although seventeenth-century England allowed hanging, embowelling alive, beheading, quartering, public dissection, and burning alive as punishments and, "in very atrocious crimes other circumstances of terror, pain or disgrace [were] super-added" to the punishment, "the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as

66. *See id.* at 859–60. Scholars adopting this view also emphasize that the prohibition on cruel and unusual, or illegal, punishments further reflects a longstanding prohibition on excessive punishment, which can be traced back to the *Book of Exodus*. *See* Granucci, *supra* note 34, at 844; *see also, e.g.*, *Exodus* 21:24 ("Eye for eye, tooth for tooth, hand for hand, foot for foot . . . ."). Such scholars point out that the Magna Carta incorporated the concept of prohibiting excessive punishments and that, by the year 1400, there was a "long standing principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." Granucci, *supra* note 34, at 845–47 (quoting SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 236 (Richard L. Perry ed., 1959)); *see also* MAGNA CARTA, arts. 20–22 (1215) (providing that an individual "shall not be amerced for a slight offence, except in accordance with the degree of the offense").

67. *See, e.g.*, Granucci, *supra* note 34, at 860 ("George Mason and the framers of the American Constitution misinterpreted the meaning of the cruel and unusual punishments clause of the English Bill of Rights of 1689."); Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1630 n.131 (1996) (citing Granucci, *supra* note 34); Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMINOLOGY 231, 241 n.38 (1995) (book review) (citing Granucci, *supra* note 34, for "an account of the origins of [the Punishments Clause] in the English Bill of Rights and its misunderstanding by the American framers").

68. *See supra* text accompanying notes 25–33. Samuel Livermore's inquiry during the congressional debates of whether the punishments of hanging, whipping, and cutting off a criminal's ears would be prohibited "because they are cruel" is an example of the colonists' focus on cruel and barbarous punishments. 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1834).

69. *See* Granucci, *supra* note 34, at 861–62.

70. *See id.*

savor of torture or cruelty."[71] Blackstone's *Commentaries* may not entirely account for how the colonists arrived at a conclusion that Article 10 was intended to prevent cruel methods of punishment, however. The Framers' misunderstanding of Article 10 may be partly due to the philosophical and legal writings of the time, such as Robert Beale's 1583 manuscript entitled *A Book Against Oaths Ministered in the Courts of Ecclesiastical Commission* and Nathaniel Ward's draft code that became Massachusetts's *Body of Liberties*, both of which expressed disapprobation of barbarous punishments or torture.[72]

II. THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE

Perhaps due to the unclear origins of the Eighth Amendment, the Supreme Court has struggled to give meaning to the Punishments Clause since the Eighth Amendment was ratified in 1791. The Court's earliest Punishments Clause cases focus on the cruelty and unusualness components of the Clause and do not squarely address whether the Clause prohibits only punishments that are both cruel and unusual.[73] In contrast, the Court's later cases fail to closely examine the individual components of the Clause but instead focus on whether certain punishments violate the "evolving standards of decency."[74] But similar to the Court's early cases, these later cases also do not seem to take a clear position on whether the Clause prohibits only punishments that are both cruel and unusual.

A. The Early Cases

Historically, the Supreme Court has distinguished between the cruelty and unusualness components of the Punishments Clause.[75] In its first case

71. *Id.* at 862–63 (quoting 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 370 (1st ed. 1769)). It adds that "[a] sledge or hurdle [is] usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any person's being embowelled or burned, till previously deprived of sensation by strangling." *Id.* at 863.

72. *See* Granucci, *supra* note 34, at 848–52, 860 (explaining that "[a] prohibition of cruel methods of punishment was first written into law in America by . . . Rev. Nathaniel Ward of Ipswich, Massachusetts," who was one of the men "appointed to frame a body of grounds of laws" and whose "draft was enacted into law under the title *Body of Liberties*"); *see also* MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 71–84 (1971). The Massachusetts *Body of Liberties* "was well ahead of contemporary English law," Granucci, *supra* note 34, at 851, and it has been referred to as "the most important as a forerunner of the federal Bill of Rights," SCHWARTZ, *supra*, at 69.

73. *See, e.g.*, *infra* notes 78–79 and accompanying text.

74. *See generally infra* Part II.B.

75. *But see* Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (stating that the Court has not drawn "precise distinctions between cruelty and unusualness").

examining the meaning of the Clause, the 1866 case of *Pervear v. Massachusetts*,[76] the Court focused on the term "unusual" as distinct from the term "cruel." In that case, the Court upheld a punishment of a fifty-dollar fine and three months' imprisonment at hard labor for the Massachusetts offense of illegally maintaining and selling intoxicating liquors.[77] Although the Court did not actually reach its holding on Eighth Amendment grounds because, at that time, the Eighth Amendment did not apply to the states and the defendant had committed an offense against the state,[78] the Court opined that the punishment would not be unconstitutional under the Punishments Clause because it was not unusual.[79] The Court stated that, even if the Eighth Amendment were to apply, the punishment would not violate the Amendment because "[t]he mode [of punishment] adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps all of the States."[80] This language indicates that the Court assessed unusualness independently from cruelty.[81] The language also suggests that the Court viewed the Punishments Clause as requiring the element of unusualness before a punishment was prohibited by the Clause. Whether

76. 72 U.S. 475 (1866). While the Court did not thoroughly examine the meaning of the Punishments Clause until 1866, litigants had previously raised Eighth Amendment challenges. *See, e.g.*, Spalding v. New York, 45 U.S. 21, 30 (1846) (arguing that "imposition of [a] fine, if criminal and going to the people, was excessive, and was a cruel punishment for the offence, for it imposed an impossibility"); United States v. Houston, 26 F. Cas. 379, 382 (D.C. Cir. 1832) (arguing that a reprimand from the U.S. House of Representatives for an assault and battery is "unusual" and likely prohibited by the Constitution); Ex Parte Randolph, 20 F. Cas. 242, 245 (D. Va. 1833) (arguing that the punishment of "interminable imprisonment" for failing to pay amounts owed to the government constitutes "cruel and unusual punishment"). Further, a few early state courts commented on the meaning of state constitutional provisions that parallel the language of the Eighth Amendment. For example, in 1828, the General Court of Virginia suggested that the punishment of stripes did not violate the state constitutional prohibition because, while the punishment "is certainly odious, [it] cannot be said to be unusual." Commonwealth v. Wyatt, 27 Va. 701 (1828). However, the number of state court opinions that comment, even obliquely, on the meaning of these parallel state constitutional provisions, and that were decided around the time the Eighth Amendment was drafted and ratified, is quite limited.

77. 72 U.S. at 479–80.

78. *Id.* It was not until the year 1962 that the Court held, although only implicitly, that the Fourteenth Amendment incorporated the Eighth Amendment, thus making the Eighth Amendment enforceable against the states. *See* Robinson v. California, 370 U.S. 660, 666–67 (1962) (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) for the proposition that the Fourteenth Amendment incorporates the Eighth Amendment even though, in *Francis*, the Court only assumed for the purpose of argument that the Fourteenth Amendment incorporated the Eighth Amendment, *id.* at 462).

79. *See Pervear*, 72 U.S. at 480.

80. *Id.*

81. *See* Furman v. Georgia, 408 U.S. 238, 276 n.20 (1972) (Brennan, J., concurring) (explaining that the language in *Pervear* suggests that "[t]here are other statements in prior cases indicating that the word 'unusual' has a distinct meaning").

the Court actually perceived unusualness as a requirement or simply as one of the two types of punishment barred by the Clause is uncertain, though, because the Court added that it "perceive[d] nothing excessive, or cruel, or unusual" in imposing the punishment for the particular crime.[82] The Court thus left room for the interpretation that it understood the Punishments Clause to prohibit either all unusual punishments or only all punishments that are both unusual and cruel.

In its 1878 case of *Wilkerson v. Utah*,[83] the Court continued its individualized treatment of the terms "cruel" and "unusual" and seemed to adopt the position that a punishment need not be both cruel and unusual to be prohibited. In that case, the Court confronted the constitutionality of the punishment of a public shooting for a defendant who was convicted of first-degree murder in the Territory of Utah.[84] The Court stated that, while

> [d]ifficulty would attend the effort to define with exactness the extent of the [Eighth Amendment Punishments Clause] . . . it is safe to affirm that punishments of torture, such as [dragging a prisoner to the place of execution, emboweling convicted criminals alive, beheading, quartering, public dissection, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.[85]

The Court thus distinguished the concept of cruelty, as illustrated by certain images of torture, from its notion of unusualness, which it associated with not being adopted "in the great majority of cases."[86] Further, the Court's language indicates that only cruelty was required to render a punishment prohibited by the Punishments Clause. The Court concluded that the punishment at issue was not cruel, however, because even more torturous punishments, such as burning alive and beheading, were available at the time of the Framers.[87]

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82. *Pervear*, 72 U.S. at 480.

83. 99 U.S. 130 (1878).

84. *Id.* at 130–31. The laws of the territory provided that the punishment for first-degree murder was death unless the jury suggested a punishment of life imprisonment at hard labor, but the territorial laws did not provide for a specific method of execution. *Id.* at 132. The Court held that the territorial government had the power to select the proper method of execution so long as it did not violate the Eighth Amendment. *Id.* at 133, 137.

85. *Id.* at 135–36.

86. *Id.* at 135. The Court suggested that, in addition to not being cruel, the punishment at issue was not unusual because the punishment of a public shooting had been adopted "in the great majority of cases" for other offenses. *Id.*

87. *Id.* at 136. Although application of the Bill of Rights to territories was complicated during this period, *see, e.g.*, Downes v. Bidwell, 182 U.S. 244, 268–87 (1901) (distinguishing the application of the Constitution and its amendments in the different contexts of territories that are "part of the

The Court again treated the terms "cruel" and "unusual" distinctly in its 1890 case of *In re Kemmler*,[88] in which it upheld New York's innovative use of electrocution for carrying out executions.[89] The *Kemmler* Court conceded that the practice of electrocution was "certainly unusual"[90] but explained that the practice was not cruel because it did not "involve torture or a lingering death."[91] Indeed, the Court found that the punishment constituted a humane innovation in carrying out death sentences.[92] The Court reiterated the *Wilkerson* Court's language that torture and similar punishments are certainly forbidden by the Eighth Amendment[93] and concluded that, because the punishment was not cruel, it could not violate the Punishments Clause. While the Court's statements constituted only dicta because the Eighth Amendment was held not to apply to the states,[94] the Court's analysis indicates that the Court viewed cruelty as a necessary element of a Punishments Clause prohibition. The status of the unusualness component of the Clause, though, remained uncertain because *Pervear* seemed to indicate that unusualness was an additional prerequisite before a prohibition could be found, yet the dicta in *Wilkerson* and *In re Kemmler* suggest that the Clause may always prohibit torture, no matter how usual the punishment.[95]

United States" and territories that are not, such as Puerto Rico), the Court appears to apply the Eighth Amendment to the Territory of Utah in this case either because: (1) the Constitution applied to the territory through the "organic act of the Territory," *see* Springville City v. Thomas, 166 U.S. 707, 708 (1897); (2) the Utah Territory was "incorporated" into the United States, and the Constitution and its amendments apply in full force to such territories, *see Downes*, 182 U.S. at 343*; cf.* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 265 (2006) ("[I]n exercising its general authority over federal territory and the national capital, Congress . . . after 1791 . . . had to abide by the Bill of Rights."); or (3) the Eighth Amendment is part of the "fundamental" law that applies to even "unincorporated" territories, *see Downes*, 182 U.S. at 268, 287; *cf.* Weems v. United States, 217 U.S. 349, 367–68 (1910) (holding that the Punishments Clause applied to the Philippine Islands because being free from cruel and unusual punishments was "fundamental law").

88. 136 U.S. 436, 447 (1890) (quoting *Wilkerson*, 99 U.S. at 135).

89. 136 U.S. at 447–49.

90. *Id.* at 443.

91. *Id.* at 447.

92. *Id.* at 443–44.

93. *Id.* at 447.

94. *Id.* at 446; *see also supra* note 78 (explaining that the Court did not hold that the Fourteenth Amendment incorporated the Eighth Amendment until its 1962 case of Robinson v. California, 370 U.S. 660, 666–67 (1962)).

95. *But see infra* note 222 (noting that torture has occasionally been described as inherently unusual) and Part V.D (noting that the Court's suggestion that all torturous punishments are forbidden by the Punishments Clause might reflect an "assumption that punishments that are viewed as torturous by most Americans will almost certainly be rare in their availability").

B. The "Evolving Standards of Decency" Test

While the Court's early cases analyzing the Punishments Clause separately examine the unusualness and cruelty components of the punishments at issue, the Court began to blur the line between these elements of the Clause in subsequent decades. By the time the Court decided *Trop v. Dulles*[96] in 1958,[97] it had for the most part abandoned independently examining the cruelty and unusualness of a punishment and instead seemed to treat the phrase "cruel and unusual punishments" as a term of art, the meaning of which cannot be clearly determined by examining the Court's Punishments Clause jurisprudence. In ascertaining whether a punishment ran afoul of the prohibition in *Trop*, the Court relied not on the cruelty or unusualness of a practice but on a constitutional test more removed from the language of the Clause.[98] This test does not seem

96. 356 U.S. 86 (1958).

97. There are only a handful of U.S. Supreme Court cases decided between the time when *In re Kemmler* was decided in 1890 and when *Trop* was decided in 1958 that deal with the Punishments Clause of the Eighth Amendment in anything other than a cursory manner. The sparsity of cases on the topic is likely due to the Court's failure to recognize the Eighth Amendment's application to the states until its 1962 case of *Robinson v. California*, 370 U.S. 660 (1962). *See supra* note 78. The cases that do touch on the issue offer little guidance on how the concept of "cruel and unusual punishments" evolved during the period between when *In re Kemmler* and *Trop* were decided. For example, the Court's 1893 case of *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), is one of the cases most on point during this period. In that case, the Court opined that the Punishments Clause had no application to the deportation of an individual who was unable to secure a certificate of residence because the deportation did not constitute a punishment. *Id.* at 730. In another case—the 1903 case of *Howard v. Fleming*, 191 U.S. 126 (1903)—the Court concluded that it was unnecessary to determine exactly what "render[s] a punishment cruel and unusual" because the sentence at issue of ten years' imprisonment had been sustained by the state supreme court and did not "deserv[e] to be called cruel." *Id*. at 136. The most significant case that was decided between the time when *In re Kemmler* and *Trop* were issued is the 1910 case of *Weems v. United States*, 217 U.S. 349 (1910). In this case, the Court first indicated its movement toward the *Trop "*evolving standards of decency" analysis, *see infra* note 98, by departing from the text of the Punishments Clause and emphasizing that the meaning of the Clause changes with time. *See* 217 U.S. 373. The *Weems* court concluded that the punishment at issue—fifteen years of "cadena" (essentially fifteen years' imprisonment at "hard and painful labor") for the crime of falsifying a public and official document—was both cruel and unusual and thus was unconstitutional. *Id.* at 377, 382. The Court built somewhat on the *Weems* case in its 1947 case of *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), in which it suggested that inflicting unnecessary pain in punishment would violate the Punishments Clause. *Id.* at 463–64. It is not until the Court's 1958 case of *Trop v. Dulles*, however, that one can easily begin to see the roots of the Court's current "evolving standards of decency" jurisprudence. *See infra* notes 99–105 and accompanying text.

98. The Court first began moving away from the language of the Punishments Clause in *Weems v. United States*, 217 U.S. 349 (1910), which was decided forty-eight years before the Court confronted *Trop v. Dulles*, 356 U.S. 86 (1958). Perhaps even more notable than the Court's movement away from the text in these two cases, however, was the Court's movement away from interpreting the prohibition in light of the norms at the time of the Framers and toward weaving the notion of a living Constitution into the prohibition. 356 U.S. at 101 (1958) (plurality opinion) (stating that the Eighth Amendment "must draw its meaning from the evolving standards of decency"); Weems v. United

to independently assess the cruelty and unusualness components of the Clause.

In *Trop*, the Court addressed whether denationalization for the crime of desertion violates the Punishments Clause.[99] After concluding that denationalization constitutes "punishment,"[100] the Court moved on to determine the scope of the phrase "cruel and unusual."[101] The Court stated that:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[102]

States, 217 U.S. 349, 378 (1910) ("The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.").

99. 356 U.S. at 87.

100. *Id.* at 95–99. The question of whether a practice constitutes "punishment" is a far-reaching and complicated one, especially in light of the barbarities that the U.S. government has purportedly committed in subjecting suspected terrorists to torture as part of its interrogation techniques. *See supra* note 15. In answering this question in *Trop*, a plurality of the Court first turned to whether the statute was penal. 356 U.S. at 95–99. The Court determined that whether a law is penal depends upon the purpose of the statute: "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." *Id.* at 96 (citations omitted). The Court noted that "the severity of the disability imposed [and] the circumstances surrounding the legislative enactment [are] also relevant to [the] decision." *Id.* at 96 n.18. While the Court did not seem to carefully analyze what it means to punish, it concluded that the statute at issue was meant to punish and thus was penal in character. *Id.* at 97.

101. *Id.* at 99–101.

102. *Id.* at 100–01 (citing *Weems*, 217 U.S. 349).

In evaluating whether denationalization violates the Punishments Clause, the Court examined the negative effects on the defendant if the punishment were to be imposed, observing that the punishment imposes "total destruction of the individual's status in organized society" and is "more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[103] The Court also surveyed the practices of other nations and observed that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[104] Finally, the Court emphasized that the task of resolving whether a statute violates the Eighth Amendment "inescapably" belongs to the Court and that "[t]his task requires the exercise of judgment . . . ."[105]

Since *Trop*, the Court has continued to employ the "evolving standards of decency" test,[106] but, naturally, the Court has provided greater content to the test since its decision in *Trop*. In determining whether a practice comports with the "evolving standards of decency," the Court has looked to certain objective indicia of contemporary values.[107] The Court has stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[108]

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

104. *Id.* at 102. The Court's consultation of the laws of foreign nations in its "evolving standards of decency" cases has been sharply criticized. *See infra* text accompanying notes 168–71.

105. 356 U.S. at 103. The Court explained that, although it is required to exercise its own judgment in determining whether a statute violates the Eighth Amendment, it is not to rely upon personal preferences. *Id.* ("Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.").

106. *See, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) ("The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'") (citations omitted); Roper v. Simmons, 543 U.S. 551, 560–61 (2005) (stating that the Court refers "to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual"); Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

107. *See, e.g.*, *Kennedy*, 128 S. Ct. at 2650 ("In these cases the Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'"); *Roper*, 543 U.S. at 564 (referring to "objective indicia of consensus"); *Atkins*, 536 U.S. at 312 (referring to "objective evidence of contemporary values"). In some subsets of Eighth Amendment cases, the Court has deviated somewhat from its traditional examination of objective indicia of contemporary values. In prison conditions cases, for example, the Court tends to focus more on the "independent judgment" component of its analysis, *see infra* text accompanying notes 122–34, such as it did in *Estelle v. Gamble*, 429 U.S. 97 (1976), when it concluded "that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id.* at 104 (citation omitted).

108. *Atkins*, 536 U.S. at 312 (examining "the legislation enacted by the country's legislatures" and drawing on the Court's "own judgment" in evaluating the requirements of the Eighth Amendment); Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (looking to "legislation enacted by the country's

Accordingly, this is the primary factor on which the Court relies in determining whether a particular practice violates the Punishments Clause.[109] In examining state legislative action to determine whether there is a consensus against a particular practice, the Court sometimes simply tallies the number of states employing or prohibiting a particular practice, and it sometimes examines the consistency and direction of change in states' legislation regarding the practice. For example, in concluding that imposing the death penalty for the crime of child rape violates the Punishments Clause, the Court relied primarily on the fact that only six states imposed the death penalty for child rape.[110] In determining that executing mentally retarded individuals violates the Punishments Clause, however, the Court relied primarily on the fact that, in the previous twelve years, nineteen jurisdictions had adopted prohibitions on executing the mentally retarded while no additional states had authorized the practice.[111]

The Court has been somewhat inconsistent in how it tabulates the number of states adopting or prohibiting a practice that constitutes a consensus against that practice. For example, in analyzing whether the practice of juvenile execution is prohibited by the Eighth Amendment in the case of *Roper v. Simmons*,[112] the Court had to determine whether states disallowing the death penalty in its entirety should be counted along with states prohibiting the juvenile death penalty in particular.[113] While not highlighting its decision, the *Roper* Court opted to include the states without the death penalty in its calculation, stating that "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or

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legislatures" and "data concerning the actions of sentencing juries" in evaluating the requirements of the Eighth Amendment). In *Stanford v. Kentucky*, 492 U.S. 361, 397 (1989), however, the Court indicated that the actions of juries may be on an equal plane with the actions of state legislatures. In that case, the Court stated:

> Having failed to establish a consensus against capital punishment for 16- and 17-year-old offenders through state and federal statutes and the behavior of prosecutors and juries, petitioners seek to demonstrate it through other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations. We decline the invitation to rest constitutional law upon such uncertain foundations. A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.

Id.

109. *See supra* note 108.
110. *Kennedy*, 128 S. Ct. at 2651–52.
111. *Atkins*, 536 U.S. at 313–16.
112. 543 U.S. 551 (2005).
113. *Id*. at 564–65.

judicial interpretation, exclude juveniles from its reach."[114] Moreover, the Court has failed to clarify what number of states or what rate of change of state legislation is necessary to constitute a consensus.[115]

In addition to examining the actions of state legislatures, the Court has also, on a number of occasions, examined secondary sources purportedly

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114. *Id.* at 564. Further, in *Kennedy*, 128 S. Ct. 2641 at 2654–2655, the Court confronted the question of whether states that had not adopted the practice at issue due to a belief that it was unconstitutional should still be counted. *See* 543 U.S. at 610 (Scalia, J., dissenting) (arguing that the majority broke with precedent in considering states that have abandoned the death penalty together with states that have abandoned only the juvenile death penalty in determining whether a consensus exists); *see also id.* at 574 ("[T]he Stanford Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles.") (citation omitted).

115. Due to this lack of clarity, commentators have criticized the Court for inconsistency in its determination of what constitutes a national consensus. *See, e.g.*, Mitchel A. Brim, *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 SW. U. L. REV. 275, 299–300 (2003) (arguing that there are a number of examples of such inconsistencies, including the fact that the Court considered polling data in *Atkins v. Virginia*, 536 U.S. 304 (2002), but not in *Penry v. Lynaugh*, 492 U.S. 302 (1989)); James W. Ellis, *Disability Advocacy and the Death Penalty: The Road from* Penry *to* Atkins, 33 N.M. L. REV. 173, 179 n.39 (2003) (noting that one inconsistency in the Court's Punishments Clause jurisprudence is its "treatment of states whose laws do not authorize the death penalty"); Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1689 & n.121 (2007) ("[T]he Court has regarded varying levels of agreement as 'national consensus' in Eighth Amendment cases, ranging from virtual unanimity in *Coker* to supermajority agreement in *Enmund* and bare majority agreement in *Roper* and *Atkins*."). Taking into account variations due to the Court's inconsistency in its counting practices, however, the following table attempts to illustrate that, in the Court's view, it probably takes somewhere between twelve and nineteen jurisdictions "prohibiting" a practice (or somewhere between twenty-five and thirty-one jurisdictions if jurisdictions disallowing the death penalty altogether are counted) before a consensus against a punishment is established. The data for this table has been derived from *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); *Baze v. Rees*, 128 S. Ct. 1520 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982); and *Coker v. Florida*, 433 U.S. 584 (1977).

Case	Jurisdictions "Prohibiting" Punishment	Total Jurisdictions "Prohibiting" (including non-DP jurisdictions)	Consensus Against?
Penry v. Lynaugh	2	16	No
Baze v. Rees	6	20	No
Stanford v. Kentucky	12	25	No
Roper v. Simmons	18	30	Yes
Atkins v. Virginia	19	31	Yes
Thompson v. Oklahoma	19	33	Yes
Ford v. Wainwright	26	35	Yes
Enmund v. Florida	28	42	Yes
Kennedy v. Louisiana	31	45	Yes
Coker v. Florida	32	47	Yes

reflective of society's contemporary values.[116] The secondary sources the Court has cited consist of how frequently juries impose the practice in jurisdictions where the practice is allowed;[117] whether public opinion polls demonstrate that the public is opposed to the practice at issue;[118] the opinions of professional organizations on the acceptability of the practice;[119] and international opinions of the practice, including whether the practice is used in foreign nations.[120] In none of its cases, however, has the Court found that any of these sources outweighed the evidence of state legislative action,[121] so it remains unclear how much weight, if any, the Court actually places on these secondary sources.

Finally, the Court has to some extent drawn on its own independent judgment to determine whether the objective indicia of contemporary values are consistent with the Court's own views. In *Coker v. Georgia*,[122] for example, the Court consulted its own judgment in determining whether the death penalty for the offense of rape violates the Eighth Amendment, stating that "the attitude of state legislatures . . . do[es] not wholly

116. *See, e.g.*, *Roper*, 543 U.S. at 575–78 (examining international opinion); *Atkins*, 536 U.S. at 316 n.21 (noting that the additional evidence from international opinion and the opinions of professional organizations "makes it clear that this legislative judgment reflects a much broader social and professional consensus"); *Penry*, 492 U.S. at 334–35 (examining evidence from public opinion polls).

117. *See, e.g.*, *Thompson*, 487 U.S. at 831 ("The second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries."); *see also Roper*, 543 U.S. at 564–65 (examining "the practice" of imposing juvenile execution); *cf. Stanford*, 492 U.S. at 373–74 (examining the evidence from jury practices with some skepticism).

118. *See Penry*, 492 U.S. at 334–35 (examining evidence from public opinion polls).

119. *Atkins*, 536 U.S. at 316 n.21 (noting that evidence that "several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender" supports the conclusion that there is a consensus against the practice); *Thompson*, 487 U.S. at 830–31 ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations . . . .").

120. *See, e.g.*, *Atkins*, 536 U.S. at 316 n.21 (noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *cf. Roper*, 543 U.S. at 575–78 (examining international opinion in the context of the court's independent judgment). The Court, however, has not always expressed that it is appropriate to examine the actions of other nations. In *Stanford*, for example, the Court "emphasize[d] that it is *American* conceptions of decency that are dispositive. . . ." *Stanford*, 492 U.S. at 369 n.1 (emphasis in original).

121. *See, e.g.*, *Kennedy*, 128 S. Ct. 2641, 2657 (2008) ("Statistics about the number of executions . . . . *confirm* our determination from our review of state statutes that there is a social consensus against the death penalty for the crime of child rape.") (emphasis added); *Roper*, 543 U.S. at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds *confirmation* in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.") (emphasis added).

122. 433 U.S. 584 (1977) (plurality opinion).

determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[123] In *Stanford v. Kentucky*,[124] however, a case in which the Court found that the Eighth Amendment did not prohibit the execution of sixteen- and seventeen-year-old offenders, the Court rejected the notion that the Punishments Clause allows it to apply its own independent judgment.[125] The Court explained that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices"[126] and that, "[i]n determining what standards have 'evolved,' . . . [the Court] ha[s] looked not to [its] own conceptions of decency, but to those of modern American society as a whole."[127] The Court returned to its position of the relevancy of its independent judgment in Punishments Clause questions in *Atkins v. Virginia*.[128] In that case, the Court stated that it had consulted its own judgment and had found "no reason to disagree with the judgment of 'the legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for a mentally retarded criminal."[129] Although the Court has been inconsistent in whether it draws on its own judgment, in its most recent Eighth Amendment cases—such as its 2005 *Roper*[130] opinion and its 2008 *Kennedy v. Louisiana*[131] opinion—the Court has called on its independent judgment without question as a check on the conclusion it had reached based on the objective indicia of contemporary values.[132]

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123. *Id.* at 597.

124. 492 U.S. 361 (1989).

125. *Id.* at 378.

126. *Id.* at 369 (quoting *Coker*, 433 U.S. at 592) (citation omitted).

127. 492 U.S. at 369.

128. 536 U.S. 304 (2002).

129. *Id.* at 321. In outlining its opinion, the Court stated that it would "first review the judgment of legislatures that have addressed the suitability of [the punishment] and then consider reasons for agreeing or disagreeing with their judgment." *Id.* at 313.

130. 543 U.S. 551 (2005).

131. 128 S. Ct. 2641 (2008).

132. *See, e.g.*, *id.* at 2658 ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." (citations omitted)); *Roper*, 543 U.S. at 564 ("We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."); *Atkins*, 536 U.S. at 313 ("Thus, in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.") (citations omitted). In the Court's 2008 opinion of *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion), however, it did not specifically refer to its own independent judgment. The Court's opinion in this case was unique in that it did not even seem to rely that heavily on the actions of state legislatures even though their actions supported the Court's conclusion that the particular method of lethal injection was constitutional. Indeed, "[t]hirty-six States that sanction[ed]

It remains questionable whether the Court's consultation of its own independent judgment in fact has any significance. Although the Court claims to consult its own judgment to determine whether it agrees with the conclusion it reaches by reviewing the objective indicia of contemporary values, the Court has never found its independent judgment to compel a conclusion different from that it reached based on the objective indicia.[133] Accordingly, it is unclear how much weight, if any, the Court actually accords its independent judgment.[134]

III. THE COURT AND SCHOLARS HAVE FAILED TO DISENTANGLE CRUELTY AND UNUSUALNESS

In addressing primarily state legislative action in its "evolving standards of decency" analysis, the Court has indicated that it is assessing both cruelty and unusualness. For example, when the *Atkins v. Virginia*[135] Court addressed whether executing mentally retarded individuals violates the Punishments Clause, the Court indicated that state legislative action reflects the prevailing values of society.[136] Similarly, in *Rhodes v. Chapman*, the Court stated that it looks at state legislative action to determine whether a punishment "violate[s] contemporary values."[137] At times, though, the Court indicates that it is assessing unusualness when examining the actions of state legislatures. For example, in *Atkins* the Court stated that because "[t]he practice . . . ha[d] become truly unusual, . . . it [was] fair to say that a national consensus ha[d] developed against

capital punishment [had] adopted lethal injection as the preferred method of execution," and "[t]hirty States, as well as the Federal Government, use[d] a series of sodium thiopental, pancuronium bromide, and potassium chloride[, the injection cocktail at issue in the case], in varying amounts." *Id.* at 1532. Although the Court noted these statistics, the Court seemed to focus more on the fact that it had never invalidated a state's chosen procedure for execution, *id.* at 1530, and on whether alternative procedures "effectively address[ed] a 'substantial risk of serious harm,'" *id.* at 1532 (stating that, "[t]o qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain"). This could be considered to constitute the Court's own independent judgment, but it seems to differ from the Court's application of its independent judgment in other Punishments Clause cases.

133. *See Roper*, 543 U.S. at 615 (Scalia, J., dissenting) (stating that the Court's resort to its independent judgment is a "rule . . . reflected solely in dicta and never once in a *holding* that purports to supplant the consensus of the American people with the Justices' views") (emphasis in original).

134. *But cf. Kennedy*, 128 S. Ct. 2641, 2658 (2008) (stating that the objective evidence of contemporary values are entitled to "great weight" but that, "in the end[, the Court's] own judgment will be brought to bear on the question of the acceptability of [a punishment] under the Eighth Amendment") (citations omitted).

135. 536 U.S. 304 (2002).

136. *Id.* at 312.

137. 452 U.S. 337, 346–47 (1981).

it," and thus it had become unconstitutional.[138] This is consistent with the Court's general failure to distinguish between cruelty and unusualness. In *Trop*, for example, the Court noted that it is unclear whether the term "unusual" has any meaning distinct from the term "cruel" and stated that, historically, the Court had not made such a distinction.[139] In *Furman v. Georgia*,[140] a number of individual Justices repeated this language.[141] This amalgamation of terms appears to be routine for the Court, and this is in tension with the Court's opinions in *Pervear*, *Wilkerson*, and *In re Kemmler*, in which the Court distinguished between the cruelty and unusualness components of the Clause.[142]

The Court has been somewhat inconsistent, however, because in select cases it has, in a sense, returned to its pre-"evolving standards of decency" roots and indicated that "cruel" does have a meaning distinct from "unusual" under the Punishments Clause. In the 1991 case of *Harmelin v. Michigan*,[143] for example, Justice Scalia, who authored the majority's opinion, asserted that for a punishment to fall under the Eighth Amendment prohibition, it must be both cruel and unusual.[144] He stated that, "[a]s a textual matter, of course," the Punishments Clause does not prohibit disproportionate punishments: "a disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual.'"[145] While only Chief Justice Rehnquist joined in this portion of the opinion,[146] it appears that a majority of the Court agreed with this position. Holding that the punishment at issue was

138. *Atkins*, 536 U.S. at 316.

139. Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958). The Court stated that the cases it had previously decided "indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.'" *Id. But see* Pervear v. Massachusetts, 72 U.S. 475, 480 (1866) (emphasizing that the challenged punishment was "the usual mode adopted in many, perhaps all of the States").

140. 408 U.S. 238 (1972).

141. *See id.* at 277 n.20 (Brennan, J., concurring); *id*. at 379 (Burger, J., dissenting).

142. *See In re* Kemmler, 136 U.S. 436, 443, 447 (1890) (determining that, although electrocution was "certainly unusual," it was not cruel); Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) (suggesting that "cruel" punishments are those that are torturous while "unusual" punishments are those not adopted "in the great majority of cases"); Pervear v. Commonwealth, 72 U.S. 475, 480 (1866) (independently assessing cruelty and unusualness).

143. 501 U.S. 957 (1991).

144. *Id.* at 967.

145. *Id.* The Court's specific adherence to the text in *Harmelin* should perhaps not be surprising, considering that Justice Scalia—a known textualist—authored the opinion. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS & THE LAW 3–47 (1997) (extolling the virtues of textualism).

146. *Harmelin*, 501 U.S. at 960.

not unconstitutional, a majority of the Court agreed that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."[147] Similarly, in *Stanford*,[148] the Court distinguished between cruelty and unusualness by emphasizing that a "punishment is either 'cruel *and* unusual' (*i.e.*, society has set its face against it) or it is not."[149]

Regardless of whether the Court understands cruelty and unusualness to be distinct concepts, the Court's application of its "evolving standards of decency" test appears to base its Punishments Clause inquiries primarily on the ground of unusualness. When the Court examines exactly how many states have banned a practice, it is examining the rarity of that practice. While this metric can get at the underlying concerns of the unusualness inquiry—such as ensuring that a punishment is time-tested[150] or ensuring that similarly situated offenders do not receive vastly disparate punishments[151]—this metric can serve as only a proxy, and an imperfect one at that, for how the public views the cruelty of the practice. As critics of the Court's reliance on state legislative action have pointed out, state legislation does not necessarily reflect moral values because states may opt to reject or accept legislation based "on a plethora of pragmatic considerations, including but not limited to contemporary rejection of [a practice] on grounds of 'decency.'"[152] For example, a state may choose not

147. *Id.* at 994–95.

148. 492 U.S. 361 (1989).

149. *Id.* at 378 (emphasis in original).

150. *See generally* Stinneford, *supra* note 13, at 1818–19 (suggesting that "unusual" punishments are those that "have not continued to withstand the test of time").

151. Drawing on the simultaneous use of "unusual" and "illegal" in the English Bill of Rights, the term "unusual" could serve a function of fairness. To prohibit unusual punishments is to prohibit punishments that other similarly situated defendants have not received or at least did not have the chance of receiving. Similar to the understanding of the use of "illegal" in the English Bill of Rights, it is to prevent the person or entity charged with doling out punishments from treating certain criminal defendants discriminately. In the same respect, the element of unusualness also serves a notice function by assuring defendants that they will receive a punishment similar to other similarly situated defendants.

152. Bryan Lester Dupler, *Another Look at Evolving Standards: Will Decency Prevail Against Executing the Mentally Retarded?*, 52 OKLA. L. REV. 593, 604 (1999) (emphasis omitted); *see also* Michael J. O'Connor, Note, *What Would Darwin Say?: The Mis-evolution of the Eighth Amendment*, 78 NOTRE DAME L. REV. 1389, 1417 (2003) (noting that "[a] law with a seemingly moral purpose may be the product of many motivations other than morality"). Moreover, as Professor Wellington has observed outside of the Eighth Amendment context, legislation "is far from conclusive" evidence of "conventional morality." Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 287 (1973). "There is the time elapsed since enactment . . ., the unreliability of drawing conclusions from subsequent legislative inaction, and, most importantly, the nature of the legislature which is responsive to shifting power configurations in a

to adopt a capital sentencing scheme not because the people of the state believe that the death penalty is cruel but because capital sentencing schemes are more expensive than non-capital sentencing schemes.[153] Further, tallying state legislative action does not sufficiently account for a societal consensus because states have differing populations.[154] Because "the legislation of a state with a population of thirty million . . . is given the same weight in the Court's calculation as a state with a population of one million,"[155] "a simple count of the number of states supporting or opposing a particular [punishment] will often not give an accurate picture of what 'national' consensus exists."[156] For these reasons, examining the actions of state legislatures appears to be more useful for determining how unusual a practice is than for determining whether there is a consensus that the practice is cruel. A cruelty inquiry, then, is markedly absent from the Court's framework of relying primarily on state legislative action to determine whether a practice comports with the Eighth Amendment Punishments Clause.

Perhaps when the Court examines the consistency and direction of change of state legislative action, or secondary sources such as public opinion polls, it is attempting to plumb the concept of cruelty. Endeavoring to assess cruelty in this manner is problematic, however. As with state legislative action in general, using the consistency and direction

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community, but not advantageously positioned to find shifting conventional morality in the community." *Id.*

153. *See* Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431, 1439 (1998) ("[A]ll serious studies on this point have found that the death penalty system costs considerably more than a non-death penalty system."). Further, legislation is not necessarily the result of "prevailing public opinion" on every issue because special interests can affect and "exert substantial anti-democratic influence on the legislatures"; the "legislation itself often contains 'calculated ambiguities or political compromises essential to secure a majority'"; and legislators often vote—particularly on issues of controversial punishments—based on their own moral values rather than on the values of their constituents. Dupler, *supra* note 152, at 603–04.

154. *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 269 n.64 (1992) (asserting that "both the *number* of states that authorize a practice and the *size* of those states are relevant in determining the unusualness of a punishment"); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N. C. L. REV 1089, 1113–14 (2006). *But cf.* Atkins v. Virginia, 536 U.S. 304, 346 (2002) (Scalia, J., dissenting) (criticizing the majority for relying on the margins by which legislatures have banned particular practices; stating that "if the percentage of legislators voting for the bill is significant, surely the number of people *represented* by the legislators voting for the bill is also significant"; and concluding that engaging in such a "nose count" is "absurd").

155. Jacobi, *supra* note 154, at 1114.

156. *Id.* "The calculation of an actual national consensus, in contrast to the simple counting of states, is further complicated by the fact that different states will have different levels of variation in their support for or opposition to the death penalty." *Id.*

of change as a proxy for cruelty suffers from assigning a moral value to a legislature's action that may be a product of a factor other than moral judgment,[157] and, even if state legislative action were an accurate predictor of cruelty, it does not give an accurate picture of a *national* consensus.[158] With respect to the secondary sources, each of jury actions, opinions of professional organizations, public opinion polls, and international opinions is also an unreliable method of assessing cruelty. First, juries are unrepresentative of society as a whole.[159] They are said to "under-represent minorities and low socio-economic-status citizens"[160] and over-represent support for the death penalty because capital juries are routinely death qualified.[161] Second, professional organizations, while they oftentimes possess expertise and insight into the scientific realities underlying criminal behavior and punishment,[162] also fail to represent society's opinion as a whole.[163] Third, public opinion polls might be

157. *See supra* text accompanying notes 152–53.

158. *See* Jacobi, *supra* note 154, at 1114; *supra* text accompanying notes 154–56.

159. David Niven et al., *A "Feeble Effort to Fabricate National Consensus": The Supreme Court's Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. KY. L. REV. 83, 104 (2006).

160. *Id.*

161. *Id.* A "death-qualified jury" is "[a] jury that is fit to decide a case involving the death penalty because the jurors have no absolute ideological bias against capital punishment." BLACK'S LAW DICTIONARY (8th ed. 2004). In addition to the difficulty of juries being unrepresentative, according to the Court, jurors are supposed to reserve certain punishments, such as the death penalty, for the most serious offenders. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'") (citation omitted). *But cf.* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1091 ("Contrary to the laws of their states, four out of ten capital jurors believed that they were required to impose the death penalty if they found that the crime was heinous, vile, or depraved."); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1543 (1998) (explaining that "jurors tend to enter their penalty-phase deliberations thinking the 'default' sentence is death"). Accordingly, it seems inconsistent for the Court to rely on a jury imposing a particular punishment only rarely for the proposition that society is morally opposed to that particular punishment.

162. *See, e.g.*, Lucy C. Ferguson, Comment, *The Implications of Developmental Cognitive Research on "Evolving Standards of Decency" and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441, 481 (2004) (noting the relevance of professional organizations' opinions and stating that "[t]he use of psychological and scientific research is unquestionably relevant to determining if the imposition of the death penalty on juveniles is 'excessive,' because current research indicates that juveniles may not have the capacity for making the reasoned decisions that adults can"); *see also* Stanford v. Kentucky, 492 U.S. 361, 388 (1989) (Brennan, J., dissenting) ("Where organizations with expertise in a relevant area have given careful consideration to the question of a punishment's appropriateness, there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards.").

163. William J. Bowers et al., *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. REV. 609, 691 (2004) ("The views of expert professionals . . . may be informed by pertinent

viewed as a promising way to assess a national consensus as to what constitutes the current standards of decency,[164] but public opinion polls are "highly variable and potentially open to manipulation."[165] Reliance on such polls may create the risk of "serious methodological errors,"[166] such as "selection biases, framing errors, and spurious correlations."[167] Fourth, some commentators have criticized the Court's consideration of international opinions. Although international and foreign laws "may provide helpful empirical information in deciding which interpretation [of the Amendment] will work best"[168] and furnish U.S. courts with useful guidance because certain principles embedded in our Constitution might have "'universal' aspects,"[169] some scholars argue that the Framers did not intend that foreign authorities would influence interpretation of constitutional provisions[170] and that the use of international and foreign law "undermines the democratic basis of American constitutional jurisprudence."[171] In addition to the difficulties posed by each of these sources, the Court's examination of them may not reflect any real attempt by the Court to base its conception of cruelty on societal values, because it

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scientific evidence, but they are typically unrepresentative of the community whose conscience is at issue."). Moreover, the official opinions of professional organizations may not accurately represent the communities they represent. *Cf.* David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1086–87 (1989) (explaining that when judges defer to professional guilds to determine what scientific evidence to admit, "internal dynamics of professional organizations" rule and evidence may be "barred from the courthouse not because we doubt the validity of [that] opinion, . . . but because [that opinion] is not represented *politically*" in the organization) (emphasis added).

164. *See, e.g.*, Niven et al., *supra* note 159, at 84, 109–12 (arguing that public opinion polls are the best measure of society's opinion on a matter).

165. Jacobi, *supra* note 154, at 1118; *see also* Atkins v. Virginia, 536 U.S. 304, 326–28 (2002) (Rehnquist, C.J., dissenting) (explaining the flaws and doubting the accuracy of public opinion polls).

166. Jacobi, *supra* note 154, at 1118.

167. Jacobi, *supra* note 154, at 1118. The results of public opinion polls often vary significantly depending on the way in which a question is framed and the level of abstraction involved in the poll. Bowers et al., *supra* note 163, at 624. Moreover, as one commentator has explained, while "[w]ell-done surveys have the potential to canvas a representative sample of the citizenry about their perceptions, attitudes, and values . . . . [t]he typical poll provides only a cursory glimpse of public opinion." *Id.* Further, these limitations on the depth and accuracy of polling may be exacerbated by resource constraints. *Id.* ("Due to time and budget constraints, most polls are relatively brief in duration, and are unable to probe underlying community values or sentiments.").

168. Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 116 (2005).

169. *Id.* at 118.

170. *See* Eugene Kontorovich, *Disrespecting the "Opinions of Mankind": International Law in Constitutional Interpretation* 261, 265 (Chicago Public Law and Working Paper No. 96, 2005).

171. Comment, *The Debate Over Foreign Law in* Roper v. Simmons, 119 HARV. L. REV. 103, 104 n.10 (2005) (summarizing Kenneth Anderson's argument in *Foreign Law and the U.S. Constitution*, POL'Y REV., June–July 2005, at 33, 47–49).

is unclear that the Court actually gives any weight to these sources.[172] The Court appears to give only lip service to these sources in referencing them, thus the cruelty component of the Punishments Clause seems to be secondary to, if not completely absent from, the Court's consideration of what the Punishments Clause prohibits.

The Court's reflection on its own independent judgment[173] may be where, in actuality, the Court independently assesses whether a practice is cruel. However, relying on the leanings of particular Justices, who are certainly not representative of society as a whole,[174] to determine what society deems is "cruel" may be somewhat objectionable.[175] Justice Scalia has criticized the Court's reliance on its independent judgment, stating that, "[o]n the evolving-standards hypothesis, the only legitimate function of [the] Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"[176] In other constitutional contexts, though, the Court has relied on its independent judgment to interpret the scope of individual rights such as the rights to freedom of speech and equal protection.[177] Perhaps the Court's lack of a clear analytical framework for determining, in its own independent judgment, whether a practice is cruel makes the Court's resort to its own judgment more objectionable in the

172. *See supra* text accompanying note 121.

173. *See supra* text accompanying notes 122–32.

174. For example, while nearly 51% of Americans are female, only 2 of the 9 current U.S. Supreme Court Justices, or 22%, are female, and while 56% of the Justices are of age 65 or older, only 12.6% of Americans are 65 or older. *Compare Annual Estimates of the Population by Sex and Selected Age Groups for the United States: April 1, 2000 to July 1, 2007 (NC-EST2007-02)* and *Annual Estimates of the Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2007 (NC-EST2007-03)*, *available at* http://www.census.gov/popest/national/asrh/ (last visited Sept. 21, 2009), *with The Justices of the Supreme Court*, *available at* http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Nov. 8, 2009).

175. *See, e.g.*, Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47, 62–63 (2008) (citing John Hart Ely's DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) for the proposition that "institutions composed of freely elected representatives" "better reflect community conventions" than courts); Coker v. Georgia, 433 U.S. 584, 604 (1977) (Burger, C.J., dissenting) ("[T]he Cruel and Unusual Punishments Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States.").

176. Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

177. *See* Stacy, *supra* note 19, at 494–95 (suggesting that the Court relies even more heavily on its own judgment, instead of majoritarian practices, in the context of equal protection and free speech); *see also, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (explaining that determining whether a law is unconstitutional because it treats an individual unequally due to his race is a "determination of the court" and concluding that the University of Michigan Law School's admissions program is sufficiently narrowly tailored to pass constitutional muster); Wisconsin v. Mitchell, 508 U.S. 476, 483–84 (1993) (explaining that the Court has the authority to form its "own judgment" about whether the operative effect of a statute punishes bigoted thought or conduct).

Punishments Clause context.[178] In consulting its judgment, the Court oftentimes thoroughly examines the culpability of the offender or class of offenders[179] but in other cases bases its independent judgment primarily on the competency of the defendant or class of defendants.[180] In *Kennedy v. Louisiana*, the Court went so far as to consider the unreliability of children's testimony in determining whether executing child rapists was a punishment that, in the Court's own independent judgment, should be unconstitutional.[181] Even if the Court is addressing the cruelty component of the Punishments Clause through its assessment of its own judgment, because it is unclear that this independent judgment is actually given much, if any, weight,[182] it seems that the Court has analytically given the component of unusualness significantly greater consideration than cruelty.[183]

The Court's failure to distinguish between cruelty and unusualness and its primary focus on unusualness by its reliance on state legislative action has led to a fair amount of criticism of the Court's "evolving standards of decency" test. In addition to commentators' concerns that assessing state legislative action is not reflective of citizens' or states' moral values[184] and that such a calculation fails to sufficiently take into account the differing populations of states in arriving at a societal "consensus,"[185] scholars have voiced a concern that the Court's reliance on state legislative action undermines the foundations of our federalist system of government. Our

178. While thoroughly examining and analyzing the various factors the Court has drawn on in formulating its independent judgment is beyond the scope of this Article, I intend to take up this project in a future article.

179. *See, e.g.*, *Roper*, 543 U.S. at 568, 571 (stating that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" and concluding that juveniles have "diminished culpability") (citation omitted).

180. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 407, 409–10 (1986) (explaining that Blackstone stated that "if, after judgment, [a man] becomes of nonsane memory, execution shall be stayed," and holding that an insane person on death row cannot be executed even if he was not insane when he committed his crime).

181. Kennedy v. Louisiana, 128 S. Ct. 2641, 2663 (2008). In *Kennedy*, the Court stated that

> [t]here are . . . serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases.

Id. (citation omitted).

182. *See supra* text accompanying notes 133–34.

183. *But see infra* note 257 and accompanying text (explaining that the Court has been accused of manipulating the objective indicia of contemporary values to arrive at the result it deems most desirable).

184. *See supra* text accompanying notes 152–53.

185. *See supra* text accompanying notes 154–56.

"federalist system was designed to allow the states to pursue diverse policies, regardless of their popularity with other states."[186] As one scholar has stated, "[l]imiting states through the action of other states" by relying on how many states have adopted or prohibited a particular practice "seriously strains and distorts our federal system, removing much of the flexibility from which it has drawn strength for two centuries."[187]

Despite scholars' criticism of the Court's "evolving standards of decency" framework, most contemporary scholarship has not pinpointed the Court's amalgamation of the terms "cruel" and "unusual" as the problem and has consequently also failed to clearly distinguish between the cruelty and unusualness components of the Punishments Clause. Like the post-*Trop* Court, scholars seem to treat the phrase "cruel and unusual punishments" as a term of art with a meaning not limited by either the term "cruel" or the term "unusual."[188] Viewing the phrase as a term of art, scholars have devoted very little time to independently examining the cruelty and unusualness components of the Clause.[189] While the Court's "evolving standards of decency" approach of assessing state legislative action focuses on unusualness, most scholars, like much of the Court's rhetoric, focus instead on the cruelty component of the clause and neglect the term "unusual."[190] Scholars have ignored the meaning of "unusual" in the English Bill of Rights, chalking up the use of the term to sloppy drafting and equating it with the term "illegal."[191] And most scholars similarly have neglected the role of unusualness in their interpretations and applications of the Eighth Amendment, suggesting that cruelty, alone, is the only relevant factor.[192] For example, a number of scholars have

186. Jacobi, *supra* note 154, at 1105.

187. *Id.* at 1107 (quoting Coker v. Georgia, 433 U.S. 584, 613 (1977)).

188. *See, e.g.*, Elizabeth M. Bruch, *Whose Law Is It Anyway? The Cultural Legitimacy of International Human Rights in the United States*, 73 TENN. L. REV. 669, 691 (2006) (stating that the Punishments Clause requires that punishments be "graduated and proportioned to [the] offense"); *see also generally* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005) (discussing the centrality of proportionality and the various purposes of punishment in Eighth Amendment analysis).

189. *But see* Shapiro, *supra* note 14, at 468 (assuming that the Punishments Clause is a "two-part equation" and explaining that the unusualness component of the Clause is often unexamined); Stacy, *supra* note 19, at 475, 502 (arguing that the text of the Punishments Clause "unambiguously requires that prohibited punishments be both cruel and unusual," yet also arguing that the Clause must be "organized around the notion of cruelty").

190. *See* Stinneford, *supra* note 13, at 1744 ("Scholars have also generally ignored the word ["unusual"] in their treatment of the Cruel and Unusual Punishments Clause.").

191. *See supra* text accompanying notes 56–68; *see also* Granucci, *supra* note 34, at 855.

192. *See, e.g.*, Anne S. Emanuel, *Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. REV. 37, 59–60 (1989) (asserting that the Punishments Clause prohibits punishments disproportionate to the offender's crime and culpability and suggesting that

argued that the death penalty violates the Punishments Clause even though a large number of states employ the punishment.[193] Thus neglecting the unusualness component of the Clause, scholars have consequently devoted very little time to examining the relationship between the cruelty and unusualness components of the Clause to determine whether both elements must be present before a punishment is prohibited.

IV. BOTH "CRUEL" AND "UNUSUAL" HAVE INDEPENDENT MEANINGS

Instead of distinguishing between cruelty and unusualness, courts and scholars seem to have assumed that the phrase "cruel and unusual," as used in the Eighth Amendment, is a term of art and that the Court has progressively defined the meaning of this phrase over time.[194] It was not until the early to mid-1900s, however, that the Court began using the phrase as a term of art.[195] When the phrase was first used in the English Bill of Rights, it seems that it was not part of the ordinary or legal vocabulary, and there appears to be no evidence that it was understood to have any special meaning.[196]

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inherently cruel punishments are prohibited under the Punishments Clause); Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493, 497–99 (1992) (focusing on the cruelty component to determine whether a punishment violates the Punishments Clause). *But see generally* Stinneford, *supra* note 13, at 1766–1815 (opining on the meaning of "unusual").

193. *See, e.g.*, Eric Engle, *Death is Unconstitutional: How Capital Punishment Became Illegal in America—A Future History*, 6 PIERCE L. REV. 485, (2008) (concluding that the "death penalty has become unconstitutional . . . . because it is irrational[, and i]t is irrational because it is inherently unfair"); Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1781–82 (1970) (arguing that the death penalty is unconstitutional even though a majority of the states authorize it).

194. *See generally supra* Part III (explaining how both the Court and scholars have failed to disentangle the cruelty and unusualness components of the Punishment Clause).

195. *Compare* Pervear v. Massachusetts, 72 U.S. 475, 480 (1866) (examining cruelty and unusualness independently), *with* Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (suggesting that the Court's earlier cases do not clearly distinguish between "cruel" and "unusual" but instead "examine[] the particular punishment involved in light of the basic prohibition against inhuman treatment") *and* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (suggesting that the Eighth Amendment pertains to "[t]he traditional humanity of modern Anglo-American law" and "forbids the infliction of unnecessary pain in the execution of the death sentence"). *See also supra* Part II.B.

196. *See, e.g.*, THOMAS BLOUNT, A LAW-DICTIONARY (1670) (lacking any entry for "cruel and unusual")*; cf.* LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 92 (1981) (stating that the phrase "illegal punishments" also was not used prior to the drafting of the English Bill of Rights)*; see also supra* text accompanying notes 39–43 (explaining that the meaning of the prohibition of "cruel and unusual punishments" in the English Bill of Rights is unclear). The English documents of the period prior to and around the year of 1688 seem to make reference to the phrase "cruel and unusual punishments" only in the context of documents related to the English Bill of Rights. *See, e.g.*, EDMUND BOHUN, THE HISTORY OF THE DESERTION 96 (1689) (setting forth *The Declaration of the Lords Spiritual and Temporal in and About the Cities of London and Westminster, Assembled at*

Furthermore, between the time when the English Bill of Rights was drafted and when "cruel and unusual" was written into American law, it appears that the phrase had not developed any unique meaning.[197] Even if it had, it would be unlikely that this meaning would have been incorporated into American law along with the phrase because Blackstone's *Commentaries*, the primary legal treatise available to the Americans at that time, does not even reference the phrase "cruel and unusual."[198] Instead, it appears that the Framers of the Constitution, as well as others of that time period, interpreted the phrase to have a common meaning. The phrase similarly had not developed meaning as a legal term of art by the time it was incorporated from the Virginia Declaration of Rights into the Eighth Amendment.[199] Thus, it seems that when the phrase was imported into the Eighth Amendment, it was not understood to have any term-of-art meaning.

Not used as a term of art, the phrase "cruel and unusual" was understood to be composed of two elements having independent meanings at the time that the English Bill of Rights was drafted. At the time the English Bill of Rights was adopted, the term "cruel" was most commonly

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Guild-Hall the 11th of December, 1688); GILBERT BURNET, A COLLECTION OF PAPERS RELATING TO THE PRESENT JUNCTURE OF AFFAIRS IN ENGLAND (1688) (same). *But see* THOMAS WILLIS, DR. WILLIS'S PRACTICE OF PHYSICK (1684) (stating that when an individual "is by chance taken with most cruel and unusual Convulsions," it should be treated by remedies instead of by seeking out a source of witchcraft). Further, a search of the collection of *Making of Modern Law: Trials* suggests that the phrase "cruel and unusual" was not in regular use in Britain prior to its appearance in the English Bill of Rights.

197. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (7th ed. 1775) (referencing "cruel and unusual" only in the context of the English Bill of Rights, "which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the Second"); THE CASE OF WILLIAM BINGLEY, BOOKSELLER, WHO WAS TWO YEARS IMPRISONED BY THE COURT OF KING'S-BENCH, WITHOUT TRIAL CONVICTION, OR SENTENCE 110 (1773) (referencing "cruel and unusual" only in the context of the English Bill of Rights); 1 TIMOTHY CUNNINGHAM, A NEW & COMPLETE LAW-DICTIONARY (2d ed. 1771) (lacking an entry for "cruel and unusual").

198. *See generally* BLACKSTONE, *supra* note 197; *see also* Granucci, *supra* note 34, at 861–62 (arguing that any other treatises available to the Americans at that time also lacked any mention of a prohibition on "cruel and unusual punishments").

199. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 199 (11th ed. 1791) (referencing "cruel and unusual" only in the context of homicide committed "upon a sudden provocation" and not in the context of prohibited punishments); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 199, 378 (11th ed. 1788) (referencing "cruel and unusual" only in the provoked homicide context and in the context of the English Bill of Rights, where the author notes that prohibited punishments are "arbitrary" and related to the "unprecedented proceedings in the court of king's bench, in the reign of king James the Second"); 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 54 (1792) (referencing the phrase "cruel and unusual" only in the context of the English Bill of Rights, I Wm. Sess. 2, c. 2); 1 TIMOTHY CUNNINGHAM, A NEW & COMPLETE LAW-DICTIONARY (3d ed. 1783) (lacking an entry for "cruel and unusual"). A Westlaw search of the va-cs-all database reveals that there was no mention of "cruel and unusual" punishments in the Virginia courts between 1776 and 1791.

understood to mean "[d]isposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress; destitute of kindness or compassion; merciless, pitiless, hard-hearted."[200] In contrast, seventeenth-century English dictionaries define the term "unusual" as "[n]ot usual; uncommon; exceptional."[201] Although scholars seem to have read "unusual" out of the English Bill of Rights without much justification, equating "unusual" with "illegal,"[202] the term "illegal" was actually understood at the time to have yet another distinct definition: "[n]ot legal or lawful" or "contrary to, or forbidden by, law."[203] One could interpret "illegal" as constituting a subclass of "unusual" because illegal punishments would most likely be unusual as well, but equating the two terms simply cannot be justified when examining the usage of the terms during the seventeenth century.[204] More important, however, is that "unusual" was understood as having a meaning distinct from "cruel" at this time.

Similarly, the terms "cruel" and "unusual" were understood to have distinct meanings at the time of the Founders. When the Punishments Clause was drafted and ratified, the term "cruel" was understood to mean "[p]leased with hurting others; inhuman; hard-hearted; barbarous" or "[b]loody; mischievous; destructive."[205] "Unusual" also had a distinct meaning at the time of the Founders; dictionaries from this time period

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200. 4 OXFORD ENGLISH DICTIONARY 78 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (setting forth the etymology of the term); *see also* ABEL BOYER, THE ROYAL DICTIONARY ABRIDGED (1700) (defining the term as "inhumane, fierce, hard, barbarous . . . grievous . . . [or] painful." A less common, colloquial understanding of the term was that it meant "severe" or "hard." 4 OXFORD ENGLISH DICTIONARY 78; *see also* Granucci, *supra* note 34, at 860 ("In the seventeenth century, the word 'cruel' had a less onerous meaning than it has today. In normal usage it simply meant severe or hard.").

201. 19 OXFORD ENGLISH DICTIONARY 249 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (setting forth the etymology of the term); *see also* BOYER, *supra* note 200 (defining "unusual" as "[r]are" or "extraordinaire"). One scholar, though, who has argued that "unusual" and "illegal" were not used interchangeably in seventeenth-century England, asserts that "unusual" instead meant "contrary to long usage" or "contrary to longstanding common law precedent" at that time. Stinneford, *supra* note 13, at 1764. According to this argument, seventeenth-century English legal thinkers understood that determining whether a practice enjoyed long usage was the best way to determine whether the practice comported with the principles of justice. *Id.* When a practice did not enjoy such long usage, it was considered unusual and was condemned. *Id.*

202. *See supra* text accompanying notes 55–58; *see also* Granucci, *supra* note 34, at 855.

203. OXFORD ENGLISH DICTIONARY (J.A. Simpson & E.S.C. Weiner eds., Clarendon Press 2d ed. 1989); *see also* BOYER, *supra* note 200 (defining "illegal" as "illegitimate").

204. For example, William Shakespeare's *Measure for Measure* refers to "an unusual hour," WILLIAM SHAKESPEARE, MEASURE FOR MEASURE (4.5) and John Milton's *Paradise Lost* refers to a feeling of "unusual weight, till on dry land," JOHN MILTON, PARADISE LOST (1667) (line 227). In neither case could "unusual" be reasonably interpreted as meaning "illegal" instead of "rare." The meaning of "unusual" may actually be more robust than that effected by the Court's simple calculus of state legislative action, but refining a proper unusualness inquiry will have to wait until another day.

205. SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773).

define "unusual" as "[n]ot common; not frequent; rare."[206] The understood distinction between "cruel" and "unusual" is evidenced by the fact that both the Supreme Court and other American courts interpreting the Clause prior to the late 1950s treated the terms "cruel" and "unusual" independently. For example, in the 1828 case of *Commonwealth v. Dickerson Wyatt*,[207] the Supreme Court of Virginia distinguished between cruelty and unusualness when it upheld the punishment of stripes because, although "[t]he punishment . . . is certainly odious, [it] [could not] be said to be unusual."[208] More important, the Supreme Court cases of *Pervear*,[209] *Wilkerson*,[210] *In re Kemmler*,[211] and their contemporaries that similarly discussed the Eighth Amendment, treated cruelty and unusualness as separate requirements, referring to cruelty as encompassing torturous punishments such as burning alive and beheading,[212] or involving a lingering death,[213] and describing unusualness as relating to whether a particular mode of punishment had been adopted by a supermajority of the states.[214]

Although "cruel" and "unusual" have historically been treated as distinct terms, they are certainly related. If a large majority of people believe that a particular punishment is cruel, then that punishment likely is or will become unusual in its availability, or at least in practice, as well.[215]

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206. *Id.*
207. 27 Va. 694 (1828).
208. *Id.* at 701.
209. 72 U.S. 475 (1866).
210. 99 U.S. 130 (1878).
211. 136 U.S. 436 (1890).
212. *See, e.g.*, *Wilkerson*, 99 U.S. at 135–36 (stating that punishments involving torture, such as "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. . . . public dissection in murder, and burning alive in treason committed by a female," constitute cruel punishments prohibited by the Punishments Clause).
213. *See, e.g.*, *Kemmler*, 136 U.S. at 447 (stating that the punishment of execution is not cruel because it does not "involve torture or a lingering death").
214. *See, e.g.*, *Wilkerson*, 99 U.S. at 135 (explaining that the punishment was not unusual because it had been adopted "in the great majority of cases"); *Pervear*, 72 U.S. at 480 (explaining that the mode of punishment at issue was "the usual mode adopted in many, perhaps all of the States").
215. *See* 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) ("As a real-world matter, it is difficult to identify a punishment that would be regarded as intrinsically barbaric—and in that sense 'cruel'—that would not also be 'unusual' (i.e., unusual as an officially and publically authorized punishment)."). It is possible that punishments overwhelmingly deemed cruel might remain on the books, however. For example, although the Florida Supreme Court in *Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) used the reasoning in *Coker v. Georgia*, 433 U.S. 584 (1977), to strike down the use of the death penalty for the crime of sexual assault, state "legislators left it on the books anyway—a move skeptics say was designed to give prosecutors more leverage in plea bargaining." John Gibeaut, *A Deal With Death: More States Make Child Molestation a Capital Crime—and Face*

In this way, unusualness, at least to some extent, may serve as evidence of cruelty. But just because a punishment is unusual does not necessarily mean that the practice is deemed cruel. For example, in *In re Kemmler*,[216] the execution method of electrocution was viewed to be more humane than the previously used method of hanging even though the practice of electrocution at that time was "certainly unusual."[217] Thus, using one primary indicium of "cruel and unusual" fails to accurately determine whether a practice is actually both cruel and unusual, if the Punishments Clause actually requires that both components be present before a punishment is constitutionally proscribed.[218]

V. BOTH CRUELTY AND UNUSUALNESS ARE REQUIRED UNDER THE TEXT OF THE PUNISHMENTS CLAUSE

Having determined that "cruel" and "unusual" are distinct terms, the question remains whether each component of the Punishments Clause must be present before a punishment is prohibited by the Clause. While some scholars and courts have examined the meanings of each of these terms,[219] there is little, if any, scholarly literature examining the relationship between the two components or inquiring whether both are necessary elements of the prohibition.[220] Many scholars have assumed without analysis that the Clause prohibits only punishments that are both cruel and unusual.[221] Yet scholars also oftentimes make statements that

Likely Challenges, A.B.A. J., Jan. 2007, at 13. This raises the question of whether, when the Court calculates unusualness, it should examine the availability or actual use of particular practices.

216. 136 U.S. 446 (1890).

217. *Id.* at 443–44 (explaining that the New York legislature had determined that "the use of electricity as an agency for producing death constituted a more humane method of executing . . . . though it [was] certainly unusual").

218. For a discussion of whether the Punishments Clause proscribes only punishments that are both cruel and unusual, see *infra* Part V.

219. *See, e.g.*, Stinneford, *supra* note 13.

220. *But see* Shapiro, *supra* note 189, at 468 (assuming that the Punishments Clause is a "two-part equation" and explaining that the unusualness component of the Clause is often unexamined); Stacy, *supra* note 19, at 475, 502 (arguing that the text of the Punishments Clause "unambiguously requires that prohibited punishments be both cruel and unusual," yet arguing that the Clause must be "organized around the notion of cruelty").

221. *See, e.g.*, Justin F. Marceau , *Un-Incorporating the Bill of Rights: the Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1293 n.322 (2008) (noting that the "Eighth Amendment only forbids punishments that are both cruel and unusual"); 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, 895 (2007) ("According to the Eighth Amendment, then, a punishment is not unconstitutional unless it is both "cruel and unusual": significantly harsher than necessary and evidenced as such by the fact that the punishment is not commonly used.") (emphasis omitted).

torturous, or "cruel," punishments are clearly prohibited by the Punishments Clause without any mention of whether the torturous punishments must also be unusual.[222] The language of the Punishments Clause, at first glance, may appear to be ambiguous. "[N]or cruel and unusual punishments inflicted"[223] could be interpreted to mean that only punishments that are both cruel and unusual are prohibited or that both cruel punishments as well as unusual punishments are proscribed. Upon a more careful examination of the text of the Clause, though, it seems that both elements are required before the Eighth Amendment can prevent a punishment from being inflicted.

A. The Use of "And" Instead of "Or" Is Significant

While the text of the Punishments Clause could plausibly be read in isolation to mean either (1) that only punishments that are both cruel *and* unusual are prohibited, or (2) that both punishments that are cruel and punishments that are unusual are prohibited, the latter interpretation has the same meaning as using the conjunction "or" instead of "and" in the Clause. In other words, if the Framers had used the term "or"—"nor cruel *or* unusual punishments inflicted"—the phrase would mean that both cruel punishments and unusual punishments are prohibited by the Clause. For this reason, it seems that, for the "and" to have meaning, the Clause must be interpreted as prohibiting only punishments that are both cruel and unusual.[224] This interpretation, then, is the only way to comply with the

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222. *See, e.g.*, Owen Fiss, *The Example of America*, 119 YALE L.J. POCKET PART 1, 2 (2009) ("The Eighth Amendment prohibits cruel and unusual punishments, and torture would surely meet the standard of cruel and unusual."); *see also* William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-Is-Different" Jurisprudence*, 28 PACE L. REV. 15, 20 (2007) (suggesting that torture is one punishment "that the Eighth Amendment clearly prohibits"); Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 719 (2006) ("Torture would violate the constitutional prohibition against cruel and unusual punishment . . . ."). *But see* Claus, *supra* note 57, at 131 ("Torture sessions are inherently non-standard because they are designed to elicit individualized results—a confession, a recantation, or some other information, which may be swiftly forthcoming from some persons and not from others.").

223. U.S. CONST. amend. VIII.

224. One might question the meaning of "and" in the Punishments Clause context under De Morgan's Rules, which provide that the negation of a conjunction of a class of propositions is equal to the disjunction of the negations of the propositions and that the negation of a disjunction of a class of propositions is equivalent to the conjunction of the negations of the propositions. RICHARD L. PURTILL, LOGIC FOR PHILOSOPHERS 25 (1971). In other words, when a negative connotation precedes descriptive terms joined by "and" or "or," this is equivalent to carrying through the negative to each descriptive term and replacing "and" with "or," or vice versa. *See* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 51 (1993). Carefully working through these rules, however, buttresses the conclusion that a punishment must be both cruel and unusual before it is prohibited under the Clause.

maxim that every word should be given meaning.[225]

"Nor," a conjunction used in negative phrases and used to continue the force of a negative, triggers the application of De Morgan's Rules. Applying De Morgan's Rules, the phrase may be represented as ~(cruel · unusual) ≡ (~cruel v ~unusual), where "~" means "not," "·" means "and," and "v" means "or." This suggests that punishments may be inflicted if they are not cruel or if they are not unusual. If a punishment is cruel but not unusual, the government may argue that the punishment does not violate the prohibition on unusual punishments and thus is constitutional. Even though the punishment is cruel, the "or" of the unpacked prohibition functions to render a punishment constitutional if it fails to violate *either* the prohibition on cruel punishment or the prohibition on unusual punishment. Similarly, if a punishment is unusual but not cruel, the government may argue that the punishment does not violate the prohibition on cruel punishments and thus is constitutional. Although application of De Morgan's Rules appears to support the conclusion that a punishment must be both cruel and unusual before it is unconstitutional, this analysis should be given little weight because application of De Morgan's Rules is highly technical in this instance, and it is unlikely that the Drafters and Ratifiers, or any ordinary person of the late eighteenth century, would have engaged in such a highly technical analysis.

225. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 865 (4th ed. 2007) (stating that "[u]nder the whole act rule, the presumption is that every word and phrase adds something to the statutory command"). Whether methods of statutory construction should be applied to the process of constitutional interpretation, however, is debatable. There are certainly differences between statutory and constitutional interpretation. *See* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 3, 21 (2004). Some argue that because the Constitution is written in broad terms, interpretation of the document warrants greater flexibility. *See* McCulloch v. Maryland, 17 U.S. 316, 407 (1819); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 90–92 (1991). Others argue that because "erroneous interpretations of statutes may be corrected by the democratic process," statutes should be viewed more broadly. *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 14 n.47 (1998). Conservatives and liberals alike, though, seem to agree that the general principles of statutory construction should be applied in the exercise of constitutional interpretation. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 915–17 (1985) (explaining that both Alexander Hamilton and Thomas Jefferson adopted the view that a constitutional provision should be construed in the same manner as a statutory provision); Stack, *supra*, at 3 ("In contemporary scholarship, there is a peculiar agreement between defenders of originalism and dynamism that constitutional and statutory interpretation should converge."). *But see* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744–45 (1982) (noting that "[t]he disciplining rules may vary from text to text" and that there are different rules in the contexts of statutory and constitutional interpretation); Powell, *supra*, at 915–17 (arguing that the rationale for statutory originalism does not justify constitutional originalism and vice versa and that the rationale for statutory dynamism does not justify constitutional dynamism and vice versa). In Justice Scalia's view, for example, the only difference between statutory and constitutional interpretation is that the interpreter of the Constitution should not expect the same "nit-picking detail" as he would from a statute and that the interpreter of the Constitution should "give words and phrases an expansive rather than a narrow interpretation." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 38 (Amy Gutmann ed., 1997) (explaining that "[t]he problem [of constitutional interpretation] is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text"). Although William Eskridge takes a more liberal stance on the methods to be used in interpreting statutory and constitutional provisions, he seems to agree with Justice Scalia that similar principles should be applied in both contexts. *See* Stack, *supra*, at 4 (explaining that William Eskridge, as well as Philip Frickey, "defend interpreting both the Constitution and federal statutes in accordance with the demands of practical reason, and have developed an approach to statutory interpretation in which statutory interpretation is viewed as 'fundamentally similar to judicial lawmaking in the areas of constitutional law and common law'").

In certain contexts, however, ordinary persons have difficulty discerning the difference between "and" and "or,"[226] so one might wonder whether the Framers' use of "and" instead of "or" should be given any real significance. Indeed, this difficulty of distinguishing between "and" and "or" has been formally recognized by certain states that have adopted the "and/or rule"—"a special hand-waving canon of construction" to eliminate the difference between "and" and "or" in the process of statutory interpretation.[227] For example, New York law provides that "[g]enerally, the words 'or' and 'and' in a statute may be construed as interchangeable when necessary to effectuate legislative intent."[228] The legislature's comment accompanying the statute explains that "[a] common mistake made by the drafters of statutes is the use of the word 'and' when 'or' is intended or vice versa [, and] [t]he popular use of 'or' and 'and' is notoriously loose and inaccurate . . . ."[229] The comment to the statute emphasizes, however, that a court is justified in using "and" and "or" interchangeably only if necessary to make the statute conform with the legislature's intent.[230] Accordingly, courts applying this canon of construction have done so only rarely.[231]

Unlike carelessly drafted statutes, the Bill of Rights, including the Eighth Amendment, were carefully crafted.[232] In formulating the first draft of the proposed amendments, James Madison painstakingly examined the bills of rights of the various states and sought to improve upon them.[233] The final wording of Madison's proposal has been described as the "fruit of much labor and research."[234] Not only did Madison carefully choose his words, but the House of Representatives thoroughly debated the language of the proposed amendments for over a week.[235] The Senate refused to

226. LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 45 (1993).

227. *Id.* Professor Lawrence Solan refers to this canon of construction as the "and/or rule." *Id.*

228. N.Y. STAT. LAW § 365 (McKinney 1971). This example is drawn from SOLAN, *infra* note 224, at 45–46.

229. N.Y. STAT. LAW § 365 (McKinney 1971).

230. *Id*. ("This change in conjunctions is made only to carry out the legislative intent; the courts will never indulge in such liberty with the words of a statute where the effect of the change will be to thwart the legislative purpose.").

231. *See* SOLAN, *supra* note 226, at 45–46.

232. *See infra* text accompanying notes 233–40. *But see* Granucci, *supra* note 34, at 840–41 n.8 ("The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective.").

233. *See* RUTLAND, *supra* note 35, at 193–94.

234. *Id.* at 204.

235. *Id.* at 207.

hastily adopt the House's language[236] and instead heavily edited the House version of the Bill of Rights, correcting for verbosity and meddling with Madison's organization.[237] A joint committee of the House and Senate further edited the proposed amendments, and additional discussion of the amendments took place over a period of many months.[238] Finally, in late September of 1789, Congress submitted to the states for ratification twelve proposed amendments.[239] The states examined the proposed language and ultimately adopted ten of the twelve proposed amendments, including the Eighth Amendment.[240]

Moreover, it is highly likely that the drafters and ratifiers of the Eighth Amendment were aware of the significance of using the term "and" instead of the term "or." At the time the Eighth Amendment was drafted and ratified, a number of states had enacted similar prohibitions on cruel and/or unusual punishments, but various states had used different permutations of the language of the prohibition. For example, while the Virginia Declaration of Rights provided "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[241] the drafters of the Maryland Constitution opted to use the term "or" instead of "and;" therefore, the corresponding Maryland edict provided "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the Courts of Law."[242] Similar to the Maryland Constitution, the Massachusetts Constitution provided that "[n]o magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments";[243] the North Carolina Constitution provided "[t]hat excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted";[244] and the New Hampshire Constitution provided that "[n]o magistrate, or court of law,

236. *Id.* at 211.
237. *Id.* at 212.
238. *Id.* at 214–15.
239. *Id.*
240. *Id.* at 217.
241. VA. CONST. § 9 (1776).
242. MD. CONST. art. XXII (1776). In addition to prohibiting "cruel or unusual punishments" instead of "cruel and unusual punishments," the Maryland prohibition is explicitly limited to only punishments imposed by its "courts of law." *Id.* This is in contrast to the broader language in the Eighth Amendment. *Compare id.* ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law.") *with* U.S. CONST. art. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
243. MASS. CONST. art. XXVI (1780).
244. N.C. CONST. art. 1 § 5 (1776).

shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."[245] The Pennsylvania Constitution omitted the unusualness component of the Clause altogether, providing "[t]hat excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."[246] The existence of these various permutations of constitutional prohibitions on cruel and/or unusual punishments suggests that the Framers and Ratifiers were likely aware of the significance of using the term "and" instead of "or" and that the Punishments Clause should thus be viewed as prohibiting only punishments that are both cruel and unusual.[247]

Even if the Eighth Amendment were carelessly drafted and the Drafters and Ratifiers were unaware of the significance of using "and" instead of "or," the statutory edict that interpreters should not distinguish between "and" and "or" would not apply. The rule is rarely applied because interpreters have held that it is applicable only if necessary to make an ambiguous provision comply with the drafters' clear intent.[248] It is far from clear that the drafters or ratifiers of the Eighth Amendment intended to prohibit both cruel punishments and unusual punishments in drafting the Punishments Clause. In fact, while there is little documentary evidence of the Framers' intentions with respect to the Clause, the little evidence there is points in the direction that the Framers did not want to limit the

245. N.H. CONST. (1784). California's Constitution of 1849 similarly proscribes "cruel or unusual punishments." California courts have stated that "[t]he difference in wording between the federal and state prohibitions is a distinction that is purposeful and substantive." People v. Sample, No. C047621, 2005 WL 2816497, at *12 (Cal. Ct. App. Oct. 27, 2005); *see also* People v. Anderson, 493 P.2d 880, 883–87 (Cal. 1972) (stating that "the delegates to the Constitutional Convention of 1849 . . . were aware of the significance of the disjunctive form and that its use was purposeful").

246. PA. CONST. art. IX § XIII (1790).

247. Professor Tom Stacy, however, has argued that state permutations of the Punishments Clause were understood as having meanings no different than the Punishments Clause itself. *See* Stacy, *supra* note 19, at 503. He reasons that if the Founders "had thought otherwise, then one would expect some recorded contemporaneous recognition of the difference's significance in a diary, letter, newspaper, or legislative record" and that, "[e]vidently there is [no such evidence]". *Id.* While there are very few state court opinions commenting on these state permutations, some early state courts have suggested that their own state's constitutional provision prohibits only punishments that are both cruel and unusual. *See, e.g.*, Commonwealth v. Wyatt, 27 Va. 694, 701 (Va. 1828) ("The punishment of offences by stripes is certainly odious, but cannot be said to be unusual.").

248. It is interesting that state legislation still refers to legislative intent in determining whether to apply the and/or rule because intentionalism appears to be an antiquated method of statutory and constitutional interpretation. *See* Kesavan & Paulsen, *supra* note 22, at 1134–50 (outlining the evolution of originalist interpretation and suggesting that the intentionalist approach has for the most part been abandoned by the academy). While the Framers' intentions and understandings may shed light on the objective understandings of people during that time, most scholars would agree that, ordinarily, the intent of the Framers, if that intent can even be accurately determined, is not dispositive. *See id.* (explaining that sources such as the public debates of the state ratifying conventions and the "secret drafting history of the Constitution" may be helpful in interpreting constitutional provisions).

development of new, thus unusual, punishments that were more humane, indicating that the Framers did not intend the Clause to prohibit both cruel punishments and unusual punishments.[249] Even Samuel Livermore, who was opposed to adopting the Eighth Amendment, conceded that"[i]f a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it."[250]

B. The Punishments Clause Is Symmetrical

Recognizing the significance of the term "and" also means acknowledging that the Punishments Clause was drafted symmetrically. No faithful reading of the Clause could effect a result in which cruel, but not unusual, punishments are prohibited yet unusual, but not cruel, punishments are not. Additionally, "cruel and unusual" cannot be interpreted as simply "cruel," because, by completely ignoring "and unusual," such an interpretation would violate a central principle of construction that every term must be given meaning.[251] Further, not only does "and" require that both the terms "cruel" and "unusual" be given effect, but it also indicates that both terms should be given equal weight.[252] Contrary to some scholars' interpretations of the Clause, "unusual" cannot simply be given effect as evidence of cruelty.[253]

Despite the symmetry of the Clause, the Court's "evolving standards of decency" framework relies primarily on state legislation and thus targets

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249. *But see* Stinneford, *supra* note 13, at 1816–17 (referencing Sir Edward Coke's writings and suggesting that innovations in punishment are "[t]he dross of the law").

250. *See* ANNALS OF CONG., *supra* note 25, at 783 (Representative Livermore further stated that, "until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration [such as the Punishments Clause].").

251. *See* ESKRIDGE ET AL., *supra* note 225, at 266. This canon is also known as the rule against surplusage. *Id. But see supra* note 225 (noting that it is somewhat debatable whether methods of statutory interpretation are generally transferable to the exercise of constitutional interpretation).

252. *See* 1 OXFORD ENGLISH DICTIONARY 449 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) ("[C]o-ordinate. Introducing a word, clause, or sentence, which is to be taken side by side with, along with, or in addition to, that which precedes it.") (italics omitted); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 43 (10th ed. 1998) (The term "and" is "used to join sentence elements of the same grammatical rank or function."). Unfortunately, dictionaries at the time of the Framers fail in providing any coherent definition of "and." *See, e.g.*, SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE (1786) (defining "and" as "[t]he particle by which sentences or terms are joined, which it is not easy to explain by any synonimous [sic] word").

253. *Cf., e.g.*, Stacy, *supra* note 19, at 538 ("Although a punishment's "unusual" nature may furnish relevant evidence of cruelty, it is neither a necessary nor a sufficient condition of unconstitutionality.").

only unusual punishments;[254] yet it appears that the Court is more drawn to the notion that cruel punishments should be prohibited under the Clause. Indeed, much of the Court's language, as well as the scholarly literature, has suggested that the Clause prohibits only cruel punishments.[255] This position, though, is directly contrary to the language and symmetry of the Clause. Although such a textual interpretation is implausible, it is somewhat understandable that the Court and the literature have made statements such as "it is safe to affirm that punishments of torture . . . are forbidden by [the Punishments Clause],"[256] because interpreting the Clause in this asymmetrical manner and ignoring the term "unusual" may be the best way to prevent convicted criminals from sentences that may be viewed as undesirable. Through manipulating its assessment of state legislative action to comport with its own views of morality,[257] the Court seemingly bridges the gap between its objective focus on unusualness and its desire to assert its conception of cruelty. The opacity of the Court's actions, though, naturally obscures the reasoning behind the Court's Punishments Clause jurisprudence and creates an atmosphere ripe for creating bad precedent.

C. An Intratextual Analysis Suggests the Necessity of Both "Cruel" and "Unusual"

Viewing the Bill of Rights as a whole instead of focusing solely on the Eighth Amendment further suggests that the Punishments Clause requires that a punishment be both cruel and unusual before it is prohibited. Engaging in such an intratextual analysis,[258] one can see that the drafters of the Bill of Rights used the conjunction "and" in various places throughout the document. For example, the Second Amendment provides

254. *See supra* Part III.

255. *See supra* text accompanying notes 189; *see also, e.g.*, Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319 (1997) (suggesting that a punishment need be only cruel to be unconstitutional).

256. Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878). *But see infra* note 222 (noting that torture has occasionally been described as inherently unusual) and Part V.D (noting that the Court's suggestion that all torturous punishments are forbidden by the Punishments Clause might reflect an "assumption that punishments that are viewed as torturous by most Americans will almost certainly be rare in their availability").

257. *See* Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 31 (2007) (accusing the Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), of "manipulating doctrine" to arrive at "the weakest 'national consensus' in Supreme Court history").

258. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (explaining the constitutional interpretative method of intratextualism and outlining its strengths and weaknesses).

for a right to "keep and bear Arms,"[259] the Fourth Amendment prohibits "unreasonable searches and seizures,"[260] and the Sixth Amendment provides for the right to a "speedy and public trial" in criminal prosecutions.[261] Among the uses of "and" in the Bill of Rights, it seems that the Sixth Amendment's guarantee of a "speedy and public trial" most closely mirrors the Eighth Amendment's prohibition on "cruel and unusual punishments." These are the only two places in the Bill of Rights where the Drafters opted to use two adjectives to modify a noun. The uses of "and" in these contexts, however, are not identical. The Sixth Amendment's provision is an affirmative guarantee, while the Eighth Amendment's prohibition employs a negative to limit the phrase, providing "nor cruel and unusual punishments inflicted."[262] Further, while the modified noun in the Eighth Amendment provision—"punishments"—is plural, the modified noun in the Sixth Amendment guarantee—"trial"—

259. U.S. CONST. amend. II.

260. U.S. CONST. amend. IV.

261. U.S. CONST. amend. VI. Further, while not part of the Bill of Rights, Article IV of the Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. Interestingly, the Fourteenth Amendment, which was not ratified until 1868, uses similar language, but uses the term "or" instead of "and," providing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. Instead of focusing on different meanings resulting from the uses of "and" and "or," however, scholars seem to have focused more on the language following the "privileges and immunities" and "privileges or immunities" language. *See, e.g.*, Colloquium, *Akhil Reed Amar's America's Constitution and Jed Rubenfeld's Revolution by Judiciary: A Dialogue*, 115 YALE L.J. 2015, 2023 (2006) (stating that "[t]he intratextual linkage between Article IV and the Fourteenth Amendment . . . confirms that the text of the latter likewise applies to civil equality but not political equality"); *Discriminatory Treatment of Non-Residents*, 92 HARV. L. REV. 75, 86 (1978) (stating that "each provision protects different individual rights" and that, while Article IV "assures the nonresident the important benefits of citizenship in another state while he is there," the Fourteenth Amendment "protects the benefits of federal citizenship"); Stephen Kanter, *The* Griswold *Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 690 n.275 (2006) (suggesting that the Article IV language is only of limited use in interpreting the Fourteenth Amendment individual rights provision because "[t]he topics of Article IV . . . strongly suggest that it was limited to dealing primarily with comity among the states, discriminatory treatment of other states' citizens by a state, and the constitutive and intergovernmental structural parts of the Constitution . . . ."); Dawn D. Schiller, *European Lessons in Higher Education*, 1992 U. CHI. LEGAL F. 539, 546 n.34 (1992) ("Despite the nearly identical 'privileges and immunities' language in both Article IV and the Fourteenth Amendment of the Constitution . . . , the Supreme Court rendered the Privileges and Immunities Clause of the Fourteenth Amendment a practical nullity in the *Slaughter-House Cases*."); *cf.* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1398 n.36 (1992) (noting that "[t]he two clauses . . . use different conjunctions for reasons of logic"—"[t]he Article IV provision is an affirmative mandate" while the "14th Amendment is a prohibition"—and stating that, if the Fourteenth Amendment instead used "and," "a strong argument could be made that a law was forbidden only if it abridged both a privilege and an immunity").

262. *Cf. supra* note 224 (explaining that the "nor" of the Punishments Clause language triggers the application of De Morgan's Rules).

is singular.[263] While either of these differences might render an intratextual analysis less persuasive, it may still be useful to briefly examine the use of "and" in the Sixth Amendment guarantee.[264] To the extent that these two provisions can be understood to employ similar uses of "and," intratextual analysis suggests that if the guarantee to a "speedy and public trial" was originally understood as a guarantee to a trial that is both speedy and public, perhaps the use of "and" in the Punishments Clause context was originally understood as prohibiting only punishments that are both cruel and unusual.

Unlike the cruelty and unusualness components of the Eighth Amendment, the speedy and public aspects of the Sixth Amendment's trial right evolved independently.[265] The speedy trial guarantee derives from English common law, was written into the Magna Carta in 1215, and was firmly entrenched in English law by the late thirteenth century.[266] The guarantee was subsequently written into the Virginia Declaration of Rights in 1776, which provided that "a man hath a right . . . to a speedy trial,"[267] and James Madison relied on this provision in drafting the right to a speedy trial into the text of the Sixth Amendment.[268] The right to a public trial was also firmly established in English common law long prior to the eighteenth century.[269] The right was first written into American law in

263. The singular use of "trial" buttresses a conclusion that individuals are entitled to a trial that is both speedy and public. One might try to argue that the Framers' use of the term "punishments" instead of "punishment" suggests that the Punishments Clause prohibits multiple types of punishments, mainly both those that are cruel and those that are unusual. The plural use of the term, though, is certainly not dispositive in determining how the Punishments Clause was generally understood at the time. Moreover, at least in the context of statutory interpretation, such distinctions between the singular and the plural have not been recognized, *see* ESKRIDGE, *supra* note 225, at 829, and both Congress and a number of states have even statutorily prohibited recognizing such a distinction, *see* 1 U.S.C. § 1 (2004); N.Y. STAT. LAW § 252 (McKinney 1971)..

264. It appears that little to no scholarship has been devoted to exploring the meaning of "and" in either the Second, Fourth, or Sixth Amendment contexts. *But see* John V. Orth, *The Enumeration of Rights: "Let Me Count the Ways*,*"* 9 U. PA. J. CONST. L. 281, 282 (2006) (asserting that the Second Amendment "seems to protect both those who keep and those who bear arms" and that the Fourth Amendment "prohibits both unreasonable searches and unreasonable seizures").

265. *See supra* Part I (explaining how the phrase "cruel and unusual punishments" originated in the 1688 English Bill of Rights).

266. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

267. *Id.* at 225.

268. *See* RUTLAND, *supra* note 35, at 202; *see also* United States v. Marion, 404 U.S. 307, 314 n.6 (1971) ("Article 8 of the Virginia Declaration of Rights, which may have been the model Madison used for the Sixth Amendment, secured the right to a speedy trial in 'criminal prosecutions' where 'a man hath a right to demand the cause and nature of his accusation.'") (citation omitted).

269. *In re* Oliver, 333 U.S. 257, 266 (1948) (stating that the guarantee of a public trial "has its roots in our English common law heritage" and "likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial"); Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 381–82 (1931–32) (explaining that a public trial "was a common law privilege" and

1776 in the Pennsylvania Constitution's Declaration of Rights and the North Carolina Constitution's Declaration of Rights.[270] It then found its way into the Sixth Amendment alongside the right to a speedy trial.[271]

It has seemingly been universally assumed throughout history and into modern times that the speedy and public aspects of the Sixth Amendment's trial right are independent and that a criminal defendant has a Sixth Amendment right to a trial that is both speedy and public.[272] This suggests that the "and" in the "speedy and public trial" provision is used in the ordinary conjunctive sense, requiring that both adjectives are necessary components of the following noun. To the extent that the "and" in the Punishments Clause was similarly used, it should be interpreted as requiring both cruelty and unusualness before a punishment is deemed unconstitutional under the Clause.

D. Early Case Law Confirms the Necessity of Both "Cruel" and "Unusual"

The conclusion that the text of the Punishments Clause was originally understood to require that a punishment be both cruel and unusual before it was prohibited is buttressed by the Court's earliest cases construing the meaning of the Clause. While these cases are not entirely consistent, they can be reconciled with each other by understanding the Clause to require both unusualness and cruelty components before triggering the prohibition. The *Pervear* Court indicated that a punishment must be unusual to be prohibited.[273] The *Wilkerson* Court suggested that a punishment must be cruel before it is prohibited.[274] The *Kemmler* Court stated that a punishment will not be invalidated just because it is unusual, indicating that cruelty is also a requirement.[275] These cases suggest, then, that a punishment must be both cruel and unusual before it is prohibited

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noting that Sir Thomas Smith and Sir Matthew Hale described the public character of English trials in their writings of the sixteenth and seventeenth century, respectively).

270. *In re Oliver*, 333 U.S. at 266–67 n.15.

271. U.S. CONST. amend. VI; RUTLAND, *supra* note 35, at 202.

272. *See, e.g.*, *Klopfer*, 386 U.S. at 223, 225–26 (establishing that the right to a speedy trial is fundamental and thus binding on the states); *In re Oliver*, 333 U.S. at 270–71 (stating that the guarantee to a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution" and stating that, "[w]ithout publicity, all other checks are insufficient"); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 858–59 1103 (4th ed. 2004) (implying that both the right to a public trial and the right to a speedy trial are fundamental rights of a criminal defendant).

273. *See supra* text accompanying notes 76–82.

274. *See supra* text accompanying notes 85–86.

275. *See supra* text accompanying notes 88–92.

under the Punishments Clause. Although the *Wilkerson* and *Kemmler* opinions contain language suggesting that torture is certainly prohibited under the Eighth Amendment,[276] one might interpret this as reflecting the Court's assumption that punishments that are viewed as torturous by most Americans will almost certainly be rare in their availability.[277] More importantly, though, to the extent that the offhand language in *Wilkerson* and *Kemmler* suggests that cruel punishments are always prohibited under the Clause, this is at odds with the text of the Punishments Clause. Further, *Pervear*'s contrary language is more persuasive because, since the case was decided earlier, that language is closer to the original understanding of the drafters and ratifiers of the Eighth Amendment, as well as the understanding of their contemporaries.

VI. TO GIVE MEANING TO THE INDEPENDENT TERMS, BOTH CRUELTY AND UNUSUALNESS MUST BE INDEPENDENTLY ASSESSED

If the Punishments Clause indeed requires that both elements of cruelty and unusualness be present before a practice may be invalidated, courts must assess these two components of the Clause independently so that each is given meaning. This may be difficult, especially in the context of defining cruelty, because it appears that no court or commentator has been able to find a satisfactory way to assess contemporary notions of cruelty.[278] Despite the daunting nature of this task, however, it is necessary so that courts' assessments of cruelty do not unsteadily and unadvisedly rely on their assessments of unusualness.

A. Independently Assessing Unusualness

While assessing state legislative action does not adequately evaluate cruelty, it does appear to be a relatively good measure of the unusualness component of the Clause. Unusualness, as measured in this manner, refers to the availability of a punishment instead of the actual implementation of a punishment.[279] Unusualness, however, may seem more related to the use

276. *See supra* text accompanying notes 87 and 93.

277. *Cf. supra* note 222 (noting that torture has occasionally been described as inherently unusual).

278. *Cf.* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 526, 528–29, 539 (1994) (explaining that a "cruel" punishment might mean one "that is more unpleasant than it ought to be," but that "people disagree about how unpleasant punishment ought to be").

279. *See supra* Part II.B. Although an assessment of state legislative action, by calculating the number of states permitting a particular punishment, frames unusualness in terms of a punishment's

of a punishment instead of its availability. This may appear to be especially true when punishments that have not been used in decades continue to be available under applicable law.[280] Further, measuring unusualness by the availability of a punishment, instead of by its use, fails to account for whether a particular defendant is receiving a harsher punishment than his compeers. While measuring unusualness by a punishment's availability instead of its use has its failings, such a method of measurement comports with the Court's current death penalty jurisprudence, which provides that the most severe punishments should be implemented only in the rarest and most extreme circumstances.[281] If unusualness were to instead be measured by the use of a punishment, the practice of reserving the worst punishments for the worst offenders would render these harshest punishments "unusual" and thus on the path to being declared unconstitutional. This could encourage juries and courts to dole out harsher punishment to less culpable offenders with the purpose of saving punishments from drifting into unconstitutional obscurity. Further, measuring unusualness by requiring that a punishment be usually available, even if it is not in regular use, will perhaps guard against certain defendants being treated differently for reasons unrelated to the crime for which they are being punished—perhaps one of the concerns underlying the prohibition of cruel and unusual punishments in the English Bill of Rights.[282] Moreover, while the Court's current assessment of unusualness may not be perfect, to implement unusualness in the sense of how frequently a punishment is utilized would require a greater departure from the Court's current "evolving standards of decency" approach. If implementation of a practice is the true meaning of the term "unusual," then it will be more difficult to advance the Court to such an

availability, the Court's survey of jury actions roughly measures the implementation of a punishment. *See supra* text accompanying note 120.

280. *See supra* note 215.

281. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'") (citation omitted); *see also supra* note 161 (noting the Court has stated that jurors must reserve the most severe punishments for the most serious offenses).

282. *See supra* note 151 and accompanying text (noting that "unusual," as used in the English Bill of Rights, "could serve a function of fairness"); *see also, e.g.*, Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 809–12 (2008) (finding that, at least in Harris County, Texas from 1992 to 1999, capital punishment "was more likely to be imposed against black defendants than white defendants"); *supra* text accompanying note 53 (explaining that a minority of the Lords involved in sentencing Titus Oates believed that the punishment was inappropriate and noting that the minority emphasized that there was no precedent for the punishment).

understanding than to encourage the Court to just add a distinct cruelty inquiry to its standing assessment of state legislative action.

Regardless of how unusualness is defined or measured, assessing unusualness independent from cruelty will allow the Court and scholars to more clearly answer questions that have plagued the Court's "evolving standards of decency" jurisprudence. For example, in allowing state legislative action to serve only as a measure of unusualness, it will be easier to determine the roles that international and foreign law should play in this inquiry.[283] It seems that while international and foreign law may be relevant to the cruelty inquiry, it is more removed from an assessment about the availability of a punishment in the United States.[284] Additionally, disentangling the unusualness assessment from the cruelty inquiry will allow the Court to determine whether states without the death penalty should be counted alongside death penalty states in determining whether it is constitutional, for example, to execute individuals with lesser competency or culpability than an adult, such as mentally retarded individuals or juveniles.[285]

B. Independently Assessing Cruelty

Independently assessing cruelty poses more difficulties. The Court's secondary sources—the actions of juries, public opinion polls, the opinions of professional organizations, and international and foreign law—have their own difficulties and built-in inaccuracies.[286] Perhaps a variation on public opinion polls, though, holds some promise. Instead of polling individual Americans, polling each state legislature to determine whether the state, as a whole and as declared through its people's representatives, is morally opposed to a particular punishment might more accurately assess the prevailing societal standards of cruelty. Such

283. *But cf. supra* text accompanying notes 168–71 (noting criticisms of the Court's examination of international law and the laws of other nations in determining the constitutionality of a practice under the Eighth Amendment).

284. But perhaps the availability or prevalence of a punishment in foreign nations is more germane to the questions of whether a punishment for a crime at the national level, rather than at the more local level, is unusual. For example, the unusualness of a punishment for treason in Japan seems more relevant to the unusualness of a punishment for treason in the United States than the unusualness of a punishment for forgery in Japan is to the unusualness of a punishment for forgery in the United States. A more detailed analysis of the proper assessment of unusualness for various punishments is beyond the scope of this Article but is a topic that I hope to revisit in the future.

285. *See supra* text accompanying note 113. Assessing unusualness independent from cruelty suggests that states without the death penalty should indeed be counted alongside death penalty states in determining the constitutionality of practices such as the execution of juveniles.

286. *See supra* text accompanying notes 157–72.

legislative polls, however, would be subject to difficult questions of who should conduct and finance the polls and how often and for which punishments they should be conducted.

If the Court's independent judgment is where the "evolving standards of decency" approach addresses cruelty,[287] then perhaps there is a way to improve this assessment by providing greater structure to the Court's inquiry and giving it greater weight. While scholars have criticized the Court's consultation of its own judgment in the Eighth Amendment context,[288] if the Court's assessment of its own judgment were limited to a list of factors or a test to determine whether a punishment is cruel,[289] then this component of its analysis would better match other areas in which the Court relies on its own judgment in resolving constitutional questions.[290] Perhaps constraining the Court's judgment in this way could lend greater predictability to the cruelty component of the Court's Punishments Clause jurisprudence and dampen, although not completely eliminate, criticisms that nine Justices' notions of cruelty are not representative of the nation as a whole.[291] If the Court were to then give greater weight to its independent judgment, this inquiry could more readily serve as an independent assessment of cruelty. Because the Court already consults its independent judgment, limiting this judgment to an assessment of cruelty, as well as giving greater weight to this judgment, would not require significant departure from the Court's current jurisprudence.

Another possibility for assessing cruelty is to draw on First Amendment obscenity analysis, which, like polls, relies to some extent on public opinion. The Supreme Court has stated that, in assessing whether speech may be regulated because it is obscene, courts and juries should consult "contemporary community standards" of the affected locality.[292] Perhaps similar local standards of cruelty could be employed in the Punishments Clause context, although handing over this question to juries

287. *See supra* text accompanying notes 173–83.

288. *See supra* text accompanying notes 173–83.

289. Further examination of how to limit the Court's independent judgment is beyond the scope of this Article, but I intend to explore this issue in greater depth at a future time.

290. *See supra* text accompanying note 177.

291. *See supra* text accompanying notes 175–76.

292. Miller v. California, 413 U.S. 15, 24 (1973); *see also* Hamling v. United States, 418 U.S. 87, 104 (1974) (referring to the *Miller* test and stating that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination"). According to the Court, while the standards of the Constitution "do not vary from community to community, . . . this does not mean that there are . . . "fixed, uniform national standards" of what constitutes obscenity. *Miller*, 413 U.S. at 30.

instead of reserving it for courts would certainly raise the difficulty of a lack of uniformity, among other concerns.[293]

C. These Difficult Assessments Are Not Unique

The notion that the Court's jurisprudence in this area should rely on a pseudomathematical test for unusualness and a more pliable, morals-based test for cruelty is not far-fetched. The Court has applied a similar analysis in the context of substantive due process. In determining whether there is a fundamental right deserving of special Fifth or Fourteenth Amendment protection, the Court has, at least on occasion, simultaneously examined whether the right is "deeply rooted in this Nation's history and tradition"[294] and whether society, by its moral consensus, has demonstrated the importance of the right.[295] In examining whether a right is deeply rooted, the Court has calculated the abundance of U.S. statutes regulating the relevant conduct[296]—an action similar to assessing the abundance of statutes providing for or prohibiting a particular punishment. In exploring whether a right is "supported by a deeply embedded moral consensus," the Court has turned to factors such as its concerns for

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293. While a thorough examination of whether local standards of cruelty should be employed in the Punishments Clause context is beyond the scope of this Article, I intend to examine this issue in greater detail in the future.

294. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); *see also* Washington v. Glucksberg, 521 U.S. 702, 710–19 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (finding a "fundamental interest of parents . . . to guide the religious future and education of their children" because "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children" and that "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

295. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 68–75 (2003) (exploring both the nation's history of enacting laws "directed at homosexual conduct" and a growing moral consensus that homosexual conduct should not be punished); *see also* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 107 (2006) (explaining that the Court has examined both American traditions and contemporary societal values in determining whether a right is fundamental under its substantive due process analysis); *Sources of Constitutional Protection for Family Rights*, 93 HARV. L. REV. 1161, 1177–80 (1980) (explaining that, in determining whether a right is fundamental, the Court has examined not only the tradition and history of the right in this nation, but also contemporary moral views on the topic); *cf.* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 947 (3d ed. 2009) (noting that some "scholars maintain that the Court should recognize non-textual fundamental rights that are supported by a deeply embedded moral consensus that exists in society") (citing Wellington, *supra* note 152, at 284).

296. For example, in *Lawrence*, 539 U.S. at 568–74 (2003), the Court traced the disappearance of laws proscribing same-sex relations in the past half century and concluded that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Id.* at 568.

autonomy and equality, international law, and the laws of foreign nations.[297] This unfettered exploration of moral concerns could be analogous to what a court would examine in independently determining the cruelty of a practice.

This parallel between substantive due process analysis and an interpretation of the Punishments Clause that is faithful to its text should be unsurprising. In his concurrence in the 1972 case of *Furman v. Georgia*,[298] Justice Marshall stated that Punishments Clause

> analysis parallels in some ways the analysis used in striking down legislation on the ground that it violates Fourteenth Amendment concepts of substantive due process . . . .
>
> The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (i.e., the right to life), the State needs a compelling interest to justify it. Thus stated, the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State.[299]

The approach of twin statute-based and morals-dependent inquiries is even more justified in the Eighth Amendment context than the substantive due process context, however, because the text of the Eighth Amendment provides for an assessment of cruelty and unusualness, whereas the text of the Fifth and Fourteenth Amendments do not even make mention of substantive due process, let alone questions of whether certain rights are deeply rooted in U.S. history or moral values.

Regardless of how justified this approach is, there is no getting around the fact that independently assessing cruelty and unusualness is difficult. One could, at least temporarily, avoid some of these difficult questions,

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297. *See, e.g.*, *id.* at 574–75 (highlighting the importance of "personal dignity and autonomy," as well as "[e]quality of treatment," and pointing to the laws of other nations and a decision issued by the European Court of Human Rights); *see also, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (explaining that the Court's substantive due process cases focus on issues "central to personal dignity and autonomy" and that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life").

298. 408 U.S. 238 (1972).

299. *Id.* at 359–60 n.141 (Marshall, J., concurring) (citations omitted).

such as what exactly constitutes cruelty, by interpreting the Punishments Clause to prohibit both cruel punishments and unusual punishments. Indeed, this appears to be what current Punishments Clause jurisprudence engenders because it focuses primarily, if not solely, on the more easily assessed component of unusualness instead of cruelty.[300] However, this of course solves only the problem of easy assessment with respect to unusual punishments. Yet, unusual punishments do not seem to be the types of punishments with which late eighteenth-century American society was concerned[301] or with which Americans are generally concerned today.[302] Cruelty, though, might be easier to assess under a Punishments Clause that prohibits both cruel punishments and unusual punishments because there would be less of a concern of assessing cruelty completely independently of unusualness. While unusualness will remain only an imperfect proxy for cruelty, if the Punishments Clause does not require both independent components, relying somewhat on unusualness in assessing cruelty would not erode the Clause's requirements because unusual punishments would be similarly prohibited.

VII. POSSIBLE EFFECTS OF INDEPENDENTLY ASSESSING CRUELTY AND UNUSUALNESS

If courts were to clarify the necessity of both cruelty and unusualness under the Punishments Clause through independently assessing each component of the Clause, Punishments Clause jurisprudence would become more transparent and predictable. Currently, the Court claims to rely primarily on assessing state legislative action in determining the constitutionality of a punishment, but, behind closed doors, the Court may be manipulating its assessment of state actions to reach conclusions it

300. *See supra* Part III.

301. *See supra* text accompanying notes 26–33 (noting some cruel punishments about which the Framers and Ratifiers were concerned).

302. *See, e.g.*, Goldberg & Dershowitz, *supra* note 193, at 1796–97 (arguing that "[i]nherent in the logic of a ban on cruel and unusual punishment is the requirement that a penalty serve some other end besides retribution more effectively than any other less severe penalty" and that, "[o]therwise, the most horrible tortures[, such as boiling in oil] might be permissible"); *Fairness in Drug Sentencing*, N.Y. TIMES, May 1, 2009, at A22 (asserting that the crack/powder cocaine sentencing disparity is unfair); Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 20, 2009, at A1 (noting the moral debate surrounding the CIA's use of waterboarding as an interrogation method and questioning the effectiveness and necessity of such a harsh method of interrogation); *Taking Action Against Cruel and Unusual Punishment*, INT'L HERALD TRIB., Jan. 8, 2008, at 6 (stating "that the death penalty, no matter how it is administered, is unconstitutional and wrong" and that "it is clear that the methods of taking life are barbaric").

believes are morally appropriate.[303] By bringing the cruelty inquiry out into the open and perhaps more clearly defining that inquiry by, for example, limiting the factors courts should examine in evaluating the cruelty of a punishment,[304] the Court's assessment of cruelty will likely become more predictable, even though such a subjective inquiry can never be completely predictable. At the same time, eliminating cruelty questions from the Court's assessment of unusualness will render the unusualness inquiry more reliable. Separating the evaluations of the cruelty and unusualness components of the Clause, then, will serve to clarify the Court's jurisprudence in this area.

Further, interpreting the Punishments Clause as prohibiting only punishments that are both cruel and unusual and independently assessing these two components addresses the federalism concern that scholars have argued undermines the use of state legislative action in determining whether a punishment is unconstitutional.[305] As one commentator explains, "constitutionally enshrining popular views in the form of judicial aggregation of a majority of states' preferences" is contrary to the concept of federalism.[306] Application of the Court's current "evolving standards of decency" approach to Punishments Clause adjudication prevents individual states from serving as laboratories of experimentation to try out novel sentencing experiments without risk to the rest of the nation.[307] This federalism problem does not arise from using state legislative action as an indication that a punishment may be unconstitutional, though. Instead, this disregard for federalism arises from using state legislative action as the primary, or sole, indicator of unconstitutionality. State legislative action relates directly to only the unusualness component of the Punishments Clause,[308] and it can serve only as an imperfect proxy for determining cruelty.[309] If the Court acknowledges this difficulty and independently assesses the unusualness and cruelty components of the Clause, then state legislative action alone cannot invalidate a punishment, and a majority of states will not have the power to undercut other states' abilities to act as

303. *See supra* text accompanying note 257.
304. *See supra* text accompanying notes 288–91.
305. *See supra* text accompanying notes 186–87.
306. Jacobi, *supra* note 154, at 1106.
307. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (extolling the virtues of experimentation and stating that "[t]here must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs").
308. *See supra* Part III.
309. *See supra* Part III.

independent laboratories dabbling in novel social experiments. In this way, interpreting the Punishments Clause as prohibiting only punishments that are both cruel and unusual, and consequently discretely assessing these components, returns some independence to the states to experiment with unusual yet humane punishments.

Finally, while requiring that a punishment be both cruel and unusual before it is prohibited may narrow the scope of the Eighth Amendment by possibly allowing punishments that are cruel but not unusual,[310] it will also allow for continued innovation in punishment.[311] Without the availability of such innovations, such as lethal injection, governments would be forced to rely on older methods of punishment, such as hanging or death by firing squad.[312] While viewing innovations in punishment as constitutionally suspect may protect punishments that have withstood the test of time and have less of a risk of being the product of enflamed public opinion,[313] labeling them as unconstitutional would force criminal offenders to suffer perhaps greater brutalities than necessary if advances in punishment are actually more humane.

CONCLUSION

Neither the Court nor scholars have devoted enough, if any, time to determining whether punishments must be both cruel and unusual before they are prohibited under the Eighth Amendment Punishments Clause. Their assumption that the phrase "cruel and unusual punishments" should be construed as a term of art has little or no basis in history and is instead a constitutional invention of the 1950s. The text of the Punishments Clause, as well as the Court's earliest cases construing the Clause, suggest that "cruel and unusual punishments" should be interpreted as requiring that a punishment be both cruel and unusual before it is prohibited under the Clause. This meaning can be given effect only by requiring courts to independently assess each component of the Clause instead of relying almost solely on their assessments of state legislative actions, the most commonly accepted indicator of the constitutionality of a punishment today. While of course this interpretation narrows the scope of the Punishments Clause perhaps more than most would hope because it

310. *But see supra* text accompanying notes 215–18.

311. *See supra* text accompanying notes 305–09.

312. *See supra* text accompanying notes 16–18; *see also* note 17 (noting that some states still permit executions by hanging or firing squad in certain circumstances).

313. *See* Stinneford, *supra* note 13, at 1745.

technically would allow cruel punishments to be used so long as they are usually available, it is the only plausible interpretation that allows for humane innovation in punishments. Further, it captures the importance of federalism to this nation by preventing a majority of states from inhibiting a minority of states from engaging in practices that the majority has rejected, regardless of the cruelty or humanity of the practices.

Adopting an interpretation that the Clause prohibits only punishments that are both cruel and unusual requires just slight modification of the Court's current "evolving standards of decency" analysis. Because the Court's current approach adequately examines only the unusualness of a practice, for the Court to give full meaning to both requirements of the Clause, it must independently evaluate the cruelty of a practice as well. While assessing cruelty may prove difficult, some promising avenues for an evaluation of this concept would be to provide further definition to the factors the Court may consult in forming its own independent judgment and accord this judgment weight equal to that of the objective indicia of contemporary values, or to approach the cruelty component as a more fact-based inquiry of contemporary community standards as is done in the obscenity context. Regardless of the approach taken, this independent assessment of cruelty would constitute just a small addition to the Court's well-established "evolving standards of decency" analysis.