Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

—THE EIGHTH AMENDMENT

Baby, Don't Be Cruel

PART 2

What's So "Cruel & Unusual" About the Eighth Amendment?

BY ROBERT J. McWHIRTER

ROBERT J. McWHIRTER is a senior lawyer at the Maricopa Legal Defender's Office handling serious felony and death penalty defense. His publications include THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW, 3RD ed. (American Bar Association 2006). This article is part of the author's book in progress on the "History Behind the History of the Bill of Rights."

Look for Part 1 of *Baby, Don't Be Cruel* in the December 2009 issue of ARIZONA ATTORNEY.

The "Pious Perjurers": Juries as Sentencers

If you were a defendant in front of a medieval jury you had a better chance than you have today.[1]

Juries became the main way of deciding cases after the Assize of Clarendon in 1166 and the Fourth Lateran Counsel of 1215. There was no plea bargaining, and the jurors knew the punishments.[2] Thus, they effectively were the sentencers, with clear and specific choices:

> "Q*uietus est*" = "He is acquitted"
> "S*uspendatus est*" = "He is hanged" (literally "he is suspended")
> "*Remittitur ad gratiam domine regis*" = "He is remitted to the king's grace"(this was part of a pardon, usually for what we would call justifiable homicides and manslaughter).[3]

The jurors knew that common law penal policy was simple: Misdemeanor convictions meant punishment in the judge's discretion that did not touch life or limb. Felony convictions meant the defendant was at the king's mercy and a fixed death sentence.[4] Thus, they controlled the sentence with their verdict.

For example, acquittal rates for homicide cases in the 14th century were 80 percent to 90 percent.[5] Moreover, from the end of Edward I's reign until the middle of the 15th century, the conviction rate for indicted defendants was between 10 percent and 30 percent.[6] This power of juries to decide sentences and give mercy as the case demanded extended well into the modern period and the founding of the United States.[7]

Much of this high acquittal rate was because there were no police detectives, crime labs or medical examiners.[8] The fact was, the medieval English jury was a dependable source of God's Grace.

The Medieval Blood Sanction

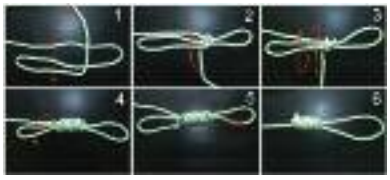
Assuming that you were one of the relatively few persons who did not get some grace from God through the Ordeal, Sanctuary, the King's pardon or a merciful jury, what then? You would face a grueling punishment. But, the point was still concord and reconciliation, if not with the community, then with God.[9]

Prison was generally not a punishment in the middle ages, mainly because there were no prisons. Sure, a king or local lord

1. *See generally* Thomas A. Green, *Societal Concepts of Criminal Liability for Homicide in Mediaeval England*, 47 SPECULUM 669, 671 (1972) (recording the high acquittal rates); J. G. BELLAMY, THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND: FELONY BEFORE THE COURTS FROM EDWARD I TO THE SIXTEENTH CENTURY 37-38 (1998) (noting that Tudor criminal justice reforms showed conviction rates raising in certain cases).

2. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 at 28-64 (1985) (noting that medieval law did not provide for manslaughter and juries would often twist facts to support a self-defense verdict); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 52-55 (1983) (noting 19th century jury nullification to temper overly severe laws).

Later commentators connected this medieval history of jury power and *Magna Carta* to modern justifications of nullification. *See, e.g.,* Steve J. Shone, *Lysander Spooner, Jury Nullification, and Magna Carta*, 22 Q. L. R. 651, 658-59, 664-65, 666 (2004).



3. Green, *Homicide* 423.

4. BAKER at 512. For misdemeanors this could include punishment of fines or whipping. For felonies the penalty after the 13th century was death, though in Norman and Angevin periods the kings' judges could order mutilations like castration or blinding instead. Traitors got a cruel death, but for English felons it was generally hanging.

The **hangman's knot** or **hangman's noose** (aka a **collar** during Elizabethan times) is a specially tied knot to break the neck when it is placed just behind the left ear.

5. Green, *Homicide* at 431-32 (noting the lack of distinction in the law for murder vs. manslaughter and accounting for the verdicts because the jurors knew the penalty involved).

6. BELLAMY at 37. The conviction rates for the process of "appeal" i.e., private prosecutions from which our modern tort law derives, the conviction rate was much higher, 50 percent to 75 percent. This rose to 70 percent to 90 percent by the mid-15th century.

7. Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93 (2006) (a persuasive historical study on original American juries as sentencers and recommending that courts advise modern juries of sentencing consequences to conform to the framers original intent). *See also* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590-91 (1939), noting that in Rhode Island, judges held office "not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury." *See also Apprendi v. New Jersey,* 530 U.S. 466, 478-79 (2000), discussing role of original American juries. BANNER (2002) also notes the common occurrence of jury nullification in America.

8. But, in what we could call *CSI: Medieval*, some jurists believed that the corpse of a victim would rise up in accusation by bleeding or grabbing a suspect brought within its view. Olson, *Blood Sanction* at 81.

CSI: Crime Scene Investigation is a popular, Emmy Award-winning CBS television series from 2000 to present. The show follows Las Vegas forensic scientists who discover the causes of mysterious crimes. Numerous spin-offs include CSI: Miami and CSI: NY.

9. Olson, *Blood Sanction* at 65, noting that benefit of clergy, sanctuary, royal pardon and high English acquittal rate prevented the blood sanction. *See also* Olson, *Blood Sanction* at 74-75.

A Medieval Hanging, Pisanello 1436-1438

Death by Hanging was the main method of American and European capital punishment through history and a cheap alternative to prisons. It is the lethal suspension of a person by a ligature. The preferred past tense and past participle in English is *hanged* when referring to an executed person, whereas all other senses of the verb *to hang* use *hung,* as in "the item was hung." *Hanging* has also a common suicide method.

There are four ways of judicial hanging: the short drop, suspension hanging, the standard drop and the long drop.

With the **Short Drop** executioners put condemned on a cart, horse or other conveyance with the noose around the neck. They move it away, leaving the condemned dangling from the rope. Death is slow and painful, as the condemned dies of strangulation.

Suspension Hanging is similar to the short drop, except a gallows falls out from under the condemned.

The Standard Drop is a calculated fall of the condemned with the noose around his neck designed to immediately break the neck. This causes immediate paralysis and probable unconsciousness. The drop is between four and six feet. The trouble with the method is that it can cause decapitation.

The Long Drop is also called the measured drop and is a scientific advancement to the standard drop. Instead of everyone falling the same standard distance, the hangman calculates the person's weight to determine the rope's length to ensure the neck is broken without decapitation. Before 1892 the drop was between four and 10 feet to deliver a force of 1,260 lbf to fracture the neck from the second to fifth cervical vertebrae. Because of decapitations the force calculation was reduced to about 1,000 lbf by shortening the rope.

Depending on the above methods, a hanging may induce one or more of the following medical conditions: Closing the carotid arteries, causing cerebral ischemia; closing the jugular veins, inducing carotid reflex, which reduces heartbeat when the pressure in the carotid arteries is high, causing cardiac arrest; breaking the neck (cervical fracture), causing traumatic spinal cord injury; or closing the airway, causing suffocation.

The table is used as a guide, but the hangman decides the drop after seeing the condemned's build and neck strength.

Hanging has had its problems. *See, e.g.,* Carla McClain, *Lethal Injection Bill Getting Little Support*, TUCSON CITIZEN, Apr. 7, 1992, at 2A (noting that Arizona switched from hanging to lethal gas in 1930 when the noose beheaded a heavy woman, Eva Dugan, when the trapdoor opened).

For how hanging works *see* L.D.M. Nokes, A. Roberts & D.S. James, *Biomechanics of Judicial Hanging: A Case Report*, 39 MED. SCI. L. 61, 64 (1999) (concluding that the traditional formula for calculating the drop in hanging is unreliable because it is not possible to determine the correct drop on the basis of the victim's mass alone to pull apart the spinal cord or brainstem without pulling off the head). *See also generally* Khan & Leventhal at 848.

may have a dungeon for political undesirables and military captives, but they generally did not waste the space on common criminals. Punishment for them could be scourging, mutilation or, more commonly, death.

Medieval people had a different notion of the meaning of suffering than we do—perhaps because there was more of it in their lives. We generally view suffering as something always to avoid.[1] For medieval culture, however, pain had its own benefit.[2] In suffering one could share in the redemptive Passion of Christ.[3] This is because body and soul were believed to be one substance.[4] Thus, the pain of the body leads to the cleaning of the soul.[5] And, who would need redemption more than a criminal/sinner?[6] For medieval people, therefore, scourging, maiming and decapitation were for the condemned's spiritual good, or, as we would say, his rehabilitation.

Because of the redemptive nature of punishment, the ritual of execution was very important and loaded with spiritual imagery and iconic symbology.[7] In the execution ritual, the bleeding body accessed God, bringing the soul along with it.[8] The key elements were that the criminal (sinner) confesses, atones and suffers steadfastly.[9]

The scaffold was like an altar, with the sacrifice being the good death.[10] Mounting the scaffold ladder compared to the theological ladder of paradise.[11] The condemned was expected to forgive his executioner, giving grace in the expectation of receiving grace.[12] Each event was not just public, but shared by the public to create reconciliation. In this, the sinner/criminal brought the community closer to God.[13]

If the ladder to the scaffold went missing or was too short, jurists took it as a sign that the accused was either innocent or had received God's mercy, *ad judicium dei*.[14]

Even the type of execution had spiritual significance.[15] For example, beheading represented the removal of the figurative crown from the sinner/criminal's head.[16] As with other themes of medieval punishment, an allusion to Christ's "Crown of Thorns" naturally followed.[17]

1. An exception, of course, is the almost spiritual experience people seek from exercise to attain the grace of youth and fitness. The descriptions of exercise as being good for "body and soul" compare to any purgative a medieval theologian could divine. Add anorexia and bulimia, and one has to question how different the psychology is from medieval food asceticism. *Cf.* Olson, *Blood Sanction* at 91, discussing St. Columba of Rieti's food asceticism.

2. ROSELYNE REY, THE HISTORY OF PAIN 49 (1995) (noting that within medieval Christendom, bodily pain possessed an affirmative meaning as a sacrificial offering allowing one to share in Christ's passion or as purgation to gain redemption). But one example in imagery is the woodcut below by Wolfgang Katzheimer displaying a judicial procession of a shacked man to his execution. A friar with a crucifix attends him and the banner reads, *"If you bear your pain patiently/it shall be useful to you/Therefore give yourself to it willing."* Reproduced in MITCHELL MERBACK, THE THIEF, THE CROSS, AND THE WHEEL: PAIN AND THE SPECTACLE OF PUNISHMENT IN MEDIEVAL AND RENAISSANCE EUROPE 156 (1999) and discussed in Olson, *Blood Sanction* at 88.

3. The two "thieves" who died with Christ, depicted hundreds of times such as ***Crucifixion,*** **Andrea Mantegna (1457-1459)** or ***Calvary,*** **Daneil Hopfer (1470-1536),** provided the example. One shared in Christ's redemption, and one did not.

Crucifixion, **Andrea Mantegna (1457-1459)**

Calvary, **Daniel Hopfer (1470-1536)**

4. Olson, *Blood Sanction* at 82-89. For Augustine and Aquinas, body and soul are one substance and thus the pain of the body leads to cleansing of the soul. For Aquinas, then, pain was a source of inward joy meaning that scourging, maiming and decapitation were for the condemned's spiritual good. Again, if the sinner/criminal could imitate Christ's suffering, redemption could be had. Olson, *Blood Sanction* at 89.

Augustine, Boticelli 1480.

5. For Augustine and Aquinas evil cannot exist in the absence of good—it is parasitic and requires good to corrupt it. *See generally* Olson, *Blood Sanction* at 92. Evil is suffering (*malum peonae*) and moral wrong (*malum culpae*), but it lacks essence ("esse" in Latin) or form by itself. Olson, ***Blood Sanction*** at 94. Evil, therefore, cannot triumph over good because to eradicate good would mean evil eradicates itself. For this reason, Aquinas states that "It is impossible to find anything totally evil." Olson, *Blood Sanction* at 94.

St. Thomas Acquinas

Dore illustration from Paradise Lost

Thus, when the human being commits wrong, he acts in "opposition to [his] fair nature" and that evil then causes a "disorder" within a man's soul. Pain (even death) equals penance and restores the wrongdoer to "order."

See Olson, *Blood Sanction* at 103 ("By negating the negation that is evil, penal pain affirms [the sinner/criminal's] status as a worthy being").

6. Writing much later Milton explained evil's existence as part of a great cosmic battle - God could have created man incapable of evil but such a mankind would not have been worth the effort. *See generally* Jillisa Brittan and Richard Posner, *Classic Revisited: Penal Theory in Paradise Lost*, 105 MICH. L. REV. 1049, 1053 (2007) (analyzing God's punishments in Milton's Paradise Lost identifying retribution for Satan to deter further angelic rebellion; rehabilitation and deterrence for Adam, Eve, and descendants (us) and strict liability for the serpent).

7. Olson, *Blood Sanction* at 81.

8. Olson, *Blood Sanction* at 89. The ritual of execution is still important today. *See* IVAN SOLOTAROFF, THE LAST FACT YOU'LL EVER SEE: THE PRIVATE LIFE OF THE AMERICAN DEATH PENALTY (2001) (a very interesting chronicle of the psychological toll the death penalty has on executioners as well as descriptions of the death protocols and mechanisms). The film THE GREEN MILE (Warner Bros. 1999), adapted from Stephen King's 1996 novel, starring Tom Hanks and Michael Clarke Duncan, shows the ritual in numerous scenes.

John Coffey (Duncan) being escorted to his execution by Edgecomb (Hanks) and Brutus Howell (David Morse).

9. Olson, *Blood Sanction* at 112. The movie DEAD MAN WALKING (Gramercy Pictures U.S. 1995) also shows the ritual of death in prisons as a prison guard declares "dead man walking" during the film. The film adapts Sister Helen Prejean's nonfiction book of the same name, which tells the story of Sister Prejean (Susan Sarandon), who establishes a special relationship with Matthew Poncelet, a consolidation of two death-row prisoners (Sean Penn). As with the mediaeval rituals, the film's climax is Poncelet's confession and atonement.

Death by Electrocution: The word "electrocution" comes from "electric" and "execution."

The Death: The executioners: shave the condemned's head and legs; strap him to a chair; place a natural sponge with saline solution on his head; and attach an electrode to the head and another to his leg, which closes the circuit. Death occurs when the executioners pass electrodes through his body in various cycles (differing in voltage and duration) of alternating current, fatally damaging internal organs, including the brain. Rosenberg & Rosenberg at 1172; Khan & Leventhal at 848. Several states still have electrocution as their primary means of execution or allow the condemned to choose it.

"Old Sparky" (Arkansas)

The Chair: A dentist, Alfred P. Southwick, conceived of the Electric Chair, patterning it off his dentist's chair after he saw an intoxicated man die on touching an exposed electric terminal.

Nicknames for the Chair include *Sizzlin' Sally*, *Old*

The common criminal would be executed with "The Breaking Wheel," a torturous capital punishment device causing death by cudgeling (*i.e.*, blunt force trauma with bone-breaking force).[18] The wheel worked systematically to break all the bones on all the condemned's limbs long before death happened.[19] But this manner of execution, which we would today call inhumane, had great spiritual significance. The wheel was also called "the Catherine Wheel" because Saint Catherine of Alexandria was

Smokey, Old Sparky, Yellow Mama and *Gruesome Gertie. Gruesome Gertie* (the Louisiana electric chair) was in the movie MONSTER'S BALL (Lions Gate Films 2001). The electric chair was first used in 1890 after the Supreme Court approved its constitutionality. *In re Kemmler*, 136 U.S. 436 (1890). Andy Warhol made it a statement of political art in *Orange Disaster*, 1963.

Andy Warhol, Orange Disaster, 1963

The Chair and the *War of Currents:* Harold P. Brown worked for Thomas Edison to make the first electric chair, which became a skirmish in the *War of Currents* between Edison, proponent and seller of direct current (DC), and George Westinghouse, proponent and seller of alternating current (AC). Edison wanted the electric chair to function on Westinghouse's AC to claim it was more dangerous. (In reality, the difference at the required amperage is marginal). Edison killed animals with AC for the press to associate it with electrical death. Edison even tried to make up the verb "to Westinghouse" for execution. Westinghouse, who knew what Edison was up to, refused to sell Edison an AC generator. Edison had to pretend he was a university and had Westinghouse's AC generator shipped to New York through South America. On the other side, Westinghouse surreptitiously financed the defense of the first person to be sentenced to death by electric chair so as not to give his AC a bad name. After the first execution went sloppily, Westinghouse commented, "They would have done better using an axe." *See generally* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002); *see also* Robert J. Cottrol, *Finality With Ambivalence: The American Death Penalty's Uneasy History*, 56 STAN. L. REV. 1641 (2004) (Reviewing STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002)).

Willie Francis with his fingers crossed for the good luck that the Supreme Court will not give him.

The Chair and Double Jeopardy: Despite its seeming technological foundation, the electric chair has produced messy results. In *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Supreme Court held that a second attempt to electrocute Willie Francis after the first time failed did not violate the Fifth Amendment's double jeopardy clause or the Eighth Amendment's cruel and unusual punishment clause. They electrocuted Francis again in 1947, this time killing him. *See* GILBERT KING, THE EXECUTION OF WILLIE FRANCIS: RACE, MURDER, AND THE SEARCH FOR JUSTICE IN THE AMERICAN SOUTH (2008); Schwartz at 790.

10. Olson, *Blood Sanction* at 103. St. Catherine of Siena records participating in an execution ritual. *See* Olson, *Blood Sanction* at 121-24. In 1375 Catherine helped prepare a Nicolas Tuldo for a good death. He was sentenced to death in Siena for speaking against the city's magistrates. "He was so comforted and consoled that he confessed his sins and prepared himself very well" hearing Mass and taking communion. "His will was united and submissive to the will of God," and he mounted the scaffold as a "peaceable lamb" … "called holy the place of justice [i.e., the gallows]!" She placed his neck on the block and when the blade struck him said 'Gesù!' and 'Caterina!' She then caught his head and her eyes "fixed on divine Goodness." Christ "received Nicolas' blood into His own." The crowd participated in the ritual too and "marveled" at what happened.

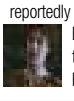
Although St. Catherine writes that Nicolas received Communion, medieval authorities and the church often denied the condemned communion because Christ was thought to remain present in the body for three days and executioners did not want to send Christ to the gallows. Olson, *Blood Sanction* at 113.

St. Catherine of Siena by Domenico Beccafumi, c. 1515. St. Catherine, O.P. (1347-80) was a Dominican lay affiliate, scholastic philosopher and theologian.

11. Olson, *Blood Sanction* at 118-19. *Cf.* ***The Ladder of Paradise*** (12th-century), showing demons and angels vying for monks, and ***Crucifixion of Christ,*** by Albrecht Altdorfer (1526), showing the thematic ladder associated with Christ, with ***The Execution of Hugh Despenser the Younger*** from the Froissart manuscript. Though not a common criminal, Despenser's execution exemplifies the expected good death. In 1326 Despenser was convicted of treason after Queen Isabella's and Roger Mortimer's successful revolt against the English king, Edward II. Although Despenser was "drawn through the whole city of Herford, then hanged, then beheaded," he "humbly and patiently suffered anything and professed publicly to all that he had merited worse, and he often asked pardon of those who stood near and the passerbys." *Quoted in* Olson, *Blood Sanction* at 115.

Execution of Despenser, from a manuscript of Froissart

***The Ladder of Paradise* (12th century)**



Despenser's large phallus is because he was Edward II's reputed homosexual lover, taking the male role. In a variation of the traitor's death, they also castrated him. Edward II was reportedly killed with a hot iron up his rectum. Peter Hanly played Edward II in the movie BRAVEHEART. In the movie, the old king Edward I throws Edward II's gay lover out the castle window. This was probably not Despenser, but an earlier lover called Peter Giles, whom some of Edward II's other courtesans had executed.

12. Olson at 116-17.

13. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 46 (1979), *discussed in* Olson, *Blood Sanction* at 127.

14. Olson *Blood Sanction* at 111. Also, a woman could intercede for the condemned by asking him to marry her.

15. Generally, beheading was for the upper nobility, hanging for the masses, and burning at the stake for heretics or those who had committed particularly heinous crimes. Olson, *Blood Sanction* at 117.

16. Olson, *Blood Sanction* at 117 (*citing* SAMUEL EDGERTON, PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE 126 (1985)). For example, Giotto's JUSTICE is an enthroned woman with a crown holding the scales of justice. An angel brandishes a sword upon the head of a seated figure who wears a crown while another angel reaches to place a crown upon another seated figure.

Personified is Distributive Justice who, according to Aquinas, "gives to each what his rank deserves … good and bad, honour and shame."

Giotto: The Seven Virtues—Lady Justice (1306)

17. Jesus Carrying the Cross with the Crown of Thorns, by El Greco 1580

18. **The breaking wheel**

19. *Breaking on the wheel* meant that the condemned would have every major bone in his body broken several times per limb.

Depending on the device this could mean he was attached to a wheel and a large hammer or iron bar would break the bones as the executioners would slowly turn the wheel. Then his executioners wove his arms and legs into the spokes of the wheel and mounted it on a pole where they left him to die from exposure and hungry birds, which could take days. Sometimes the condemned received mercy when his executioner struck him on the chest and stomach, blows known as *coups de grâce* (French for "blow of mercy"), causing death.

Of course, it would be hard to argue that the modern game show *Wheel of Fortune* retains this sense.

Wheel of Fortune

The wheel was also an important cultural theme in medieval Europe in the concept of the Wheel of Fortune or Rota Fortuna. God's Grace put you at the top one day, but the earth is a transitory place and the next day you could be one the wheel's bottom or broken by it, as Chaucer notes:

"And thus does Fortune's wheel turn treacherously
And out of happiness bring men to sorrow." Geoffrey Chaucer, *The Canterbury Tales*, The Monk's Tale.

Also, William Shakespeare in *Hamlet* wrote of the "*slings and arrows of outrageous fortune*" and, of fortune personified, to "*break all the spokes and fellies from her wheel.*" *See also Henry V*, Act 3 Scene VI, and *King Lear* at the end of Act II, Scene 2: "*Fortune, good night, smile once more; turn thy wheel!*"

***Crucifixion of Christ,* by Albrecht Altdorfer (1526)**

to be executed on one.[1] Medieval paintings of Christ's Passion depict the wheel in the scene, in an analogy to Christ's crucifixion, despite the fact there is no biblical reference to one.[2]

The disturbing implication to this spiritual focus of redemptive punishment, however, is that it can be all too tolerant of the execution of an innocent.[3] Indeed, if the goal of the death ritual is the reconciliation of the community, who better than an innocent person suffering in imitation of Christ, the true innocent sacrificial lamb?[4] After all, we are all guilty of something. Thus, even if a person did not commit the crime, he was still a sinner like everyone else and would have an easier path to heaven.[5] And the community is reconciled nonetheless. The problem, of course, is it that a sacrificial lamb becomes a scapegoat.[6]

Medieval public executions probably did serve deterrence to crime as well as a spiritual value.[7] But the jurists at the time were very clear that deterrence was not the focus of their justifications.[8] The executions were bloody and public, but infrequent. This contrasts with our age of frequent executions behind sealed prison walls.[9]

Kings and Death

Much of the history of the English monarchy involved kings wanting to get control of the death business. From Henry II's attempts to prosecute "crimonious clerks"[10] to Henry VIII's use

***St. Catherine of Alexandria*, Caravaggio, c. 1598**

1. Catherine visited Roman Emperor Maxentius to convince him to stop persecuting Christians. Instead, the Emperor tried to seduce her, and when he failed he ordered her condemned on the breaking wheel. When Catherine touched it, the wheel broke, so the Emperor had her beheaded.

St. Catherine was one of the saints that Joan of Arc speaks to in the movie THE MESSENGER: THE STORY OF JOAN OF ARC (Columbia Pictures 1999).

Also, Santa Catalina (Catalina) Island in California and a lunar crater are named for this St. Catherine.

Michelangelo, detail of *The Last Judgement* (1534-41), with St. Catherine holding a broken wheel

Catherine Wheel was also an English "alternative rock" band from 1990 to 2000.

2. For example, **The Procession to Calvary, Pieter Bruegel (1564),** has a Catherine Wheel on the far right.

3. Our age, with its limited spiritual focus, can be just as tolerant of innocents executed. For example, Cassell states, "Perhaps the most successful rhetorical attack on the death penalty has been the claim that innocent persons have been convicted of, and even executed for, capital offenses." Paul G. Cassell, *In Defense of the Death Penalty*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 183, 205 (Hugo Adam Bedau & Paul G. Cassell eds., 2004). As of February 2008, the Innocence Project has exonerated more than 213 death-row inmates. www.innocenceproject.org.

***Dante and His Poem*, Domenico Di Michelino 1465.**

4. The sacrifice of the innocence lamb is metaphor for redemption and is a very old Christian theme evident in the books and movie THE CHRONICLES OF NARNIA.

THE CHRONICLES OF NARNIA (Buena Vista, 2005)

***Dante and His Poem*, Domenico di Michelino 1465**

***The Violent, tortured in the Rain of Fire*, Gustave Doré**

***The Severed head of Bertrand de Born speaks*, Gustave Doré**

5. Thus, avoiding the extension of the earthily blood sanction in hell. This was the premise of Dante's Divine Comedy. Olson, *Blood Sanction* at 88. The damned are blind to their own vice and thus continue to pursue it—the sin itself causes the suffering, not God. Olson *Blood Sanction* at 100-01, 126 (demonstrating how Dante illustrates the cultural theme of the purpose of punishment). Therefore Dante's Hell is not about retribution or "an eye for eye" because the punishments arise from the crime/sin itself, not from the damage. *See* WHAT DREAMS MAY COME (PolyGram 1998), starring Robin Williams, Cuba Gooding Jr., and Annabella Sciorra for a modern rendition of Dante's themes. Dante's punishments are symbolic (*e.g.,* the Neutrals, those who refused to take sides during times of moral crisis, run forever under a symbolic blank banner). In Purgatory the punishments are generally the same as Hell but the souls are aware of their sin and their penance. Olson, *Blood Sanction* at 102. Thus, Purgatory is about payment of debt and the chance to gain Grace. Olson, *Blood Sanction* at 99.

Picking up on the theology of St. Thomas Aquinas that the soul and body are one essence, Dante notes that so intense is the soul's need of the body that when deprived of it the soul "imprints" its body in the air. Olson, *Blood Sanction* at 100. This "imprinting" of the soul idea is a nice plot device allowing Dante to talk to the souls during his guided tour of Hell and Purgatory. THE MATRIX (Warner Bros. 1999) uses the same plot device, calling it "residual self-imaging," explaining why the characters look the same in both the "real" and the computer generated Matrix worlds.

6. The priests of ancient Israel would drive a goat into the wilderness as part of the Day of Atonement ceremonies (Yom Kippur) after ceremonially heaping the sins of the community on it. Leviticus 16 describes the practice, which foreshadowed the Christian theme of the Sacrificial Lamb of Christ. Today, to "scapegoat" is more widely used as a metaphor meaning to blame someone or a group for misfortunes usually to distract from the real problem.

7. *See* Ambrogio Lorenzetti's fresco *The Allegory of Good Government* in the Palazzo Publico (1328 A.D.) in Siena showing a winged and draped woman, "Securitas," flying over the town holding a gallows with a dead man. Noted in Olson, *Blood Sanction* at 72.

8. Olson, *Blood Sanction* at 70-81. For Aquinas the benefit of removing a "corrupt limb" from society outweighed the evil of physical punishment to the sinner/criminal. Olson, *Blood Sanction* at 97. Again, this is in the context of a society that lacked the alternative of prison.

A modern (semi private) death chamber

9. "[E]xecutions which had once been frequent public spectacles became infrequent private affairs. The manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public." *Furman v. Georgia*, 408 U.S. 238, 340 (1972) (Marshall, J., concurring).

See also Nicholas Levi, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 FED. COMM. L.J. 131, 134-35 (2002).

For a study of modern punishment in general *see* Eva S. Nilsen, *Decency, Dignity and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse,* 41 U.C. DAVIS L. REV. 111-175 (2007). Modern punishment involves longer and meaner sentences, and prison conditions that are more degrading and dangerous; there also is a lack meaningful post-release programs. Moreover, the Supreme Court's formalistic reading of the Eighth Amendment has produced "a legal and moral blindness" to the constitutional problems of modern punishment.

Court of King's Bench, c. 1460, showing a chain gang at the bottom and a jury to the left with judges, lawyers and clerks. Inner Temple Library at www.innertemplelibrary.org.uk/welcome.htm.

10. ANTONIA FRASER, THE LIVES OF THE KINGS AND QUEENS OF ENGLAND, 40-41.

of the death penalty to become the English Pope as well as king,[1] death became a useful state tool.[2]

Indeed, the law of homicide developed as kings got into the death business. In the 16th century, under the Tudors, the concept of "benefit of clergy" passed into common law and produced the outlines of modern homicide law.[3] "Murder," for instance, became a homicide that did not qualify for "benefit of clergy" (something akin to what we today would call manslaughter or a justifiable homicide).[4]

At this point the use of torture as punishment and as an investigative tool came into question as being "cruel."[5] These objections to torture in criminal procedure, however, cut against longstanding practices.

For example, common law courts had long used a torture called ***peine forte et dure*** (Law French for "hard and forceful punishment") to get defendants to enter a plea submitting to the court's jurisdiction.[6] Common law courts originally considered that they lacked jurisdiction over a defendant until he submitted to it—a holdover from when the parties could choose from other types of trials, such as ordeal, battle or compurgation.

After these other forums passed into history and the Crown gained more of an interest in providing a system of criminal justice, the king's courts needed a way to assert jurisdiction.[7] Thus, when a defendant stood mute and refused to plead, the court would order him to a "press room," where stones were placed on his or her chest until he submitted to jury trial with his plea.[8] If not, they added weight until he suffocated.[9]

The simple expedient of entering a plea for the defendant eluded the common law until 1772, when Parliament made a mute plea equivalent to a "guilty" plea. In 1827, Parliament changed a mute plea to "not guilty," the modern practice.[10]

The Coming of the English Bill of Rights

The 1600s were a tumultuous time in English history.

In 1603, the last of the Tudors, Elizabeth I, died, and the


Coke


Justice Marshall


Henry VII


Blackstone

1. In the 16th century during Henry VIII's reign, there were an estimated 72,000 executions, LEVY at 232, a staggering number for a nation the size of England at the time.

Executing and Punishing the Insane: Henry VIII passed a law providing that a man convicted of treason should still be executed even if he became insane. 33 Hen. VIII, ch. 20 *cited in Ford v. Wainwright*, 477 U.S. 399, n.1 (1986). The common law writers uniformly condemned the law, with Coke writing that the "cruel and inhumane Law lived not long, but was repealed, for in that point also it was against the Common Law." 3 E. COKE, INSTITUTES 6 (6th ed. 1680). *Quoted in Ford* at 477 U.S. at 407-08.

On the topic of punishing the insane in general, Coke wrote "[B]y intendment of Law the execution of the offender is for example, … but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extreme inhumanity and cruelty, and can be no example to others." *Id., quoted in Ford* at 477 U.S. at 407-08, also citing 1 M. HALE, PLEAS OF THE CROWN 35 (1736); 1 W. HAWKINS, PLEAS OF THE CROWN 2 (7th ed. 1795); Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How.St.Tr. 474, 477 (1685).

Blackstone followed less than a century later: "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 W. BLACKSTONE, COMMENTARIES 24- 25.

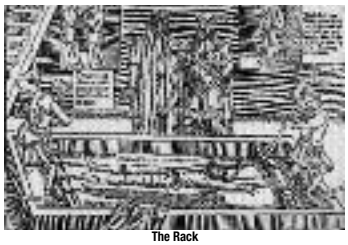
Justice Thurgood Marshall in 1986, writing for the U.S. Supreme Court in *Ford v. Wainwright*, 477 U.S. 399 (1986), finally found the practice unconstitutional.

2. "Capital punishment" comes from the Latin word *capitalis* (from *caput*, head) to describe that which related to life. They used the neuter form of this adjective, *i.e., capitale*, substantively to denominate death, or loss of all civil rights, and banishment imposed by public authority in consequence of crime. THE CATHOLIC ENCYCLOPEDIA www.newadvent.org/cathen/12565a.htm.

3. *See* Green, *Homicide* at 415, 472-76 on benefit of clergy affecting development of homicide law; also at 480 n.241 on the power struggle with Henry VIII. Henry VIII , of course, had eliminated the independence of the church courts and terminated the old "benefit of clergy." This facilitated its passage into the common law courts.

4. Lanham at 90. The courts, not parliament, first defined manslaughter. Kaye at 369. Over time the older definitions of serious and simple homicide became murder and manslaughter. Green, *Homicide* at 472-73, 473- 491. These more formal definitions replaced the informal rough justice of the jury system. Thus, though conviction rate increased from the 14th century, the condemnation rate remained the same, showing that the law used the manslaughter/murder distinction to replace the old jury justice system. Green, *Homicide* at 493; Kaye at 365. The penalty for manslaughter was imprisonment not more than one year, and branding. Green, *Homicide* at 483, 488.

5. In 1583 Robert Beale condemned "the racking of grievous offenders, as being cruel, barbarous, contrary to law, and unto the liberty of English subjects." *Quoted in* LEVY at 232. Again, as noted earlier, there is a close relationship between the Fifth Amendment's prohibition on coerced statements and the Eight Amendment's prohibition on cruel and unusual punishments. *See* Rumann, 665-66, 668 and n.45, 679.


The Rack

6. *See generally* Andrea McKenzie, *This Death Some Strong and Stout Hearted Man Doth Choose": The Practice of Peine Forte Et Dure in Seventeenth- and Eighteenth-Century England*, 23 LAW & HIST. REV. 279 (2005). *See also* Olson, *Blood Sanction* at 111 for example of Richard II pardoning a man after enduring *peine forte et dure*.

7. *See* LEVY at 233.

Peine forte et dure is not the same as **execution by crushing**. In ancient times the Carthaginians executed people this way and for more than 4,000 years of recorded history it was common in South and South-East Asia using elephants.


From Rousselet (1868) "Le Tour du Monde"

8. After Henry VIII, pleading in religious trials became all the more pertinent. In 1586 Saint Margaret Clitherow refused to plead to the charge of harboring Catholic priests. She did this to avoid a trial where her children would have to testify. They laid her on a sharp rock, put a door on her and loaded it with rocks and stones, killing her within 15 minutes. This was Mar. 25, 1586, a Good Friday. THE CATHOLIC ENCYCLOPEDIA, www.newadvent.org/cathen/04059b.htm.


Giles Corey pressed to death during the Salem Witch Trials.

This mix of torture as pretrial coercion and punishment again showing the connection between the Fifth and Eighth Amendments, played out in America during the Salem Witch trials. Giles Corey died from *peine forte et dure* on Sept. 19, 1692, after he refused to enter a plea in the judicial proceeding. According to legend, his last words as he was being crushed were "more weight," and he was thought to be dead as the weight was applied. Arthur Miller's political drama THE CRUCIBLE has Giles Corey refuse to answer "aye or nay" to witchcraft, but the movie version has him killed for refusing to reveal a source of information.


St. Margaret Clitherow


THE CRUCIBLE (20th Century Fox 1996)

9. Such a death did, however, allow a defendant to avoid a conviction and subsequent forfeiture of property. If convicted, the king got the condemned's property (*i.e.,* it was "escheated" to the Crown) leaving the defendant's heirs nothing.

The U.S. Constitution prohibits making a person "dead in law" (*i.e.,* loss of civil and citizen rights) and "corruption of blood" (*i.e.,* preventing heirs for receiving the condemned's property and rights) in three prohibitions against Bills of Attainder:

- "No Bill of Attainder … shall be passed" – Article I, § 9, cl. 3
- "No State shall … pass any Bill of Attainder" – Article I, § 10, cl. 1
- "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted" – Article III, § 3, cl. 2

See Claus at 149-52. *Also* Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause,* 18 ST. THOMAS L. REV. 177 (2005).

10. *See e.g.*, Federal Rule of Criminal Procedure 11 (a)(4), which states, ***"Failure to Enter a Plea.*** *If a defendant refuses to enter a plea … the court must enter a plea of not guilty."See* Claus at 149-52. *Also* Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 ST. THOMAS L. REV. 177 (2005).

Stuarts starting with James I took over England.[1] James' son, Charles I, later took over, followed by Oliver Cromwell, who assumed power until he died in 1658, leading to the restoration of Charles I's son, Charles II.[2]

This set the stage for Titus Oates and his "Popish Plot." Oates hatched an idea of a Catholic plot to kill Charles I. As his conspiracy theory spun out, and people were tried and executed for treason, his claims became more and more outrageous. The rampant anti-Catholicism of his day gave him an open audience.[3]

Oates' escapades finally caught up with him under the reign of James II, when Oates was convicted for perjury. Judge George Jeffreys declared Oates a "Shame to mankind" while sentencing him to pillory, public whippings and prison.[4] Given that Oates was clergy, Jeffreys also sentenced Oates to be defrocked. This had implications for the history of the Eighth Amendment because it was "unusual"[5]—the second twin of our pair "cruel and unusual."

It was "unusual" because whether a common law court could defrock clergy and combine Oates' various punishments was an open question. After Charles I was deposed, Parliament abolished the Court of High Commission for Ecclesiastical Causes, the body that would have defrocked clergy. Thus, it was unclear whether a common law court now had that power.[6]

For the time there was nothing "cruel," at least as a legal matter, about each individual part of Oates' sentence. His pillorying, whipping, fine, and prison were standard fare for the day. But the objections to Oates' sentence were that it was "cruel and unusual" and "cruel and illegal."[7] Thus, the sentence was "unusual" because it was "illegal" as being unprecedented in the common law or authorized by Parliament.[8]

The "Bloody Assizes" of 1685 underscored that punishments could be as cruel as ever.[9] The assizes were several trials beginning in August 1685 after the Monmouth Rebellion.[10] Lord Chief Justice George Jeffreys presided.[11]

Of the roughly 1,400 prisoners in the first round of Bloody Assize trials, most received the death sentence. About 292 were hanged or hanged, drawn and quartered, and about 841 of the rest were transported to the West Indies as slave labor.[12] Others

1. **Elizabeth I**

James I

2. **Oliver Cromwell and King Charles I**

☜ The movie RESTORATION (Miramax 1995) tangentially dealt with the Charles II monarchy.

Charles II

3. For the detailed history *see* JOHN KENYON, THE POPISH PLOT (1972); *also* Claus at 136-37; Parr at 43-45.

Regarding English anti-Catholicism *see* Claus at 135. Though Oates was a perjuring fraud, he never lost popular support. Following James II, King William of Orange and Queen Mary pardoned him in 1688 and parliament gave him a pension. Claus at 141. Oates died in 1705.

Oates

James II

4. Claus at 137-39. Jeffreys built his career in the service of Charles II and James II. He presided over Algernon Sidney's trial, who had been implicated in the Rye House Plot to kill Charles and James. He became Lord Chief Justice and Privy Councilor in 1683 and Lord Chancellor in 1685. James II made him Baron Jeffreys of Wem.

5. *See* Claus at 140-42; Parr at 44.

6. Granucci at 858-59, noting that the House of Commons (where Oates still enjoyed popular support) criticized the House of Lords for allowing a temporal court to render a judgment reserved to the ecclesiastical courts. *See also* Parr at 44.

Judge Jeffreys

7. *See* Granucci at 859 and LEVY at 237, noting that the "Oates affair presented the only recorded contemporary uses of the terms 'cruel and unusual' and '"cruel and illegal.'"

8 Granucci at 855-59. *See also* Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1289-92 (2007) (outlining briefly the Oates history as source of the Eighth Amendment and noting that the Eight prohibits "the official who assigns the punishment [who] has no legal authority to assign punishments of that kind, or because the law does not provide for punishments of that kind for the relevant offense").

See also Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishment to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 420 (1995) (following Granucci at 860 and thus Justices Thomas and Scalia incorrectly state that the expansion of the Eighth Amendment to prison deprivations is "beyond all bounds of history and precedent" in *Helling v. McKinney*, 113 S. Ct. 2475, 2482-83 (1993) (Thomas, J. dissenting) and *Hudson v. McMillian*, 112 S. Ct. 995, 1010 (1992) (Thomas, J. dissenting)).

9. Steve Bachmann, *Starting Again With the Mayflower … England's Civil War and America's Bill of Rights*, 20 QLR 193, 205-06, 257-59 (2001). *Also*, Parr at 47-48 and Granucci at 855-59, arguing that the Bloody Assize was not the Eighth Amendment's source but the Titus Oates trial. *See also* LEVY at 236, noting that Henry Pollfexen, chief prosecutor of Bloody Assizes and backer of Bill of Rights, did not view Bloody Assizes as illegal.

10. The **Monmouth Rebellion** of 1685 was supposed to overthrow James II who was unpopular because he was Catholic. The Protestant James Scott, 1st Duke of Monmouth (Charles II's illegitimate son) claimed the throne. James won the Battle of Sedgemoor and executed Monmouth on July 15, 1685. **The Bloody Assizes** followed resulting in the execution or transportation of Monmouth's followers. *See generally* Bachmann at 257-59.

James Scott, 1st Duke of Monmouth

11. The infamous executioner Jack Ketch botched the job of dispatching the Duke of Monmouth. Ketch was famous for messy executions either though incompetence or sadism. Of his execution of Lord William Russell in 1683, Ketch wrote that the botched job was the condemned's fault because he did not "dispose himself as was most suitable" and that Ketch was interrupted while taking aim. For Monmouth in 1685, Ketch used at least five axe strokes and finally used a knife to sever Monmouth's head. "Jack Ketch" is now a name for death, Satan and the gallows. The hangman's knot is sometimes called Jack Ketch's knot. On Ketch *see* Gerald D. Robin, *The Executioner: His Place in English Society*, 15 BRITISH J. OF SOCIOLOGY 234, 242 (1964). On the place of executioners under Hebrew law *see* Hiers at 793-97.

12. LEVY at 234.

died in custody of "Gaol Fever" (typhus). Later, another 500 prisoners were tried and 144 were hanged and their remains displayed around the country.

In these punishments, the issue was not cruelty, as we define the term, but *unusuality*. The assizes were bloody indeed, but not unusual for the time.[2] It was the fact that the punishments were also unusual that became the issue. Therefore, these concepts became a pair.

In these punishments, the issue was not cruelty, as we define the term, but *unusuality*.

"Cruel and Unusual" As a Pair

King James' reign was short (1685–1688). Anti-Catholicism, the Stuart notions of Divine Right of Kings, struggles with Parliament, and rebellions all led to his fleeing the country in the face of "The Glorious Revolution" of 1688.[3]

The pairing of "cruel and unusual" in the law comes from a pair of sovereigns. Parliament in 1689 called William III and Mary II (James' daughter) to replace James II, who was "deemed to have fled" the country.[4]

William and Mary brought a new cooperation in governing with Parliament and ended any hope of Catholicism's restoration.[5] And part of the deal was that they had to agree to the Bill of Rights, including Article 10: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."[6]

What the English Meant—and Who Cares?

What the English meant in 1689 is supposed to have a lot of significance for what the Framers of the Eighth Amendment meant in 1789.[7] And as the start of this chapter notes, the wording is identical with the exception of "ought" for "must," which appears to have no significance. But, 100 years passed between the two, and it was not a static century.

The Enlightenment—that was the difference. The Eighth Amendment was the product of a different age altogether. In 1689, Parliament passed the Bill of Rights to recognize what existed—the common law liberties from a grasping monarch.[8] For

1. For his work, King James made Jeffreys Lord Chancellor, the highest judicial officer in England. After James was deposed, Jeffreys died a prisoner in the Tower of London of kidney failure in 1689. *See generally* LEVY at 236.

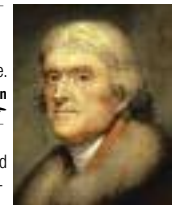
Judge Jeffreys

2. Even after the Bill of Rights, executing male rebels with drawing and quartering continued until 1814 when Parliament only eliminated the disemboweling part—beheading and quartering continued until 1870, and the burning of female felons continued until 1790. Granucci at 855-56.

3. On James II losing the throne *see* account in Granucci at 852-53.

4. After Mary died in 1694, William of Orange ruled alone until his death in 1702. Their rule was the only time of "joint sovereigns" with equal powers. Usually, the spouse of the monarch has no power, being simply a consort.

The College of William & Mary in Williamsburg, Virginia, chartered in 1693, is named for them. Thomas Jefferson, among other notables, is a graduate.



Thomas Jefferson

William III

5. These actions led to the nation we now call the United Kingdom under their successor, Mary's sister Anne.

The English colonials brought their anti-Catholicism to America, which flourished to the point of costing Al Smith the presidency in 1928 against Herbert Hoover and was still an issue in John F. Kennedy's election.

Mary II

John F. Kennedy

6. Granucci at 853; Claus at 124. *See also* Rumann at 680, demonstrating that Parliamentary intent was not to limit this provision to post conviction situations.

For the Proposals in Parliament *see* Granucci at 854-55.

For the origins of the English Bill of Rights with the Levelers and the Humble Petition to Parliament of 1648 *see* Bachmann at 256-57.

Again, we call our first 10 Constitutional Amendments "The Bill of Rights" because the English Bill of Rights was an actual legislative bill in Parliament in 1689.

7. *See, e.g.,* Claus at 130 ("The language of the English Bill of Rights meant for the Founders whatever it meant for the English.").

8. Claus at 143; Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 49 (2000-2001), arguing the intent of the English Bill of Rights and the Eighth Amendment was merely to prevent judges from sentencing outside the statutory range. *Also* Parr at 45, noting the English capitally punished trivial crimes for more than 100 years after the English Bill of Rights.

Bank of England

For example, murder and forgery were the crimes most likely to send a man to the gallows in 18th century England. Randall McGowen, *Managing the Gallows: The Bank of England and the Death Penalty, 1797-1821*, 25 LAW & HIST. REV. 241, 243 (2007). Between 1797 and 1821 the Bank of England faced a forgery epidemic, and the bank's solicitors and directors actually decided who got pardoned or executed. McGowen at 243-44, 280. Robert Peel supported the death penalty for forgery in Parliament in 1830 because the "punishment of death had checked the crime" and thus he "was in favour of the law as it stood." McGowen at 281, citing *Parliamentary Debates*, n.s. 1830, xxiii, 1183, xxiv, 1049-50, 1054.

Al Smith

Herbert Hoover

the English, it was not about law reform; they thought nothing of heaping subsequent cruelties on criminals and political dissidents.[1] For them, the only issue from the Oates case and perhaps the Bloody Assizes was the unusualness—that is, the illegality of the punishments.[2]

Americans, however, had a Puritan cultural heritage sensitive to the "cruel" punishments suffered in England.[3] Patrick Henry was speaking from (and perhaps to) this heritage when he decried a lack of a bill of rights because "congress will lose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments."

As products of the Enlightenment, the Eighth Amendment's framers were expansive. Certainly they wanted to protect individual liberties, just like the Parliament men who wrote the English Bill of Rights. But the Eighth Amendment encompasses an evolving notion of crime, proportionality and punishment, which Representative Livermore's statements quoted at the start of this chapter.[4] Indeed, one of the first things the new American states did after independence was to reform criminal law, making it less punitive.[5]

It was, after all, not just a revolt from Great Britain—it was an American *Revolution.*


John Wilkes

1. But reform in punishment was coming to England as well. In the 1760-70s John Wilkes as Lord Mayor of London championed punishment and criminal justice reform. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 581-93 (1990). During this period, there was a reduction of capital crimes from the more than 204. This was through reform efforts of Charles Dickens in his novels such as OLIVER TWIST, adapted to the musical movie OLIVER!. The Judicature Acts of 1873-75 implemented this reform. *See* Thompson at 226 and 452. (Also for the reforms of Jeremy Bentham *see* Thompson at 451).

For the reform of policing and criminal justice see the discussion of Henry & John Fielding in John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983), and J.M. Beattie, *Sir John Fielding and Public Justice: The Bow Street Magistrates' Court, 1754-1780*, 25 LAW & HIST. REV. 61 (2007). Arguably, Henry and John started the first police force, the Bow Street Runners, and conducted a magistrate court to treat the criminal justice problems of their day. Henry was the author of THE HISTORY OF TOM JONES, A FOUNDLING, made into a movie in 1963 starring Albert Finney. After Henry's death, his brother, John, who was blind, continued the police/magistrate work and reforms.

See also Simon Devereaux, *Imposing the Royal Pardon: Execution, Transportation, and Convict Resistance in London, 1789*, 25 LAW & HIST. REV. 101 (2007) (outlining the need for reforms of an unfair English justice system causing prisoners to refuse transportation and instead opt for the death penalty as a protest.). *See also* James J. Willis, *Transportation Versus Imprisonment in Eighteenth and Nineteenth-Century Britain: Penal Power, Liberty, and the State*, 39 LAW & SOC'Y REV. 171 (2005); BAKER at 516 on transportation to America and Botany Bay.

2. For "unusual" meaning illegal at common law *see* Claus at 122. Punishments for the second Jacobite Raising of 1745-46, to put James II's son, Bonnie Prince Charles, on the throne, were brutal and unmitigated by the English Bill of Rights. *See* Claus at 144; Granucci at 856 and JOHN PREBBLE, CULLODEN (1967). The "Jacobite Rising" gets its name from "*Jacobus,*" Latin for James, and is the backdrop to Henry Fielding's THE HISTORY OF TOM JONES, A FOUNDLING.

Culloden ended the rebellion with a great slaughter. The song *Ye'll Take the High Road* comes from the aftermath:

Oh! ye'll take the high road and
I'll take the low road,
And I'll be in Scotland afore ye;
But me and my true love
Will never meet again
On the bonnie, bonnie banks of Loch Lomond.

One man is taking the "high road," the fast road as in a "highway." But even though the other man takes "the low [slow] road," he will get home first because this "low road" is the one his spirit takes after his execution.


"Culloden" — Morier


Cesare Beccaria

3. LEVY at 232-33, noting the influence of Beale and objections to "cruel" punishments. Although Parr at 42 argues that "[n]either the English nor the Framers, however, intended to incorporate a guarantee of proportionality," he notes that the Eighth Amendment's framers did "misinterpret English history and intended to prevent certain modes of punishment. *See* Parr at 49. On this issue *see* Granucci at 847, noting the paradox that America omitted prohibition on excessive punishments but instead adopted a prohibition that did not exist in English law of cruel punishments.


John Adams

4. The Italian jurist and philosopher Cesare Beccaria, ON CRIMES AND PUNISHMENTS (1763-64), was very influential with the founding generation. LEVI at 135. Beccaria based his thinking on punishment on the concept of proportionality. *See generally* Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1975) (concluding that the Supreme Court's embracing of the proportionality doctrine in *Weems* was correct when looking at the Eighth Amendment's enlightenment antecedents). For Beccaria's influence on Blackstone *see* Schwartz at 788, on Montesquieu *see* Schwartz at 810, on Voltaire *see* Schwartz at 811-13, on Jefferson *see* Schwartz at 817-18, and on Benjamin Rush *see* Schwartz at 823.

In fact, John Adams in his opening statement defending the soldiers in the Boston Massacre case invoked Beccaria:

"May it please your honors, and you, gentlemen of the jury: I am for the prisoners at the bar, and shall apologize for it only in the words of the Marquis Beccaria: If I can be the instrument of preserving one life, his blessing and tears of transport shall be a sufficient consolation to me for the contempt of all mankind." Quoted in Schwartz at 814 and n.148.


Engraving of the Boston Massacre by Paul Revere

5. *See* Erwin C. Surrency, *The Transition From Colonialism to Independence*, 46 AM. J. LEGAL HIST. 55, 56 (2008).

TOM JONES (United Artists 1963)


Henry Fielding


John Fielding

OLIVER! (Columbia Pictures 1968)


Charles Dickens