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

—THE EIGHTH AMENDMENT

BY ROBERT J. McWHIRTER

Baby, Don't Be Cruel PART I

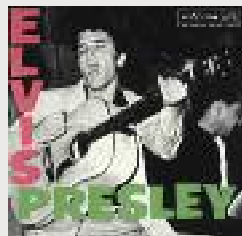
What's So "Cruel & Unusual" About the Eighth Amendment?[1]

Before his death in 1305 William Wallace saw his executioners pull out his intestines—and there was nothing "cruel *and* unusual" about it.

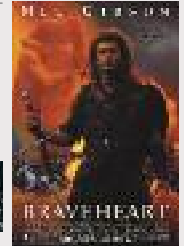
Wallace gets special attention because he was "Braveheart," and they made a big movie about him. But he was only one of thousands during British history to receive the well-codified formula of a traitor's death.[2] Thus, even though for the time his punishment was "cruel," it was hardly "unusual."[3]

This strange coupling of "cruel and unusual" that the Eighth Amendment prohibits is the measuring rod for constitutional analysis of any punishment. Though we could argue American capital punishment today is "cruel,"[4] history provides many worse examples—pulling out the tongue, slicing off the nose, cutting off genitals, boiling to death—that were all common punishments throughout English history.[5]

But as we will see at the end of this chapter, the Eighth Amendment was part of a movement of punishment reform.[6] At its passage, the traditional ☛

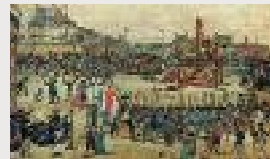


1. What would the Framers have thought of Elvis Presley singing *Don't Be Cruel* (1956) when they wrote the Eighth Amendment? Elvis released this as a single with *Hound Dog* on the other side. Written with Otis Blackwell, this is the only record to have both sides reach No. 1 on the charts. www.songfacts.com/detail.php?id=1140 (last visited Jan. 13, 2008). See the lyrics at www.lyricsfreak.com/e/elvis+presley/dont+be+cruel_20048329.html. Watch Elvis sing *Don't Be Cruel* at www.youtube.com/watch?v=sdmNx3_0oEE.



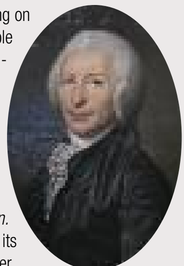
2. BRAVEHEART (20th Century Fox 1995). **Death by Drawing, Hanging, and Quartering:** "The victim, if male, was hanged but cut down while still alive [the hanging supposedly dulled the pain]; his genitals were cut off and burned before him; he was disemboweled, still alive, and then he was cut into four parts and beheaded. . . . Women convicted of treason were sentenced to being burned alive, although they were usually first strangled until unconscious." LEONARD V. LEVY, ORIGINS OF THE BILL OF RIGHTS, 234-35 (1999) (Parliament did not prohibit drawing and quartering for treason until 1870, but it was last inflicted in 1817 and burning of women ended in 1790).

3. **Death by Beheading:** The cause of death is simple enough—after the chop no more blood goes to the brain, the blood in the brain drains out and without blood the brain gets no oxygen, destroying it within seconds or minutes.



In England, simple beheading, as opposed to hanging on the gallows or burning at the stake, was an honorable death for noblemen. In the French Revolution's egalitarian spirit, Dr. Joseph Guillotin recommended in 1791 a device to execute people by beheading, making each person's execution equal to another. Guillotin did not invent the guillotine; it just got his name. France used it from 1792 until it abolished the death penalty in 1981. Older and less efficient devices were the *Halifax Gibbet* and *Scottish Maiden.*

Though the guillotine is outlawed, some still see its potential. In 1996, Georgia state legislator Doug Teper proposed the guillotine as a replacement for the electric chair so the condemned could be organ donors. The proposal was not adopted.

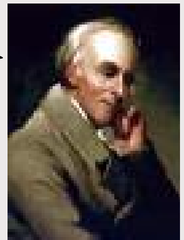


Dr. Joseph Guillotin

The movie **Papillon** (Allied Artists Pictures 1973), starring Steve McQueen and Dustin Hoffman, has a guillotine scene of a prisoner.

4. *See, e.g.,* W. Noel Keyes, *The Choice of Participation by Physicians in Capital Punishment,* 22 WHITTIER L. REV. 809, 809-10 (2001).

5. LEVY at 234-35.



Dr. Benjamin Rush, by Peal, c. 1818 ☛

6. All the American colonies had capital punishment, but generally for fewer crimes than in England. 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, 133-34 (2002). Dr. Benjamin Rush, a signer of the DECLARATION OF INDEPENDENCE opposed capital punishment in his *Considerations of the Injustice and Impolicy of Punishing Murder by Death* (1792) and *An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society* (1787). Levi at 135-36 and Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine,* 24 BUFF L. REV. 783, 823 (1975) (a well-quoted and documented account of enlightenment thinkers as the precursors showing the original intent of the Eighth Amendment's framers). "It is in my opinion, wrote Rush, "murder to punish murder by death." For Dr. Rush and the movement to abolish the death penalty in early America, *see* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 103-09 (2002) and LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENTS AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 (1989) (especially Chapter 3).

For the abolition of capital punishment in England see J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 518 (4th ed. 2002) and in America, Levi at 136-38, noting the first anti-death penalty movement in 1800-60 and the growth of prisons. *See also* Levi at 134, noting that slaves were favored for capital punishment. For death penalty reforms from Civil War on, *see* Levi at 138-39.

Conversely, for a presentation of literary support of the death penalty of his day from William Wordsworth, see Gregg Mayer, *The Poet and Death: Literary Reflections on Capital Punishment Through the Sonnets of William Wordsworth,* 21 ST. JOHN'S J. LEGAL COMMENT 727 (2007).

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punishments of pillorying, disemboweling, decapitation, and drawing and quartering were out of style.[1]

The modern question that this history presents is, "What does the Eighth Amendment's prohibition on 'cruel and unusual' punishments mean?" That is the central debate in the Supreme Court today.[2]

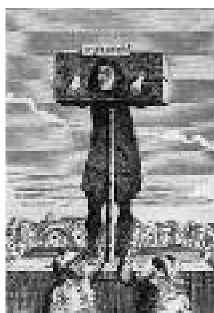
Underscoring this debate is that the terms "cruel and unusual" are perhaps the most relative in the Constitution. Primarily, the words are relative to personal experience.[3] All punishment is *cruel* to somebody but not necessarily *unusual* to everyone.

More pertinent to constitutional interpretation is that the words are also relative to the age. What is cruel at one point in history is not so in another,[4] and we do know that the word "cruel" had a slightly different meaning in the 17th century.[5] For example, Puritans and others considered the oath *ex officio* "cruel," though few of us today would consider a compelled oath cruel.[6]

James Madison proposed what ultimately became the Eighth Amendment on June 12, 1789. Even at the time, those voting on the Bill of Rights recognized the relativity of the terms.[7] Indeed, the sum total of legislative comment at the passing of the amendment in Congress from Representatives Smith of South Carolina and Livermore of New Hampshire demonstrate this relativity:

> MR. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.
>
> MR. LIVERMORE: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine.[8]

After this brief exchange, the record states that "[t]he question was put on the clause, and it was agreed to by a considerable majority."[9] So, for Representative Livermore and "a considerable



1. All forms of corporal/physical punishment (except the death penalty) disappeared in the early years of the republic. *See* John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?,* 46 UCLA L. REV. 1727, 1732 (1999). *Weems* at 217 U.S. 349, 389-400 (1910) (dissenting opinion) discusses the early attitudes toward the Eighth Amendment as forbidding the unusual cruelty in the method of punishment that the Framers condemned. As we shall see, the reaction to the punishment meted out to Titus Oates, including his pillorying, was a main source of the "cruel and unusual" clause.

2. For example, a debated question is the extent to which the Eighth Amendment prohibits excessive punishments. *See, e.g., Roper v. Simmons,* 125 S. Ct. 1183, 1190 (2005) ("[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions"); *Atkins v. Virginia,* 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits 'excessive' sanctions"); *Solem v. Helm,* 463 U.S. 277, 284 (1983) ("The [Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed"). *See generally* Samuel B. Lutz, *The Eighth Amendment Reconsidered: A Framework For Analyzing the Excessiveness Prohibition,* 80 N.Y.U. L. REV. 1862 (2005) (citing Supreme Court cases prohibiting all "excessive" criminal sanctions). Conversely, others argue the Framers could not have intended the Eighth Amendment to restrict punishments like the death penalty prevalent when the amendment was passed. *See Harmelin v. Michigan,* 501 U.S. 957, 975-83 (1991) (joint opinion) (Scalia, J.); *McGautha v. California,* 402 U.S. 183, 226 (1971); *Ewing v. California,* 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (the Eighth Amendment prohibits "only certain *modes* of punishment").

See generally Aimee Logan, Note, *Who Says So? Defining Cruel And Unusual Punishment By Science, Sentiment and Consensus.* 35 HASTINGS CONST. L.Q. 195-220 (2008).

3. The author once helped represent a battered woman convicted for killing her abusive spouse. She told her lawyer, "Prison is the only safe place I have ever known."

4. See Harry F. Tepker, *Tradition & The Abolition of Capital Punishment for Juvenile Crime,* 59 OKLA. L. REV. 809, 814-15 (2006) (showing the historic relativity of the terms "cruel and unusual"). See also Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards of Cruel and Unusual Punishments Clause,* 126 U. PA. L. REV. 989, 1030-32 (1978) (The Framers' use of a moral concept of "cruelty" rather than specifically enumerated list of prohibited punishments demonstrates the validity of an evolving standard).

5. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning,* 57 CAL. L. REV. 839, 860 (1969).

Sir William Blackstone, by Thomas Gainsborough, 1774

6. The delegates discussed the Fifth Amendment just before the Eighth, showing the Amendments' thematic close relationship. See Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment,* 31 PEPP. L. REV. 661, 665-66, 668 and n. 45, 679 (2004) (noting the relationship between the amendments regarding prohibitions of "barbarous interrogations" and coercive interrogations). *See also* Laurence Claus, *The Antidescrimination Eighth Amendment,* 28 HARV. J. L. & PUB. POL'Y 119, 131 (2005); Granucci at 848-50.

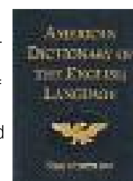
The delegates heavily relied on Blackstone's COMMENTARIES and his notation that "punishment" included torturous interrogations thus showing the Fifth and Eighth Amendments' connection. Rumann at 674-75 and n.106. Tacitly, the Supreme Court has recognized this relationship between the Fifth Amendment's pretrial prohibitions on torture and the Eighth Amendment's limits on posttrial punishment. *See Furman v. Georgia,* 408 U.S. 238, 345 (1972) ("the Eight Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case."). *Quoted* in Rumann at 707.

The Eighth Amendment's bond clause, stating, ***"Excessive bail shall not be required,"*** also demonstrates a link with the Fifth Amendment's due process clause, stating, ***"nor be deprived of life, liberty, or property, without due process of law."***

The medieval bail practice was for the defendant to promise to show up for trial or have a surety. If the defendant has fled from justice and was then caught and tried, his goods were forfeited even if he was acquitted. Thomas A. Green, *The Jury and the English Law of Homicide,* 1200-1600, 74 MICH L. REV. 414, 425. *See also* Claus at 123 on the overly high bonds of the 1670 – 1680s.

On modern federal bond practice, *see* Ann M. Overbeck, Editorial Note, *Detention for the Dangerous: The Bail Reform Act of 1984,* 55 U. CIN. L. REV. 153, 193-97 (1986).

Noah Webster



7. Tepker at 814. During the Constitutional debates before ratification and the subsequent Bill of Rights, Noah Webster, an advocate of a national constitution and author of America's first great dictionary, stated the common sense of the problem: "[U]nless you can, in every possible instance, previously define the words excessive and unusual—if you leave the discretion of Congress to define them on occasion, any restriction of their power by a general indefinite expression, is a nullity—mere formal nonsense." *Id.,* quoting Noah Webster, Reply to the Pennsylvania Minority: "America," DAILY ADVERTISTER (N.Y.), Dec. 31, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 553, 559 (Bernard Bailyn ed., 1993).

The relativity of terms even at the time creates a great problem for those arguing "original intent" in constitutional interpretation. For example, Justice Brewer wrote, "The Constitution is a written instrument. As such its meaning does not alter. That which is meant when adopted it means now." *South Carolina v. United States,* 199 U.S. 437, 448 (1905). Given the clear relativity at the time of the Eighth Amendment's passage, advocating a meaning that "does not alter" appears to be a false altar indeed.

Justice David Josiah Brewer

8. House debate discussed and quoted in *Weems v. United States,* 217 U.S. 349, 368-69 (1910), and *Furman v. Georgia,* 408 U.S. 238, 243-45, 262-63 (1972). *Quoted also* in Tepker at 815, citing 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1834), and Granucci, at 842.

9. 1 ANNALS OF CONG. 782-83 (1789).

10. With this history, the modern Supreme Court's reading of the Cruel and Unusual Clause is well founded. *See e.g., Weems v. United States,* 217 U.S. at 378 ("the proscription of cruel and unusual punishments 'is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice'"). What is "cruel and unusual" must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and punishment must accord with the "dignity of man." *Trop v. Dulles,* 356 U.S. 86, 100-01 (1958). *See also* William C. Heffernan, *Constitutional Historicism: An Examination of the Eight Amendment Evolving Standards of Decency Test,* 54 AM. U. L. REV 1355 (2005) (arguing that the jurisprudence on the punishment's clause conforms to the need to apply the constitution to different issues). Regarding *Weems, see also* Rumann at 697, Granucci at 843, Bukowski at 423, Parr at 51-53, Claus at 158-59. *Also,* Pressly Millen, *Interpretation of the Eight Amendment:* Rummel, Solem, *and the Venerable Case of* Weems v. United States, DUKE L. J. 789, 84-108 (1984) (*"Weems* would allow courts freely to decide what is "cruel and unusual," as the eight amendment's adopters intended, without the scope of review being bound by narrow historical constraints"). Schwartz & Wishingrad at 793-800. On *Weems'* break from earlier Eighth Amendment cases, *see* Claus at 152-53 and Granucci at 842.

majority," the clause that became our Eighth Amendment was not all that clear—if it reflected anything, it was "a great deal of humanity."[10]

Of course, the world of 1789 was a very different place, which the punishments reflect:

> MR. LIVERMORE: No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?[11]

Today, we do not condone whipping or cutting off ears.[12] For one thing, in 1789 there were virtually no prisons.[13] Indeed, Representative Livermore foreshadowed that there would be other options less cruel, even by 1789 standards, to achieve the goals of criminal justice:

> MR. LIVERMORE: If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

So, what the Eighth Amendment is for, according to the Framers, is "correcting vice and deterring others."

Notably, this leaves out retribution as a goal of punishment. Although Livermore did say that "villains" often "deserve whipping," the main purpose of the Eighth Amendment was not to portion what criminals "deserved" but rather it was about "a great deal of humanity." The Eighth Amendment that the first congress passed and the people ratified reflect this humanity.

But, Madison did not pull the words "cruel and unusual" out of the air. Rather, this wording is verbatim from the English Bill of Rights, Section 10, of 1689, written exactly 100 years earlier:

> *That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*[14]

The only difference is that the Eighth Amendment states that excessive bail "shall," rather than "ought" not, be required.

This English Bill of Rights language ended up ☛

Blackstone

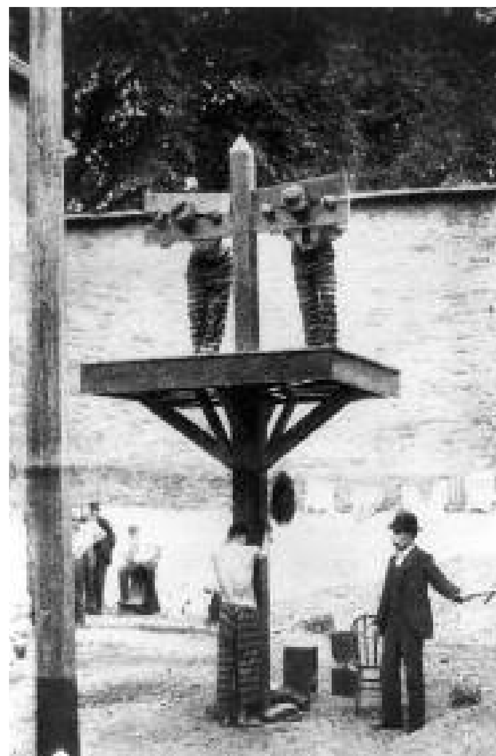
11. *Quoted in* Claus at 128-29 and Granucci at 842. *See also* Claus at 129 noting punishments under the original Federal Crimes Act. In all likelihood, Rep. Livermore would have known of Blackstone's somewhat defensive catalogue of English punishments: "Of these [crimes] some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain or disgrace are super-added: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savor of torture or cruelty: A sledge or hurdle being 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 emboweled or burned, till previously deprived of sensation by strangling.

Some punishments consist in exile or banishment, by abjurgation of the realm, or transportation to the American colonies: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or movables, or both or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears: others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or face. Some are merely pecuniary, by stated or discretionary fines: and lastly there are others, that consist primarily in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for crimes, which arise from indigence, or which render even opulence disgraceful. Such as whipping, hard labor in the house of correction, the pillory, the stocks, and the duckingstool. Disgusting as this catalogue may seem it will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment, to be met within the criminal codes of almost every other nation in Europe." *Quoted in* Granucci at 862-63 citing to 4 W. BLACKSTONE, COMMENTARIES 377.

12. Sterilization may be somewhat akin to cutting off ears and was held cruel and unusual in *Mickle v. Henrichs,* 262 Fed. 687 (D. Nev. 1918), but not in *State v. Feilen,* 70 Wash. 65, 126 Pac. 75 (1912).

As for whipping, it was an official punishment under federal law until 1839 and in some states long after. Claus at 143, 154. As late as 1963, Delaware's highest court upheld a whipping sentence. *State v. Cannon,* 1900 A.2d 514 (Del. 1963).

Whipping or **"flogging"** was a common form of discipline in the British Navy. The Latin *flagellum* ("whip") is probably the source of the word "flogging" and "flagellation." Even Justice Scalia, the most forceful proponent of originalism on the Supreme Court, would pause at imposing a whipping sentence. "[I]n a crunch," he too might "prove a faint-hearted originalist": "I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging." Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CIN. L. REV. 849, 861-62, 864 (1989). Presumably branding and the removing of body parts are out of bounds too, though as Representative Livermore's statement shows, these were accepted punishments in 1789.


Delaware prison whipping post c. 1907

13. The prison reform movement did not succeed in creating the "penitentiary" system until the mid-1800s. *See generally* David J. Rothman, *Perfecting the Prison: United States, 1789-1865* in MORRIS & ROTHMAN at Chapter 4. This supposedly not "cruel and unusual" prison system yields some odd results. For example, in *Rummel v. Estelle,* 100 S. Ct. 1133 (1980), the Supreme Court held that a life sentence for three minor felony thefts aggregating in $229.11 was not a "cruel and unusual" punishment. By any measure, this is an absurd result. To choose between flogging, which even Scalia would find "cruel and unusual," and the life sentence the Supreme Court blessed in *Rummel* would be for most of us an easy choice—give me a good flogging any day! *But see* Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel,* 71 J. CRIM. L. & CRIMINOLOGY 378 (1980) (arguing that *Rummel* was "fundamentally sound" using a through historical analysis that only a law professor could love).

14. LEVY at 231; Granucci at 840, 852-53 (noting that the 8th Amendment was taken verbatim from the English Bill of Rights of 1689). Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law,* 79 HARV. L. REV. 635, 636 (1965 -1966). Granucci argues, "There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the 8th Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." Granucci at 845-846; *cited also* in *Furman v. Georgia,* 408 U. S. 238, 243-44 (1972). See also *Gregg v. Georgia,* 428 U.S 153, 169 (1979) (noting the English Bill of Rights as source of the Eighth Amendment).

in colonial legislation.[1] George Mason wrote it into the Virginia Declaration of Rights, § 9, of 1776.[2] This chapter will later treat the history of the English Bill of Right of 1689. But, for the concepts of crime, punishment and proportionality that the Eighth Amendment embodies, we begin with an earlier, even ancient, time.

"Cruel and Unusual" From *Lex Talionis*

When we speak of punishment being "cruel" or "unusual," or even "cruel and unusual," we speak from a perspective. A "cruel" or an "unusual" punishment is out of balance with a cultural norm. Or, to put it another way, the punishment is out of proportion.

Proportionality is an ancient concept. The bible speaks of "an eye for an eye."[3] Although often used today as an argument for retribution, this "eye for an eye," or *lex talionis*,[4] is actually about proportionality in punishment.[5] *Lex talionis* avoids the potentially disproportionate blood feud common in tribal societies.[6] The Eighth Amendment incorporates this ancient sense of proportionality.[7]

The Ancient Greeks are the source of any number of philosophical arguments on proportionality in many aspects of life, including punishment. Aristotle considered inequality in punishment as an injustice, calling it the "kind of justice indentified with injustice." For Aristotle, "What the judge aims at doing is to make the parts equal by the penalty he imposes."[8]

The Anglo–Saxons had the *lex talionis* concept, as well. King Alfred codified the *lex talionis* in England around 900 A.D.[9] Later, King Edward the Confessor incorporated the concept of proportionality in his laws.[10] Thus, the concept that the punishment should fit the crime has a long tradition in English law.

The early punishments for "murder" reflect the proportionality concept. During this Anglo–Saxon time, the "King's peace" or anything approaching a modern criminal justice system was centuries away. Thus, if you killed someone, you answered to his fam-

1. Predating the English Bill of Rights by almost 50 years was the Massachusetts Body of Liberties of 1641. Section 46 articulated, "For bodilie punishments we allow amounst us none that are inhumane Barbarous or cruel." Claus at 130-31. *See also* Granucci at 850 and Rumann at 667. The Reverend Nathaniel Ward (1578–1652), a Puritan clergyman and pamphleteer in England and Massachusetts, wrote the Body of Liberties, the first constitution in North America. The English Puritan Robert Beale was a great influence on Ward. Rumann at 668-69; Granucci at 851. Indeed, Granucci argues that the intent of the "cruel and unusual" punishments clause in the English Bill of Rights was only to prevent courts from imposing punishments not in the statutes and disproportionate sentences. The American framers, however, intended the meaning of Ward and Beal that torture, both before trial to obtain a confession as well as after trial as a punishment, is prohibited. Granucci *generally* and at 860.

LEVY at 237-38 notes that even after the Body of Liberties, Massachusetts branded robbers on the forehead and branded and flogged horse thieves. And the scarlet letter remained a favorite punishment as well as a future literary device in NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850), set in 17th-century Puritanical Boston about Hester Prynne, who gives birth after adultery, refuses to name the father, and struggles to create a new life of repentance and dignity. Several movie adaptations exist, including the THE SCARLET LETTER (Hollywood Pictures 1995), starring Demi Moore, Gary Oldman and Robert Duvall.

2. Claus at 124–27; Tepker at 816. For passage in other states with variations on the formulation, *see* Claus at 133. For the Confederation Congress' ban on "cruel and unusual" punishments in the Northwest Ordinance of 1787, *see* LEVY at 239 and Claus at 133.

See also Rumann at 673-74, 681 who argues conclusively that the Framers intended a general ban on the use of torture in both the Eighth and the Fifth Amendments. As Patrick Henry objected when arguing against the new Constitution because it lacked a Bill of Rights,

"In this business of legislation, your members of congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? – That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone." Quoted in Rumann at 677 and Granucci at 841 n.10.

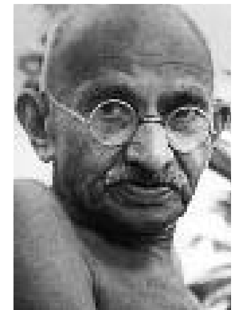
See also Ingraham v. Wright, 430 U.S. 651, 664-66 (1977) (discussing the origins of the cruel and unusual punishments clause in the English Bill of Rights of 1679, the Virginia Declaration of Rights of 1776).

Patrick Henry before the House of Burgesses, by Peter F. Rothermel, 1851

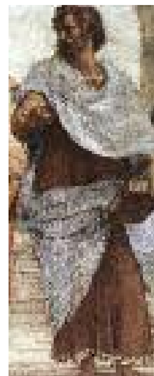
3. "If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered." THE JERUSALEM BIBLE, 162 (Jones ed. 1966) (*Leviticus* 24:19-20). *See* LEVY at 231, 410; Tepker at 816.

4. The term *lex talionis* is Latin – lex = "law" and talio = "equivalent to" or "equal" – a law of proportionality. *See* Granucci at 844.

5. Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty,* 1998 UTAH L. REV. 505, 509-10 (concluding the biblical verse "eye for eye" and *lex talionis* reflects not punitive or retaliatory values in ancient Jewish law but instead the standard of compensation or making the community whole); J.W. EHRLICK, THE HOLY BIBLE AND THE LAW 189-90 (1962) (noting that the "eye for eye" concept "established a fixed limit to retaliatory punishment"). *See also* Jack B. Weinstein, *Does Religion Have A Role In Criminal Sentencing?* 23 TOURO L. REV. 539, 542 (2007) (outlining historically the Jewish law against capital punishment); Alex Kozinski, Sanhedrin *II,* NEW REPUBLIC, Sept. 13, 1993, at 16 ("[T]he Talmud tells us, a Sanhedrin that upheld an execution in seven years or even in seventy years was scorned as a bloody court.").



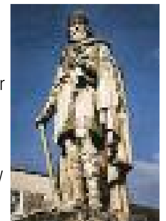
Lex talionis is not a prohibition on cruelty, it allows heinous punishments for heinous crimes. Granucci at 848. But, as Gandhi notes, "An eye for eye only ends up making the whole world blind." www.brainyquote.com/quotes/quotes/m/mohandasga107039.html.


From The School of Athens, Sanzio, 1509, showing Aristotle with the *Ethics.*

6. *E.g., Ecclesiastics* 8:5 "Reproach not a man that turneth from sin [crime], but remember that we are all worthy of punishment"; Deuteronomy 25:3 (if a person be adjudged wicked, order him beaten but no more than forty stripes, because above that number "thy brother should seem vile unto thee").

7. Granucci at 844-46 (tracing the constitutional ban on excessive punishment to the Old Testament and other elements of Western tradition).

8. *See* Granucci at 844 and at n. 23. Aristotle in context reads as follows: "The law never looks beyond the question, what damage was done? And it treats the parties involved as equals. All it asks is whether an injustice has been done or an injury by one party on other. Consequently, what the judge seeks to do is to redress the inequality which is this kind of justice identified with injustice. Thus in a case of assault or homicide the action and the consequences of the action may be represented as a line divided into equal parts … What the judge aims at doing is to make the parts equal by the penalty he imposes." ARISTOTLE, ETHICS 148-49 (Penguin Classics ed. 1955).


Statue of Alfred the Great in Wantage, England

9. Granucci at 844-45 (discussing the Anglo–Saxon fine schedule and noting that Germanic peoples had the fixed punishments called the Gulathing and Frustathing Laws.

Alfred the Great (*Ælfred* from the Old English *Ælfrēd* (c. 849–899)) was king of the southern Anglo–Saxon kingdom of Wessex (871 to 899) but styled himself "King of the Anglo–Saxons." He is "the Great" for his defense against the Danish Vikings, and because he encouraged education, and improved the legal system.

King Edward the Confessor

10. LEVY at 232; Rumann at 666.

Edward the Confessor or *Eadweard III* (c. 1003/1004–1066) was the son of Ethelred the Unready and the second to the last Anglo–Saxon King of England, the last of the House of Wessex. Edward died in 1066 with no son, causing a conflict between three claimants: William, Duke of Normandy, supplanted Edward's successors Harold Godwinson and Edgar Ætheling. The Roman Catholic Church canonized Edward in 1161 and he is the patron saint of kings, difficult marriages and separated spouses. From King Henry II to 1348 he was the patron saint of England and remains the Royal Family's patron saint.

ily, clan or tribe. Either a blood feud would begin or the killer paid reparation to the victim's family, called the *wergild*,[1] which the victim's social rank determined. The killer's actual intent was unimportant—accidents to premeditated murder all demanded the *wergild*.[2] The law recognized no mental state, *mens rea*, to make an act a crime and, indeed, the law recognized no difference between crime and tort.[3]

A variation of the *wergild* was the *murdrum*, which the Normans revived from the older *Danelaw* in England.[4] The *murdrum* applied to an Anglo–Saxon who killed a Norman, a likely occurrence with a lot of unhappy Anglo–Saxons after the Battle of Hastings in 1066 A.D.

> ...nor excessive fines imposed...
> THE EIGHTH AMENDMENT

The *murdrum* involved a very large fine to the king for such a killing. Moreover, the Normans assumed that any dead body was Norman, unless the locals could prove he was a Saxon.[5] If not, the village had to pay the *murdrum*. Our word "*murder*" comes from *murdrum*.[6]

Surely, the *murdrum* created political stability for the Norman rules of England. But, like the *wergild*, it also had an element of proportionality. The Normans required a set fine for a Norman's killing—not the destruction of the village or other reprisal.

After the Norman Conquest of England in 1066, the Anglo–Saxon system of proportional punishments had disappeared, giving the King unfettered discretion in punishment.[7] *Magna Carta*, Chapter 14, of 1215 sought to correct this imbalance, demonstrating *lex talionis* and the proportionality tradition:

> *A free man shall not be amerced* [fined] *for a trivial offense, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood*.[8]

Magna Carta then articulates the fundamental law prohibiting disproportional punishment.[9]

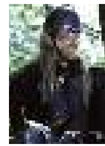
Hywel Dda (King Howell the Good) b. circa 880 d. 950 in Wales.

1. The word *wergild* is composed of *were,* meaning "man" in Old English and other Germanic languages (as in *werewolf)* and *geld,* meaning "payment." *Geld* is the root of English gilt and is the Dutch, Yiddish and German word for money. Wergild in practice may have existed for long after is officially fell into disuse. Green at 694.

Something akin was the Welsh compensation payments to avoid blood feuds in the "laws of Hywel Dda" named after Hywel Dda ("the good"), who was king of most of modern-day Wales in 949. BAKER at 30.

On proportionality in homicide cases in ancient Jewish law, see Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law,* 81 U. DET. MERCY L. REV. 751, 806-09 (2004), *and* Irene Merker Rosenberg & Yale L. Rosenberg & Bentzion S. Turin, *Murder by Gruma: Causation in Homicide Cases Under Jewish Law,* 80 B.U. L. REV. 1017, 1021, 1052-59 (2000) (hereafter *Gruma)* (noting the lack of anything like felony murder).

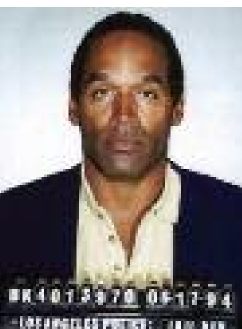
See also Ehrlick at 130, noting that the Hebrew bible states that *"Thou shalt not commit murder"* but the Protestant and Catholic bibles state that *"Thou shalt not kill."*



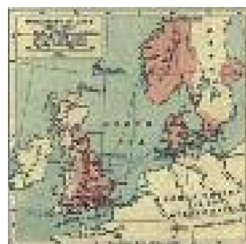
A Ceorl of Rohan from the Lord of the Rings movies.

2. See Frederick Pollock, *English Law Before the Norman Conquest,* 14 L. Q. REV. 291, 299, 302 (1898). Private vengeance in Anglo–Saxon times drew no distinction between willful, negligent or accidental killings—rather, the issue was the number of cattle for payment. See Thomas A. Green, *The Jury and the English Law of Homicide,* 1200-1600, 74 MICH. L. REV. 413, 417 (1976) (hereafter Green, *Homicide)* (noting that the earliest "dooms", i.e., Anglo–Saxon laws or decrees, only record the level of compensation for homicides). For example, a thegn (or thane), who was an Anglo–Saxon official, was worth a wergild of six times that of a ceorle, a common freeman.

The word ceorle is also the basis of the British place and surnames of Carlton and Charlton, meaning "the farm of the churls." The names Carl and Charles are derived from churl or ceorle. In Tolkien's fictional Middle-earth, a Ceorl is a rider of Rohan.



3. On the development of *mens rea, see* A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW 355-60. *Also* FREDERICK G. KEMPIN, HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW 182 (1990); George Jarvis Thompson, *History of the English Courts to the Judicature Acts,* 17 CORNELL L. Q. 9, 13-17 (1932). The Anglo–Saxons would have had no Simpson criminal trial for murder. The only thing they would have understood was his later civil trial for wrongful death.



4. On *murdrum* fines and *wergilds see* Green, *Homicide* at 419.

The Danes and Normans were cousins, both having originated from Scandinavia ("Norman" is an adaptation of "Northmen" or "Norsemen"). The *Danelaw,* aka the *Danelagh,* applied over the parts of Enland the Danes had taken from the Anglo–Saxons in the ninth and tenth centuries (the Kingdoms of Northumbria, East Anglia, and the Five Boroughs of Leicester, Nottingham, Derby, Stamford and Lincoln). The Danelaw had its greatest extent under King Canute's empire. Our English word "law" comes from the danish "lagh," found in the word *Danelagh.* BAKER at 3.

Canute is also famous for showing his flattering couriers that even he could not turn back the tide.

King Canute, 1849
F.Holl engraving after R. E. Pine The Danelaw appeared as late as the early 12th century in the listing of the Laws of King Henry I *(Leges Henrici Primi.)* and the law of Cnut and King Edward the Confessor are our main sources for Old English law. BAKER at 3.

5. Modern forfeiture law also came from this Coroner's Inquest. Any object that caused a death was a *deodand* from *Deo damdum,* meaning "giving to God" when giving the object to the Church expunged the sin of the item. Under the Normans the king, not the Church, took it. The *deodand* could be any chattel—an axe, hoe, dog, horse, mill-will or tree. By the 19th century the *deodand* could be a ship or locomotive, which is why the practice was abolished in 1846.

6. KIRALFY at 366 n.86. Even long after the Norman Conquest, the murdrum continued to exist. The murdrum boosted the Treasury, which the common people resented, especially when crown officials applied it to any death, not just homicide. Eventually it only applied to felonious killing and Edward III abolished it in 1340. Green, *Homicide* at 456 n.157, J. M. Kaye, *The Early History of Murder and Manslaughter,* 83 L. Q. REV. 365, 366 and n.11 (1967).

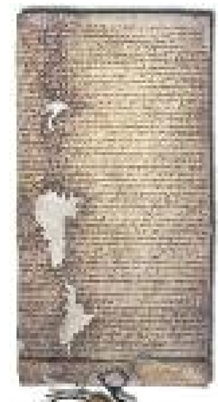
John of England signs Magna Carta

7. *See Furman v. Georgia,* 408 U. S. at 242-43 ("Following the Norman conquest of England in 1066, the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary amercement. Although amercement's discretionary character allowed the circumstances of each case to be taken into account and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines.").

8. *Quoted in* LEVY at 231-32 and Granucci at 845-46. Also quoted in *Furman,* 408 U.S. at 243 (noting that "[t]he problem of excessive amercements became so prevalent that three chapters of the *Magna Carta* were devoted to their regulation. Maitland [the historian] said of Chapter 14 that 'very likely there was no clause in the *Magna Carta* more grateful to the mass of the people.'").

This is also the origin of the Eighth Amendment's clause prohibiting "excessive fines."

9. *See* Schwartz at 787-88 for Magna Carta and proportionality. *See also* BAKER at 512 (noting the penal policy of the common law that judges for misdemeanors could not disproportionately fine an offender).



Magna Carta (not the original that King John signed, which has been lost—though four copies survive—but the 1225 version by Henry III preserved in the UK's National Archives).

Double Jeopardy and Proportionality

Underscoring the proportionality foundation of the Eighth Amendment's "*cruel and unusual*" clause is the Fifth Amendment's Double Jeopardy clause:

> *[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.*[1]

...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

FIFTH AMENDMENT, DOUBLE JEOPARDY CLAUSE

In preventing a person from having to face a second trial after acquittal (or even conviction), the double jeopardy clause is a key foundation of the rule of law. In addition, though, the clause forbids the government from imposing multiple punishments for the same offense,[2] encompassing the principle of proportionality.

This multiple punishment prohibition is as ancient as the proportionality concept of "an eye for an eye."[3] Jewish law prohibited double jeopardy, holding that "for one offense, only one punishment might be inflicted."[4] Thus, a person condemned to death could not also be flogged.[5] The story of Cain killing Abel has a biblical basis, because after God punished Cain He forbade anyone to kill him upon risk of God's sevenfold vengeance.[6]

The Romans held *nemo debet bis puniri pro uno delicto*—"No one ought to be punished twice for the same offense."[7] This norm passed into canon law with some added biblical justification. Saint Jerome in 391 A.D. read a verse from Nahum 1:9 that "Affliction shall not rise up the second time" to mean "that God does not punish twice for the same act" or "not even God judges twice for the same act."[8]

Thus, the Eighth Amendment's historical foundation of proportionality finds support in the history of the Fifth Amendment's double jeopardy clause. This concept of proportionality applies to all punishments. But, nowhere is proportionality in punishment more important than the death penalty. If a non-death penalty is

1. U.S. CONST. amend. V.

2. *Hudson v. United States,* 522 U.S. 93, 99 (1997); *Missouri v. Hunter,* 459 U.S. 359, 366 (1983); *see also Dep't of Revenue of Mont. v. Kurth Ranch,* 511 U.S. 767, 784 (1994) (holding that a "drug tax" assessed after a conviction violates double jeopardy); *North Carolina v. Pearce,* 395 U.S. 711, 718-19 (1969) (holding that "punishment already exacted must be fully 'credited"' upon re-conviction), *overruled on other grounds by Alabama v. Smith,* 490 U.S. 794 (1989). *But see Witte v. United States,* 515 U.S. 389, 407 (1995) (Scalia, J., concurring in the judgment) ("I adhere to my view that 'the Double Jeopardy Clause prohibits successive prosecution, not successive punishment."' (citation omitted)).

3. David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* 14 WM. & MARY BILL OF RTS. J. 193, 197 (2005). *See also* Justin W. Curtis, *The Meaning of Life (or Limb): An Originalist Proposal for Double Jeopardy Reform,* 41 U. RICH. L. REV. 991, 995-96 (2007), noting the Code of Hammurabi fined and removed a judge that changed a final sentence.

4. *See* Rudstein at 197, citing GEORGE HOROWITZ, THE SPIRIT OF JEWISH LAW 170 (1973); SAMUEL MENDELSOHN, THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS 35 & n. 62 (2d ed. 1968).

5. Rudstein at 197, *citing* the Babylonian Talmud. *See also* Rudstein at 197 for the example of rabbis teaching that when a man forcibly engages in sexual intercourse with his maiden sister he may be flogged for the intercourse with his sister but not also fined for intercourse with a maiden because *Deuteronomy* 25:2 means that "you punish him because of one guilt but not because of two guilts."

Not punishing "because of two guilts" is broader than American law, which allows stacking of multiple punishments for separate crimes even when committed in the same course of conduct and at the same time.

William Blake's *The Body of Abel Found by Adam and Eve*

6. Cain said unto the Lord, My punishment is greater than I can bear. Behold, thou hast driven me out this day from the face of the earth; and from thy face shall I be hid; and I shall be a fugitive and a vagabond in the earth; and it shall come to pass, that every one that findeth me shall slay me. And the Lord said unto him, Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold. And the Lord set a mark upon Cain, lest any finding him should kill him. *Genesis* 4:13-15 (King James). *See* Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law,* 81 U. DET. MERCY L. REV. 751, 755 (2004).

Cain Killing Abel, Detail of the Ghent Altarpiece (1432)

St. Jerome, Ghirlandaio (1480)

7. Rudstein at 200, *citing* JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 2 (1969) and BLACK'S LAW DICTIONARY 1736 (8th ed. 2004). Rudstein notes, however, that because Roman criminal prosecution was generally brought by an accuser/victim and not the state, the law did not prevent other accuser– victims from charging the same defendant for the same crime.

8. *Nahum* 1:9 (King James) in Rudstein at 201. *Also cited in Bartkus v. Illinois,* 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting). Jerome's interpretation controlled in canon law ignoring the fact that God would not need to judge twice because, unlike humans, God would not need to. *See* Rudstein at 201.

9. Julius Rosenberg and Ethel Greenglass Rosenberg met death as traitors. The Rosenbergs were executed on June 19, 1953, after having been found guilty of conspiracy to commit espionage for supposedly passing information about the nuclear bomb to the Soviet Union. The Rosenbergs' guilt and execution have been controversial ever since.

10. EHRLICH at 50. *See also* Hiers discussing capital offenses in Hebrew law (at 760-61), negligent homicide (761-62) and killing a burglar (762).

11. Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation,* 78 TUL. L REV. 1169 (2004) (hereafter Rosenberg & Rosenberg).

12. Rosenberg & Rosenberg at 1178 (noting that the proof and evidence rules in the rabbinic codes amounted to a supercharged Bill of Rights). *Also* Rosenberg & Rosenberg at 1208-09 ("The difficulty of conviction [in Jewish law] effectively emphasizes the sanctity of beings created in God's image. In America, on the other hand, executions have become almost numbingly routine, particularly in some jurisdictions, making ours, in a sense, a death-oriented society in which life, if not cheap, at least has less value."). *Also* Hiers at 797-800.

13. *See* Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination,* 63 N.Y.U. L. REV. 955, 1031-41 (1988) (discussing the nearly absolute Talmudic prohibition against using confessions in criminal cases).

14. Rosenberg & Rosenberg at 1179 *citing Deuteronomy* 17:6, 19:15; *Numbers* 35:30.

"Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses: but one witness shall not testify against any person to cause him to die." *See also* also EHRLICH at 52.

15. Rosenberg & Rosenberg at 1179 and 1190.

disproportionate, even if it involves mutilation, something can be done about it—restitution paid, a good name cleared, fines waived, estates or property restored. But death precludes any restoration. Thus, the history of the Eighth Amendment, as well as the modern debate, focuses on the death penalty.

A History of Death

The death penalty is nothing "unusual" in history. As the start of this chapter presented, governments—be they kings or democracies—readily impose capital punishment on traitors.[9] And the death penalty is biblically old.

Biblical Death

Mosaic law listed 36 capital crimes, including:

> adultery, sex perversion, incest, homosexuality, blasphemy, idolatry, false prophecy, profaning the Sabbath, witchcraft, polytheism, sins against parents, kidnapping, treason, and murder.[10]

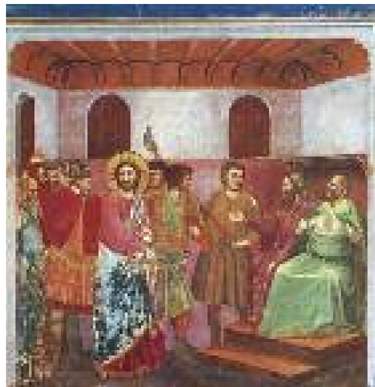
Although this list seems long to our modern eye, capital sentences were actually uncommon.[11] Procedural rules in Jewish law made it very difficult to convict a person. The rabbis designed it this way to protect the sanctity of life.[12]

The trial procedures favored the defendant, and he had every chance to argue for acquittal. For example, circumstantial evidence was disallowed, and confessions were inadmissible.[13] Also, Jewish law required at least two competent and independent witnesses to prove a fact.[14] Any discrepancy between the witnesses, even on minor matters, disqualified the testimony.

The judges who heard capital cases interrogated the witnesses rigorously on even the most tangential facts. They would then discuss the case overnight, seeking any possible basis for acquittal.[15] In the Sanhedrin, the high court, favorable evidence to the defendant had greater weight than unfavorable, and the voting procedure on the death penalty favored the defendant.[16]

Even after trial, the courts allowed the convicted defendant to return to court with any favorable evidence, even if he was on his way to his execution.[17] On the way to the execution site, at some distance from the court, court officials would shout out the convict's name and crime and call for any exculpatory evidence.[18]

The condemned man also deserved a humane death, and efforts were made to minimize suffering and humiliation.[19] In terminology similar to later Christian Medieval Europe, the condemned merited "a favorable death."[20] The condemned received frankincense and wine "to dull his senses" to make the execution less painful.[21] And though the methods of execution—stoning, burning, beheading, strangulation—may seem harsh, each was carried out to avoid suffering and degradation.[22]



16. The Great Sanhedrin served as the Jewish high court and legislature specified in Numbers 11:16, 17 "Gather unto me seventy men …elders of the people." The Sanhedrin heard the defense evidence first and testimony favorable to the defendant was irreversible but unfavorable testimony could be reversed. As for voting in capital cases a majority of one equaled an acquittal but conviction needed a majority of two. EHRLICH at 146-47.

17. *Id.* at 1190-91 noting that the Jewish law allowed the defendant to return to court as many times as necessary to articulate all possible exonerating arguments. This is contrary, of course, to contemporary cries that there are far too many appeals in capital cases.

18. *Id.* at 1180.

19. *Id.* at 1192.

20. *Id.* at 1191-92 (noting that this law came from *Leviticus* 19:18 to "love your fellow as yourself.").

21. *Id.* at 1186.

The Gospel of Matthew 2:11 notes that frankincense along with gold and myrrh were the gifts of the Magi to the Christ child. Frankincense is an aromatic resin from Boswellia trees used in incense and perfumes. The name for this resin possibly comes from "incense of Franks" because Frankish Crusaders reintroduced the fragrance to Europe. Myrrh is also a resin from trees used in perfumes and medicines.

22. Generally each execution method applied of specific crimes, although there is some overlapping:

Stoning was for (1) sexual offenses like adultery and incest; (2) blasphemy; (3) idol worship and instigation of others to idolatry; (4) Sabbath desecration; (5) cursing one's father or mother; (6) sorcery; and (7) being a stubborn and rebellious son. Rosenberg & Rosenberg at 1183. *Method:* Executioners remove all the condemned's clothes except for covering of the genitals. They then pushed the condemned from a cliff twice the height of a man, which if it did not kill him at least stunned him, before throwing stones on him. *Id.* at 1191-92.

Burning was for adultery with a priest's daughter and having sex with a woman and her daughter. *Id.* at 1183. *Method:* Executioners put the defendant in manure to his knees. A coarse scarf is wrapped in a soft scarf and executioners wind them around the defendant's neck in opposite directions, opening his mouth while a "lighted wick" or molten lead goes into the defendant's mouth, burning his intestines. This is faster and, believe it or not, less painful than being burned at the stake and, besides, the body is left intact. *Id.* at 1194-95.

Beheading was for murderers and inhabitants of a city of idol worshipers. *Method:* Executioners used the edges of a sword specified in *Deuteronomy* 13:16: "[S]mite the inhabitants of that city by the edge of the sword." *Id.* at 1183 and 1195-96.

Strangulation was for a child who strikes his parent, a kidnapper, a Sage who refuses to follow the Great Sanhedrin's rulings, a false prophet or one who prophesies for a false god, an adulterer, a false witness against a priest's daughter, or one who illicitly cohabits with a priest's daughter. *Id.* at 1183. *Method:* Executioners would place the condemned in manure to his knees and with a coarse scarf in a soft one wound around his neck they would pull in opposite directions until death. *Id.* at 1199.

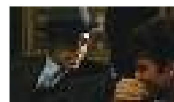
See also Hiers at 791-93 (noting the Methods of Execution).

Angelico & Fillippo Lippi: Adoration of the Magi

Saint Stephen, Crivelli 1476 with three stones and the martyrs' palm. In the Acts of the Apostles (6:11 and 6:13-14) the Sanhedrin tried Saint Stephen for blasphemy against Moses, God, the Temple and the Law. A mob stoned him with the encouragement of Saul of Tarsus (the future Saint Paul).

Judith beheading Holofernes by Caravaggio 1598. The Babylonian king Nebuchadnezzar dispatched Holofernes to punish the western nations that had withheld assistance to his reign. Holofernes laid siege to "Bethulia" (Meselieh), which almost surrendered. Judith, a beautiful Jewish widow, saved the city by entering Holofernes's camp, seducing him, and beheading him while he was drunk. The Jews defeated his army after she returned with his head. See the deuterocanonical Book of Judith. This was not, however, a court-ordered execution.

In the movie THE GODFATHER (Paramount Pictures 1972), Michael Corleone has his brother-in-law Carlo garroted in a car for Carlo having arranged for Sonny Corleone's death.



◂ Michael telling Carlo he is "exiled" before sending him to his death by garrote.

The biblical strangulation method appears similar to the modern garrote execution device for ligature strangulation.

Thus, although biblical law seems harsher to our modern eyes,[1] and prosecutors often use it today to argue for harsher punishments, in practice it was not so. The extensive procedural protections in Jewish law assured that these punishments rarely, if ever, occurred. If they were imposed, the procedures were conducted in a way that minimized pain and indignity to emphasize the sanctity of life.[2]

Again, an eye for an eye was not about retribution, but about proportionality.

A Classical Death

THE GREEKS: Plato in the *Laws* supported the death penalty.[3] But, in a precursor to the framers of the Eighth Amendment, Plato in the dialogue *Gorgias* has Socrates identify the goal of all punishment as correction and deterrence, not retribution:

> *He who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear to suffer the like, and become better.*[4]

The logical extension of Plato's philosophy on capital punishment then would be the execution of Socrates in 399 B.C. for impiety—an execution wholly unjust because Socrates the philosopher had no need of state correction (as he argued to his detriment to the jury deciding death), and his execution was not to deter evil but in fact deterred good. Again, Plato underscores the wrongness of retribution, the true motive behind Socrates' trial and execution.

The Athenians executed Socrates by having him take hemlock.[5] Plato accurately described death by hemlock in the *Phaedo*.[6]

1. The closest modern execution method to stoning would have to be death by firing squad.

Death by Firing Squad or Shooting: Several soldiers or peace officers form the firing squad, who fire simultaneously to prevent identifying who fired the lethal shot. Often a single shot *(coup de grâce)* from an officer or official follows the initial volley to assure death. Traditionally, one unknown squad member has a blank cartridge, allowing each member the chance he did not fire the fatal shot. Although an experienced marksman can tell the difference between a blank and a live cartridge from the recoil, there is a significant psychological incentive not to pay attention and to remember the recoil as soft *(i.e.,* like the recoil of a blank cartridge). For procedure and cause of death, *see* Arif Khan & Robyn M. Leventhal, *Medical Aspects of Capital Punishment Executions,* 47 J. FORENSIC SCI. 847, 848 (2002).

The Third of May, **Francisco Goya**

When courts martial impose the death penalty, they commonly use a firing squad such as Breaker Morant's execution during the Boer War, rendered into the very good courtroom drama movie BREAKER MORANT (Roadshow Entertainment 1980), or when the U.S. Army executed Private Eddie Slovik in 1945. Some jurisdictions traditionally use the firing squad at first light or sunrise, giving the term "shot at dawn."

Gary Gilmore was the first person to be executed after the death penalty was reinstated in *Gregg v. Georgia,* 428 U.S. 153 (1976), after *Furman v. Georgia,* 408 U.S. 238 (1972), and he chose to die by firing squad on Jan. 17, 1977, at the Utah State Prison. The five executioners had .30-30 caliber rifles and off-the-shelf Winchester 150-grain (9.7 g) SilverTip ammunition and fired from 20 feet (6 m) at his chest.

The Supreme Court upheld the constitutionality of death by shooting in *Wilkerson v. Utah,* 99 U.S. 130 (1878).

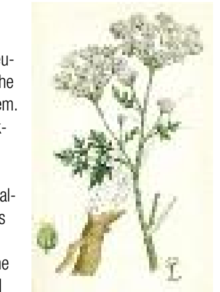
Eddie Slovik

Gary Gilmore

NORMAN MAILER, THE EXECUTIONER'S SONG (1979) is a Pulitzer-Prize-winning novel about the events around Gary Gilmore's execution.

2. Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty,* 1998 UTAH L. REV. 505.

3. PLATO, THE LAWS, BOOK VIII, Chapter 16. *"… if someone is proved guilty of a murder, having killed any of these peoples, the judges' slaves will kill him and throw him naked in a cross-road, out of the city; all the judges will bring a stone in the name of the whole State throwing it on the head of the corpse, then will bring him out of the State's frontier and will leave him there unburied; this is the law."*



Plato

Socrates

4. Plato, *Gorgias* quoted in Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds,* in NORVAL MORRIS & DAVID J. ROTHMAN, EDS. THE OXFORD HISTORY OF THE PRISON 5 (1998). In a precursor to the middle ages discussed below, Plato has Socrates note the benefit of pain in correction:

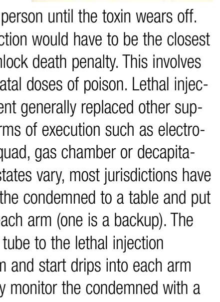
> *Those who are improved when they are punished by gods and men, are those whose sins are curable; and they are improved, as in this world so also in another, by pain and suffering; for there is no other way in which they can be delivered from their evil.*

As we will see, this foreshadows a key aspect of medieval punishment.

5. ***The Death of Socrates,*** **David (1787)**

"The man … laid his hands on him and after a while examined his feet and legs, then pinched his foot hard and asked if he felt it. He said 'No'; then after that, his thighs; and passing upwards in this way he showed us that he was growing cold and rigid. And then again he touched him and said that when it reached his heart, he would be gone. The chill had now reached the region about the groin, and uncovering his face, which had been covered, he said—and these were his last words, 'Crito, we owe a cock to Asclepius, pay it and do not neglect it.' 'That,' said Crito, 'shall be done; but see if you have anything else to say.' To this question he made no reply, but after a little while he moved; the attendant uncovered him; his eyes were fixed. And Crito when he saw it, closed his mouth and eyes."

6. **Death by Hemlock.** The killing substance in hemlock is coniine, a neurotoxin, which disrupts the peripheral nervous system. It causes death by blocking the neuromuscular junction creating an ascending muscular paralysis that eventually stops the respiratory muscles withholding oxygen to the heart and brain. Artificial ventilation can save the person until the toxin wears off.



Death by Lethal Injection would have to be the closest modern form to the hemlock death penalty. This involves injecting a person with fatal doses of poison. Lethal injection for capital punishment generally replaced other supposedly less humane forms of execution such as electrocution, hanging, firing squad, gas chamber or decapitation. *Method:* Although states vary, most jurisdictions have the executioners fasten the condemned to a table and put an intravenous tube in each arm (one is a backup). The executioners attach one tube to the lethal injection machine in another room and start drips into each arm with saline solution. They monitor the condemned with a heart monitor. Executioners then send a "cocktail" down the tube in the following order:

1. Sodium thiopental—an ultra-short action barbiturate and anesthetic that renders the condemned unconscious in seconds
2. Pancuronium/Tubocurarine—a non-depolarizing muscle relaxant causing complete muscle paralysis including the diaphragm and the rest of the respiratory muscles and would eventually cause an asphyxial death.
3. Potassium chloride—a chemical that stops the heart, causing death.

Rosenberg & Rosenberg at 1170; Khan & Leventhal at 847. This "cocktail" may be truly cruel because the condemned may actually feel great pain from the final agent of death, the potassium chloride, because the second agent, the pancuronium/tubocurarine, renders him completely paralyzed and unable to scream. This was the main issue the Supreme Court heard in *Baze v. Rees,* 553 U.S. ___ (2008), when it ruled that Kentucky's lethal injection was not unconstitutional. Thus, death by hemlock may indeed be a much more humane method as Plato's description of Socrates' death shows. The last time the Supreme Court ruled on a method of execution was more than 100 years ago in *Wilkerson v. Utah,* (1879) upholding the use of a firing squad and *In re Kimmler* (1890), upholding the use of the electric chair.

In addition to using hemlock, the Greeks also executed people by shackling them to wooden planks to die from exposure.[1]

Plato in his general support of the death penalty for deterrence certainly did not speak for all Greeks. Thucydides did not even uphold the value of capital punishment as a deterrent. He provides a long dialogue arguing the fallacy of the death penalty's value related to a rebellion in the island of Mitylene:

> *We must not, therefore, commit ourselves to a false policy through a belief in the efficacy of the punishment of death, or exclude rebels from the hope of repentance and an early atonement of their error.*[2]

Thus, the Ancient Greeks reflected a view of capital punishment as complex as our own.[3]

THE ROMANS: The Romans built an empire on death.

They used crucifixion for heinous crimes, treason or to make a political point during conquests and slave revolts.[4] In crucifixion, asphyxiation—suffocation—is usually what causes death. The Romans nailed and/or tied the condemned to a large cross, which requires him to support his entire weight with his outstretched arms. The hyperexpansion of the lungs severely impedes inhaling. Eventually, the condemned gets too exhausted to pull himself up, and he is unable to breathe.[5] To hasten death, Roman executioners could break the condemned's legs, making it more difficult for him to pull himself up. If death did not come from asphyxiation, eventually shock, exposure, dehydration or bleeding from the nails would cause it.

Common criminals might be sent to the arena to either become a gladiator or be executed by one.[6] Indeed, the gladiatorial games themselves probably began as an extension of public executions. Many factors caused the end of gladiatorial games, including the rise of Christianity with a very different morality about death, even the death of a criminal.

The Middle Ages had arrived, a time of God's mercy.

Death in a Time of God's Mercy

Although medieval punishments could be cruel, even gory, they were uncommon. Moreover, retribution was not a justification for punishment, as it is today.[7] Rather, the main point was rehabilitation and, to a lesser extent, deterrence. But the rehabilitation was not so much to make the offender a better member of society; it was to redeem him for God.[8]

Through the late 12th century, there was no clean line between "sin" and "crime."[9] English judges were clerics until the late 13th century. Penance was the key element of the criminal justice system. Penance acknowledges that under strict justice all is lost. Grace is what you need—God's, the lord's, or the victim's.[10]

Prometheus

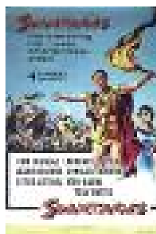
1. Adriaan Lanni, *"Verdict Most Just": The Modes of Classical Athenian Justice,* 16 YALE J. L. & HUMAN. 277, 287 (2004). Prometheus, chained to a rock and having an eagle eat his liver each day for having given fire to man would have been an archetype for exposure execution. Being immortal, though, Prometheus did not die because his liver grew back each night.

2. THUCYDIDES, THE PELOPONNESIAN WAR, (1954 Rex Warner trans.) 212-22.

3. The Greek cultural heritage is but one of the reasons international law is relevant to any reading the American Bill of Rights, especially on issues of punishments. First, the cruel and unusual clause was borrowed verbatim from England's bill of rights. Bill of Rights, 1689, 1 W. & M., c. 36, 1 (Eng.). *See* Tepker at 827. Second, the concept of cruel and unusual punishments traces through the history of western civilization. *See e.g.,* Granucci at 844-46. Third, the DECLARATION OF INDEPENDENCE—the document announcing America's separation from the old world—acknowledged a duty to maintain a "decent Respect to the Opinions of Mankind." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Fourth, the text of the Constitution permits, or even requires, Congress to create jurisdictions and laws to punish "Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10.

The Supreme Court in it earliest cases dealt with and implemented international law. *See* Tepker at 828. Justice Joseph Story spoke for a Court holding that kidnapped Africans on the schooner *Amistad* were not pirates or mutineers because they had the right of self-defense under "eternal principles of justice and international law." *The Amistad,* 40 U.S. (15 Pet.) 518, 595 (1841).

See also the movie AMISTAD (DreamWorks 1997). Tepker at 827-28 compares this to Justice Marshall's decision 10 years earlier in the *Antelope* case, which had upheld the slave captivity on that ship. *The Antelope,* 23 U.S. (10 Wheat.) 66, 121 (1825) (Marshall, C.J.). *See generally* Youngjae Lee, *International Consensus As Persuasive Authority in the Eighth Amendment,* 156 U. PA. L. REV. 63 (2007) (outlining various aspects of the international consensus on the death penalty).



4. Rome fought three *Servile Wars* against slaves with Spartacus leading the last one starting in 73 B.C. Marcus Crassus crushed it two years later in 71 B.C. Stanley Kubrick's SPARTACUS (Universal Pictures 1960) ended with almost everyone's crucifixion.

5. The term excruciating literally means "out of crucifying."

Saint Peter died from crucifixion, but he begged to be executed upside down because he was not worthy of the same death as Jesus. See Catholic Encyc. www.newadvent.org/cathen/11744a.htm.

Crucifixion of St. Peter by Caravaggio

Pollice Verso ("With a Turned Thumb"), Gérôme 1872

6. The thumb up or down is Hollywood invention. The Romans did refer to *pollice verso* (literally "with turned thumb"), but no one now knows which way they pointed their thumbs. A thumb up (called *pollux infestus)* was an insult to Romans so was probably not the way they would ask to spare a life.

7. *See e.g.,* 18 U.S.C. § 3553.

8. Trisha Olson, *The Medieval Blood Sanction and the Divine Beneficence of Pain: 1100-1450,* 22 J.L. & RELIGION 63 (2007) (Olson, *Blood Sanction)* (arguing "that while one cannot discount the language of deterrence that crops up in assorted sources, the cultural acceptance of the blood sanction lay less with such utilitarian concerns and more with that set of conciliatory principles that informed dispute resolution more widely.").

Olson does note a few examples of retributavist punishments but they were a relative rarity in medieval law. *See e.g.,* the rape penalty in early 14th-century England allowing a victim to gouge out the eyes and/or sever the offender's testicles herself. Olson, *Blood Sanction* at 69, *citing* The Eyre of Kent: 6 & 7 Edward II, A.D. 1313-1314, at 134 (F.W. Maitland, L.W. Vernon Harcourt & W.C. Bolland eds., Selden Socy. 1909).

9. Olson at 81 (*citing* G.R. EVANS, LAW AND THEOLOGY IN THE MIDDLE AGES 12-13 (Routledge 2002)).

10. Trisha Olson, *Of the Worshipful Warrior: Sanctuary And Punishment In The Middle Ages,* 16 ST. THOMAS L. REV. 473, 423 (2004) (Olson, *Sanctuary). Also* Olson, *Blood Sanction* at 73 quoting The Laws of King Henry I *(Leges Henrici Primi)* that "With respect to an offender who has either confessed or is of manifest guilt, the proper course is to hand him over to the relatives of the slain man so that he may experience the mercy of those to whom he displayed none." Such a concept of grace or forgiveness is not expressed in today's victim's rights movement.

Making the Community Whole

In the medieval system of justice, there were many ways to get God's grace or pardon. For a medieval jurist/cleric, all wrongdoing, be it sin or crime, was an act of pride against God. Bringing the sinner/offender back to God, often through the intercession of a saint, bishop or especially the victim, was the ultimate goal.[1]

THE ORDEAL: Until the mid-13th century, proof was by the ordeal (*i.e., judicium Dei*). It was not so much about determining guilt—the court probably already knew that and, if not, God did—but about commutation. The goal of the ordeal ritual was about redeeming the guilty after his contrite confession. If the offender did not confess to his judge/confessor/priest and God still acquitted him after Ordeal, the assumption was that he had confessed in his heart.[2]

SANCTUARY AND PILGRIMAGE: The medieval practice of Sanctuary had a similar purpose of reconciliation.[3] In Britain, the *dooms* (statutes) of King Ine, ruler of West Saxon from 688 A.D. to 725 A.D., provided for the practice of sanctuary. If a person facing the death penalty could make it to a church and if he paid legal compensation, he would be spared.[4] During most of the medieval period, justice was a private matter. Sanctuary sheltered the person from private justice and avoided the blood feud.[5]

We tend the think of sanctuary as a place to flee. But it is more likely that the intercessor was more important than the place—the intercessor made the peace.[6] Again, as with the Ordeal, the practice allowed for God's grace through the intercession of the priest, bishop or saint.[7]

Surely this would happen "in the church" as a physical place, but, more importantly, it happened "in the church" as a metaphorical place or community.[8] Again, a goal of criminal justice was not retribution—that was for God—but rehabilitation and deterrence.[9] Indeed, retribution as a goal would not have been possible because the criminal/sinner would stand before God in no different position than the victim/sinner—unless, of course, the victim gave the criminal the grace of forgiveness, raising both to heaven.[10]

BENEFIT OF CLERGY: Another way of getting grace, or, as we would say "avoiding criminal responsibility," was Benefit of Clergy. A tonsured and clothed cleric could avoid the king's justice and courts by claiming *benefit of clergy* (*privilegium cleri*)

1. Olson, *Sanctuary* at 518. *See also* Olson, *Blood Sanction* at 72 on St. Augustine. Augustine advised in regard to sanctuary that "[a]ll sins do indeed seem pardonable as long as the guilty party promises to reform. This is your opinion; and it is also mine." *Id.* Augustine writes, "[T]he more just it is to punish sinners, the more welcome are the favours bestowed by those who intercede for them or spare them" for, as his text implies, the greater is the example of love and gentleness which scripture enjoins upon the actions of all as in the teaching of forgiveness for the woman taken in adultery. *Id.* at 79-80.

Augustine by Sandro Botticelli, c. 1480

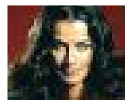
Christ With the Woman Taken in Adultery, by Guercino, 1621

2. *See* Olson, *Sanctuary* at 517 (noting that ordeal literature's main theme is not the innocent acquitted but the guilty redeemed because of a contrite confession).

3. *See generally* Olson, *Blood Sanction* at 64, BAKER at 512-13.

4. Olson, *Sanctuary* at 476, 491-92. *See also* Olson, *Sanctuary* at 479, noting Sanctuary as a legal concept in the Theodosian Code and Olson II at 499 in the Laws of William and Edward the Confessor.

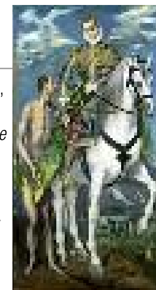
5. *See* Olson, *Sanctuary* at n. 73.



6. Olson, *Sanctuary* at 477 and 482. For Saint Augustine and sanctuary *see* Olson II at 480, 502. The great intercessors for the sinner/criminal today are the public defenders like Joyce Davenport (Veronica Hamel) from ***Hill Street Blues,*** a police drama on NBC from 1981-1987 for 146 episodes. It received high critical acclaim, and its innovations proved highly influential on other television series. The series won eight Emmy awards in its first season and had 98 Emmy Award nominations.

7. On the relationship between Ordeal and Sanctuary *see* Olson, *Sanctuary* at 505, 508.

Saint Martin had a special place as an intercessor Saint. *See* e.g., Olson, *Sanctuary* at 486, 495. His shire was also a great stopping point for pilgrims on the road to Santiago de Compostela.



St. Martin and the Beggar, by El Greco, ca. 1597-99

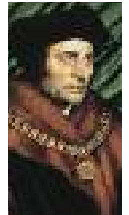
8. The opposite of sanctuary was the law of outlawry. Olson, *Sanctuary* at 510. To be outside the community meant that the law no longer protected you. It was the civil equivalent to *ex communication.*

See generally Paul R. Hyams, *The Proof of Villein Status in the Common Law,* 89 ENGLISH HIST. REV. 721 (1974) (detailing community and family life and the common law "suit of kin" to establish whether a person was free of villein, *i.e.,* a man outside the law).

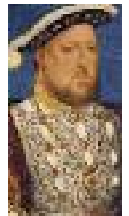
Pilgrimage practice had a similar quality in that the pilgrim did go to a place, and the journey itself had a redemptive value, but it was to gain the intercession of the saint at the shrine. *See* Olson, *Blood Sanction* at 63.

Pilgrimage as a journey to redress sin played out in KINGDOM OF HEAVEN (20th Century Fox 2005) directed by Ridley Scott starring Orlando Bloom, Eva Green, Jeremy Irons, Edward Norton and Liam Neeson.

9. *See* Olson, *Sanctuary* at 477-78, 532, 535-41 arguing that the end of sanctuary in the 16th century's was not because of the raise of temporal power but because the canonists and culture changed regarding sanction and reconciliation. *See id.* at 539-40, 542 discussing Sir Thomas More's new way of looking at sanctuary as a deterrence problem. Henry VIII through legislation brought sanctuary practice under the control of the monarchy, *Id.* at 547, which is but one of many powers Henry arrogated to himself.



St. Thomas More



King Henry VIII

10. *See* Olson, *Blood Sanction* at 73, quoting from the laws of King Henry I, *Leges Henrici Primi* (c. 1115) provided that acts of disobedience toward one's lord or superior were to be graciously resolved: "[I]f anyone ma[de] amends to another for his misdeed" and offered something beyond what was owed "along with an oath of reconciliation," it was commendable of the wronged man to "give back the whole thing. He continued, "it ought to be sufficient" that the accused had "in some measure offered himself to his accuser."

because they were outside the king's jurisdiction.[1] At first, the practice was for a charged clerk to claim he was clergy, which a jury would decide after an "inquest of office." Later, the clergyman would accept a trial and, if convicted, claim the benefit. Given the very large numbers of clerics in England, Benefit of Clergy had a huge effect on the criminal justice system.[2]

The punishment in ecclesiastical courts was penance, which even if severe was better than hanging.[3] If the crime was really bad, a clergyman could be defrocked (literally lose his protective clerical clothes), which would assure his punishment for a repeat offense.[4]

For most of its history, Benefit of Clergy was part of the conflict between church and king in England. Moreover, its history shows it to have been one of the most abused practices, encouraging impunity for "crimonious clerks."[5] But, as with the Ordeal, Sanctuary and Pilgrimage, Benefit of Clergy had the goal of grace, concord and reconciliation. And it showed that for most times and in most circumstances, the Church opposed the death penalty.

THE KING'S (I.E. GOD'S) PARDON: Another way of obtaining God's grace was through a pardon from his representative, the King. The Anglo–Saxon kings lacked unfettered pardoning power. The Norman kings, however, enjoyed a much wider pardoning prerogative. The king would give the grace of the pardon and thereby win grace for himself, as well.[6]

The distinction between felonies versus misdemeanors is important here because the king only had pardon power over felonies. In the common law, ***misdemeanors*** were lesser crimes, although they were still distinct from being what we would call a civil wrong or tort.[7] *Felonies* were a much more serious crime, subjecting the convict to lose his life, lands and personal goods (*chattels*).[8] The felon was at the king's mercy and thus could get the king's pardon or grace.

After a time, however, the king's pardoning power became a moneymaker.[9] For example, the Crown would sell pardons for military action, and a defendant could buy a pardon "of grace" before trial to immunize himself from prosecution. After the 13th centu-

Tonsured monks

1. *See generally* BAKER at 513-15. Benefit of Clergy became established during Henry II's reign as part of his penance for his role in the death of Archbishop Thomas Becket. BAKER at 513. See chapter 5 outlining the Becket/ Henry II struggle and effect.

A better and more descriptive translation of *privilegium cleri* is *clerical privilege or privilege of clerics.* Later, anyone who could read qualified for *benefit of clergy* because usually only clerics could read. Unofficially, this legal loophole was even larger, because anyone who could memorize Psalm 51 (Psalm 50 in the Vulgate and Septuagint) *Miserere mei, Deus, secundum misericordiam tuam. (O God, have mercy upon me, according to thine heartfelt mercifulness)* could receive benefit of Clergy regardless of whether they really were clergy. Psalm 51 became known as the "neck verse" because it could save your neck. *See* BAKER at 514; George Jarvis Thompson, *History of the English Courts to the Judicature Acts,* 17 CORNELL L. Q. 395, 404 (1932); A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW, 361-63 (4th ed. 1958).

King Henry VII introduced the practice of branding the thumb of a convict who pleaded benefit of clergy with an "M" for murder or "T" for thief. This allowed detection of a second offender. BAKER at 515; Thompson at 404 n.405; Green II at 488. His son, King Henry VIII, tried to close this jurisdictional loophole and his frustrations in dealing with the Church (as well as his sexual frustrations in finding a wife that would give him a male heir) were part of the break with Rome. Thomas A. Green, *The Jury and the English Law of Homicide,* 1200-1600, 74 MICH. L. REV. 414, 480 n.241 (1976).

Benefit of Clergy passed into the common law as a basis for granting leniency. *See* Green, *Homicide* at 474-76, 483-84 and n.251 (on Benefit of Clergy affecting development of homicide law). Parliament began to place limits on the application of the clergy privilege. *See* Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body,* 40 U. MICH. J. L. REFORM 93, 98 (2006). The common law already excluded treason, highway robbery, and arson of a house from this privilege, and Parliament added most major crimes. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources,* 50 U. CHI. L. REV. 1, 38-40 (1983). Later, "benefit of clergy" applied to women, removed the literacy requirement, and replaced branding of the thumb with the sentence of transportation of seven years indentured servitude in the colonies. Thus, instead of hanging a first time offender convicted of manslaughter would receive the "burnt in the hand" punishment of a branded "M" for "manslayer."

King Henry VII

2. On the procedure of "inquest of office," *see* BAKER at 513. By the end of the 16th century half of all men convicted of felonies in the King's courts successfully claimed Benefit of Clergy. BAKER at 514.

This pleading of "Benefit of Clergy" became in practice an early form of plea bargaining. Langbein IV at 278 n.43. This was coupled with the jury's role in setting sentences. Langbein IV at 304 (describing early plea bargaining). For a recounting of the prevalence of modern plea practices *see* George Fisher, *Plea Bargaining's Triumph,* 109 YALE L. J. 857 (2000), and Fisher's expanded presentation in GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003). *See also* Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America (reviewing* FISHER'S PLEA BARGAINING'S TRIUMPH) 57 STAN. L. REV. 1721 (2005). For modern British plea bargaining practice *see* Peter W. Tague, *Guilty Pleas and Barristers' Incentives: Lessons from England,* 20 GEO. J. LEGAL ETHICS 287 (2007).

3. For an outline of the ecclesiastical court punishments *see* Thompson at 410-11.

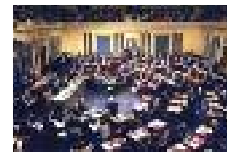
4. Because women could not be clerics, they could not plead the Benefit. However, they could "pray the benefit of her belly." BAKER at 517. The court could not order a female felon to be put to death if she was pregnant. Juries would often find this to allow a woman to avoid the automatic death penalty. If the Crown contested the pregnancy claim a jury of "matrons" would decide the matter and would generally find for the defendant.

5. This is what happened to the only two soldiers convicted in the Boston Massacre Trials of 1770. It was not just the massacre but this leniency that sparked the American Revolution. It also showed that John Adams, who defended the soldiers, was indeed a clever lawyer. For his defense of the soldiers, however, the patriots widely criticized Adams, who defended the soldiers to uphold the rule of law. Perhaps in reaction to the Boston Massacre case, Congress abolished Benefit of Clergy in 1790, though it survived in some states and may even remain technically available today. Parliament finally abolished Benefit of Clergy in 1827. *See* Jeffrey K. Sawyer, *Benefit of Clergy in Maryland and Virginia,* 34 AM. J. LEGAL HIST. 49 (1990).

Boston Massacre

6. *See* Olson, *Blood Sanction* at 72-73, noting the literature on good kingship expressing the value of concord and reconciliation. This would have been part of a longer biblical tradition of mercy starting with the Kings of Israel sparing the life of murderers if the execution would leave his parents with no heirs. Noted in Hiers at 755.

7. BAKER at 502. The word misdemeanor corresponds to the Latin *malefactum.* Today, it is a crime with a punishment of less than one year. *See e.g.,* 18 U.S.C. § 3559. But misdemeanors may have greater significance under the U.S. Constitution because Congress can impeach and remove from office the President or a judge for "high crimes and misdemeanors," and the definition of a "high" misdemeanor is for Congress to decide.


President Clinton impeachment trial 1999

8. BAKER at 502. The concept of felony was feudal in that it was an act that destroyed the bond between lord and man justifying the forfeiture of life, land, and chattels. Generally, the felon's lands reverted to his local lord but his goods (chattels) were forfeited ("escheated") to the king. In cases of treason, however, the crown got chattels and land. Green, *Homicide* at 414, 425 and n.48; BAKER at 512. In the gradation of the time, a felony was a crime between treason and trespass. BELLAMY at 8.

9. *See* Green, *Homicide* at 426-27. The king's pardoning power later had great influence on homicide law. Instead of today's distinctions between various degrees of killing, offenses were either "pardonable" or not, which a jury decided. The king, through his court, would customarily impose the sentence. An excusable defendant, accidental homicide or self-defense, stayed in jail until he obtained the king's pardon and after the 1340s the defendant's chattels automatically became forfeit, becoming essentially the price the defendant paid to get the pardon. *Id.* at 425. For the common criminal this meant that the king's judges started to gain discretionary power over pardons. A convict was hanged within hours of conviction. For pardoning to work, the king's representative (the judge) in conjunction with the jury had to decide then and there whether the defendant deserved pardon. *See also* Simon Devereaux, *Imposing the Royal Pardon: Execution, Transportation and Convict Resistance in London,* 1789, 25 LAW & HIST. REV. 101 (2007) (relating to a later period but demonstrating judicial control of pardoning system allowing for transportation to New South Wales rather than death).

ry, the king retained this "prerogative" power to grant a pardon "of grace" (*de gratia*), often for a political favor or money.[1]

Related to the king's pardoning power "of grace" were the king's pardons to reward informants who "turned approver."[2] Death was the penalty for felony convictions. By the 13th century, a convicted felon could avoid hanging if he provided evidence against his accomplices. The criminals who did this were called "approvers." Among many problems with this system is that if the approver failed to secure his former associate's conviction, he hanged—this was a powerful incentive for him to commit perjury.[3] Over time, the danger of perjured testimony caused the judges to develop the "corroboration rule" and other protections excluding testimony of uncorroborated witnesses who gave "king's evidence."[4]

The "king's" pardoning power became a key foundation of judicial discretion.[5] During the middle ages this had much to do with practicality; a convict was hanged within hours of conviction. Thus, for the king's pardoning power to work, the king's representative (the judge), in conjunction with the jury, had to decide on the spot whether the defendant deserved pardon.

By the time of Blackstone (mid-1700s), Parliament had become supreme over the king and, by implication, "the King's judges" became subservient to Parliament's statutes.[6] But for most of their history English judges had considerable power to do justice on the spot, a power they exercised in conjunction with the jury.

Look for the conclusion of *Baby, Don't Be Cruel* in the January 2010 issue of ARIZONA ATTORNEY.

Alexander Hamilton

1. Green, *Homicide* at 426. American presidents still enjoy the king's pardoning power. The U.S. Constitution states that the President *"shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."* Article II, § 2. Today, a request for a pardon goes to the Justice Department's Office of the Pardon Attorney. Though the pardon power was controversial from the start, Alexander Hamilton defended it in THE FEDERALIST PAPERS, at *Federalist No. 74: The Command of the Military and Naval Forces, and the Pardoning Power of the Executive.* In his final day in office, George Washington granted the first high-profile federal pardon to leaders of the Whiskey Rebellion. Many pardons have been controversial, such as the following:

- Andrew Johnson's sweeping pardons of thousands of former Confederates after the American Civil War
- Gerald Ford's pardon of President Richard Nixon for the Watergate scandal
- Jimmy Carter's grant of amnesty to draft evaders of Vietnam
- George H. W. Bush's pardon of 75 people in connection with the Iran–Contra affair
- Bill Clinton's pardon of 140 people on his last day in office
- George W. Bush's commutation of I. Lewis "Scooter" Libby's prison term

The President's pardon power only applies to federal crimes.

Ford Signing Nixon Pardon

Lewis "Scooter" Libby

Most state governors also have pardon or reprieve power for state crimes. Today, a governor pardoning or commuting a death sentence is a relatively rare event, but historically governors used this power as a matter of course. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002), noting that as many as half of those sentenced to death were pardoned, including valuable slaves.

2. BAKER at 516.

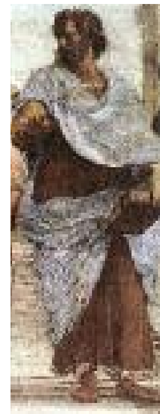
3. An "approver" "approved" or "proved" a matter, i.e., he vouched. The custom was only in capital cases and allowed the approver to confess before plea and accuse others to gain pardon. BLACKS'S 5th ed. at 94. Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England,* 19 LAW & HIST. REV. 1, 4 (2001). *See also* A. J. Musson, *Turing the King's Evidence: The Prosecution of Crime in Late Medieval England,* 19 OXFORD JOURNAL OF LEGAL STUDIES 468 (1999); Frederick C. Mamil, *The King's Approvers: A Chapter in the History of English Criminal Law,* 11 SPECULUM 238 (1936). Regarding perjurers in ancient Jewish law see Rosenberg & Rosenberg at 1189 and for the belief that perjurers are cast out forever from the fellowship of God *see* Olson, *Sanctuary* at 528.

4. JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 157, 203 (2003). This included the *corpus delicti* doctrine, which nullifies a conviction based on a statement alone. Matthew Hale warned, "He would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead." 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 290 (P.R. Glazebrook gen. ed., Professional Books, 1971) (1736).

Blackstone followed the same reasoning: "Never convict any person of murder or manslaughter, till at least the body be found dead …" 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 359 (Univ. of Chicago Press, 2002) (1769). *Quoted* in *Bruce P. Smith, The History of Wrongful Execution,* 56 HASTINGS L. J. 1185, 1194-95 (2005). Blackstone argued against "presumptive" (circumstantial) evidence and required the prosecutor to prove the crime had occurred: "[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."

For modern defense of the *corpus delicti* rule see David A. Moran, *In Defense of the Corpus Delicti Rule,* 64 OHIO ST. L. J. 817 (2003); Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession,* 103 U. PA. L. REV. 638 (1955).

Coke and later Hale also reacted to accounts of executed innocents such as Coke's account of the Warwickshire case of 1611 where an uncle was executed for the death of his niece only to have her show up later to claim her inheritance. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 232 (London, 1644). *Also cited by* 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 290 (P.R. Glazebrook gen. ed., Professional Books, 1971) (1736) and discussed in JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA 417 (3d ed. 1940). *See* Smith at 1193 (citing the above example and noting the instanced in England and America of wrongful executions and the response both in law and culture).

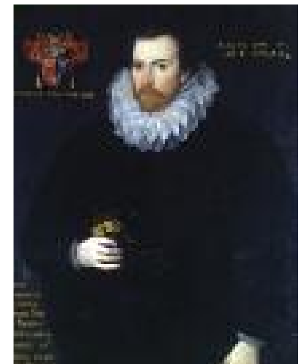

Aristotle with the *Ethics*

5. On judges gaining the king's discretionary power over pardons *see* Green, *Homicide* at 425. In exercising this discretion, the medieval English judge could have looked back to the Nicomachean Ethics by Aristotle, who encouraged equity for the exceptional case. The equitable decision is what the king (or later a legislator) would have taken in the particular circumstances if he had been present.

For a discussion of sentencing discretion in modern federal court *see* John S. Martin, Jr., *Cruel and Usual: Sentencing in the Federal Courts,* 26 PACE L. REV. 489 (2005).

6. *See* 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 369-72 (1st ed. 1769) *quoted in* Claus at 144-45 and Granucci at 862-63:
"And it is moreover on the glories of our English law, that the nature, though not always the quality of degree, of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation; with which an offender might flatter himself, if his punishment depended on the humor or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequences in that law, which ought to be the unvaried rule, as it is the inflexible judge of his actions."

Hale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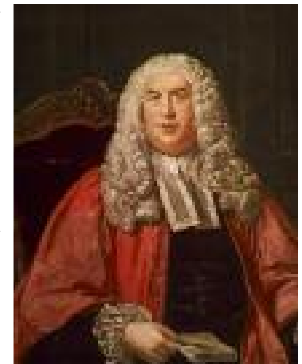
Blackstone