

Why Must Punishment be Unusual as well as Cruel to be Unconstitutional?

I. Introduction

The Eighth Amendment of the United States Constitution dictates that “Excessive bail shall not be required, excessive fines imposed, nor cruel *and* unusual punishments inflicted.”¹ I have often wondered, and perhaps the reader has as well: just what purpose is served by the addition of the word “unusual” to the constitutional clause prohibiting cruel punishments? When a legislature enacts or a judge levies a punishment that is much harsher than what the norm is for such an offense, this unusual punishment is often taken to be unconstitutional. But while it is certainly unusual to bestow a life sentence without parole upon a petty thief, is not this excessive punishment cruel and thus wouldn’t a ban of just cruel punishments suffice? If “cruel” in a constitutional sense means something like “unjustifiably harsh,” why would a punishment need to have any other property to be unconstitutional? Of course, there are punishments that are unjust but not cruel. One such case would occur when a judge gives a guilty friend an unusually light sentence. But the word “unusual” could not have been added to render such lenient sentences unconstitutional for the crucial phrase of the Eighth Amendment is a conjunction and not a disjunction. It does not prohibit cruel *or* unusual punishments but cruel *and* unusual punishments.

To make sense of the phrasing of the Eighth Amendment, my suggestion is that we should break with the dominant legal tradition and no longer understand “cruel” as “unjustifiably harsh.” We should not accept any claims in the spirit of Janet Radin’s that “The essence of cruelty appears to be the gratuitous infliction of suffering - that is, the infliction of physical or mental pain without good reason.”² Nor should we follow Justice Burger and hold that the determination of cruelty is: “not merely descriptive, but necessarily embodies a moral judgement.”³ Instead, my contention is

that “cruel” should be understood as merely “harsh.” “Cruel” is not a thick concept.⁴ Something can be cruel without deserving moral condemnation. Thus Hugo Bedau is wrong to claim that “the idea of a tolerably cruel punishment verges on an oxymoron.”⁵ So on my recommended interpretation of the meaning of “cruel,” the cruelty of a type of punishment is not sufficient for the practice to meet the criterion for being unjust and unconstitutional. A punishment would need another property to be unconstitutional. Is the property of being unusual up to the task? I think it is.

Since I will defend the wisdom of literally reading the Eighth Amendment as a conjunction which means that a punishment cannot be unconstitutional unless it has the properties of being both cruel *and* unusual, my approach is at odds with the Supreme Court’s traditional approach to the word “unusual.” Justice Warren summarizes the constitutional history of the word in the following manner: “On the few occasions that the Court has had to consider the meaning of the clause, precise distinctions between cruelty and unusualness do not seem to have been drawn...whether the word “unusual” has any “qualitative” meaning different from ‘cruel’ is not clear.”⁶ Justice Brennan similarly dismisses the import of “unusual.” He writes about inquiring into the word’s meaning: “that the question is of minor significance. This court has never attempted to explicate the meaning of the clause by parsing its words.”⁷ Justice Marshall claims that “the use of the word ‘unusual’ in the final draft of the Bill of Rights appears to be *inadvertent*.”⁸ And Justice Burger takes a view that is the complete opposite of that defended in this paper when he asserts that “the term ‘unusual’ cannot be read as limiting the ban on ‘cruel punishments.’”⁹

My suggestion in this paper is that we assume that the adopters of the Constitution and the later Bill of Rights believed that they were living in a society with basically just laws, at least as

these pertain to punishment and most other issues not involving English authority. The existing justice of such institutions and practices they sought to have reflected in the laws of the new Constitution. Since their present system included many punishments that were cruel (read this as merely meaning “harsh”) but deserved, it would be punishments that diverge from these established practices that had to be guarded against.¹⁰ The conjunction of “unusual” and “cruel” would do this quite well, even better as we shall see than a phrase banning only “unjustifiably harsh” or “excessive” punishments. There is considerable wisdom in the exact words of the Eighth Amendment - though it has been overlooked by commentators. The best way to mine the wisdom of the “cruel and unusual” clause is to interpret the phrase literally.

The rather literalist interpretation I offer of the Eighth Amendment should be of interest to death penalty abolitionists since it includes an argument that the unconstitutionality of capital punishment can be derived from the proper reading of “unusual” as meaning “the subjective expectation that something is uncommon” rather than “the objective fact that something is uncommon.” So my arguments will provide abolitionists with the resources to launch something like an internal critique of the originalist supporters of the death penalty, turning the originalists’ own theory of constitutional interpretation against their insistence on the legality of executions.

II. The Benefits of a Literal Reading of the “Cruel and Unusual” Clause

I suggested in the introduction that “cruel” should just be read as meaning “harsh.” I do not believe that I am guilty of merely stipulating a nonmoralistic conception of “cruel.” There is still such a usage alive outside the legal system, and perhaps it was once the popular understanding within the legal community, in which “cruel” is just a synonym for “harsh.” One of the only two references

to the “cruel and unusual” clause in the ratification debate about the Bill of Rights suggests that “cruel” meant just “harsh” rather than “unjustifiably harsh.” Representative Livermore states: “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 Since hanging a man was advocated by Livermore as cruel but necessary, “cruel” couldn’t have been understood as unjustifiably harsh. If “cruel” meant “unjustifiably harsh” then there would not have been any point to debating over the wisdom of retaining punishments that were cruel. More support for this interpretation is provided by the fact that the English Bill of Rights, from which the Americans copied their Eighth Amendment, was written at a time in which dictionaries defined “cruel” just as a synonym of “harsh” and “severe.”¹² This understanding of “cruel” is still active in the meaning or implication of phrases such as “gratuitous cruelty,” “unnecessarily cruel,” a “cruel workout,” “a cruel disease,” “a cruel but justified battle” and “no punishment is too cruel for Hitler.”¹³ These phrases all suggest that there could be cruelty that is not unjustifiable.¹⁴

I don’t think that the current constitutional understanding of the “cruel and unusual” clause has always been the case. I will sketch later some reasons for not believing it was the original understanding. But discovering the original understanding of a clause does not end the debate over how to interpret the Constitution.¹⁵ It doesn’t even matter if it was clearly the intent of the adopters that their intentions bind later generations of lawmakers and jurists. Such an appeal to the original understanding must be given a moral defense. Original intent is unimportant if a compelling argument can not be given for why later generations should interpret the Constitution in the manner that the adopters intended. And it is very interesting to note that the framers’ own attitude to their

concrete conception of constitutional clauses may have been that it wasn't to govern future judges. H. Jefferson Powell's historical investigations show that the framers did not believe that their collective subjective intention, formulated in secrecy behind the closed doors of the Constitutional Convention, should be authoritative.¹⁶

Perhaps the proper way to approach the Constitution is not to stress unswerving loyalty to the *concrete* understanding of the framers and ratifiers, but to give the most morally defensible interpretation of its more abstract and often moralistic phrases such as "equal protection," "just compensation," "excessive bail," "impartial trial," "due process," etc. An argument can be made that a judge may even be loyal to the adopters' abstract intention by disregarding their concrete application of the abstract principle that they wanted applied. For example, if they intended that trials be impartial, they would want later courts to establish *truly* impartial trials, not necessarily the type of trial they had in mind.¹⁷ One can here follow Dworkin and distinguish between *concepts* and *conceptions*. Dworkin would say the framers may have wanted us to be guided by the concept of "impartiality" but not necessarily by the particular conception of "impartiality" that they had in mind.¹⁸ The adopters did or should have realized that they were not infallible and thus could be convinced if they were not already aware that some of the traits that they believed necessary to an impartial trial may not be. Confronted by such a possibility, most would probably advocate applying the best interpretation of "impartial trial" even if it is not what they thought it to be.¹⁹ So it may be that while the best interpretation of the Eighth Amendment goes against the actual conception of the adopters of the Bill of Rights, such an interpretation may be loyal to their abstract intention. But we shall see later that it is easier to do this with the phrases mentioned above than a conjunction such as

the “cruel *and* unusual” clause.

Instead of looking for a better conception of the Eighth Amendment a la Dworkin, let’s investigate the wisdom of what I take to be the original understanding. The analysis to follow of the “cruel and unusual” clause may have to be considered a *charitable* interpretation of the Constitution’s adopters - *i.e.*, those people who framed and ratified the Constitution and the later amendments. The reason that the interpretation should perhaps be labeled “charitable,” is that it casts the adopters’ thinking in what may be a more attractive light than history warrants. Though I believe that my interpretation captures the literal meaning of the phrase, there isn’t an abundance of evidence that it was the adopters’ subjective intention to construe “cruel and unusual” as I suggest - but neither is there much evidence to the contrary.

If the adopters conceived of their existing penal laws as basically just, then it would be the new and thus unusual rather than the old and familiar punishments that people needed to be concerned about.²⁰ By “new” I mean not only punishments never seen before anywhere in the legal system, but also the application of existing punishments to a class of crimes to which they were not previously applied. A punishment such as the life sentence for petty larceny would be new in the latter sense. Treating a child or retarded person like a criminal adult would also be new and thus unusual. In addition, this criterion would prohibit a punishment that, while appropriate to impose upon *all* normal adults, is only applied to a despised minority.²¹ Thus “unusual” captures some of the force of the principle of “equality before law.”²²

It is certainly a good thing that such unjustifiably harsh punishments are ruled out by the word “unusual” but the reader might be wondering why weren’t such punishments just prohibited by

writing a clause banning “unjustifiably harsh” punishments? Isn’t that the principle behind or spirit of the prohibition of cruel and unusual punishments? I believe that there is a good reason for *not* doing this. The applications of such abstract moral terms as “unjustifiable” are often contestable. One person’s unjustifiably harsh punishment is another’s justifiably harsh punishment. But “unusual,” on the other hand, is a quasi-statistical concept and not susceptible to such a range of controversial interpretations. There is almost always likely to be far greater agreement about what is unusual than whether a penalty change is excessive or unjustified. At worst, there will be a grey area around “unusual” where there is some question about whether the frequency of the occurrence is low enough to be considered unusual. So if lawmakers believed that the present criminal laws and penal practices were just, a good way to secure the continual justice of the penal system would be to prevent punishments that were harsh and unusual.²³

A second benefit that the adopters of the Bill of Rights, and we today, would obtain through understanding the “cruel and unusual” clause in the way that I suggested, is that it prevents reinterpretation of existing punishments as cruel by activist judges of the future.²⁴ That this may well have been a concern of those debating the Bill of Rights can be inferred from one of the only two references to the “cruel and unusual” clause in the Congressional debates about the Bill of Rights. In these debates, Congressman Livermore expressed a worry that certain punishments applied in his era that he and others felt to be morally acceptable, could come to be abolished because they were cruel. 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? 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 time.²⁵

If Livermore's objections to the Bill of Rights expressed a concern that others had, then the addition of "unusual" would be a welcome solution. Livermore himself appears to have ignored the "job" that can be done by the word "unusual" in securing existing legal practices. If he had heeded the "work" that the word "unusual" could do, his worries would not have arisen since the punishments he feared that the proposed Bill of Rights would take away were not unusual. Since we hear no more from anyone else on this theme, perhaps it was recognized that the addition of "unusual" prevented such an unwelcome possibility from arising.

The reader should also notice that Livermore thought that maybe someday in the future, the present punishments could be replaced with more lenient methods for accomplishing reform and deterrence. He argued that until that time, we must keep those punishments that we have. His exact words again were: "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 time." This leads to the third advantage of the recommended interpretation of the Eighth Amendment, one which Livermore missed but appears to have desired. While activist judges of the future will be prevented from reinterpreting familiar punishments as unjustified, the phrase "cruel and unusual" does not completely tie the hands of future legislators and judges. Future lawmakers and adjudicators are not bound to the present system of punishment even though it may presently be considered just. They are open to the possibility of progress in penal techniques.²⁶ The punishment clause of the Eighth

Amendment when read as a conjunction allows this to take place. It doesn't prevent innovations - which by definition are unusual. It only rules out unusual punishments that are also cruel. If the goals of punishment are as Livermore suggests, reform and deterrence, then if they can be brought about without being harsh, so much the better.²⁷

A fourth reason for introducing the conjunction of "cruel and unusual," and for us today to take it literally, is that it also allows room for leniency or mercy.²⁸ Such merciful acts would be unusual but not unconstitutional for they were not also cruel. Mercy or leniency in sentencing may be attractive where there are extenuating circumstances or some other reason for not carrying out a sentence permitted by the letter of the law. But perhaps if such sentences were appropriate given the specifics of the situation, then the light penalties would not be considered unusual for harsher punishments were not the usual punishments in such distinctive situations. However, there are other punishments, which, while historically commonplace, could be replaced as sociological and psychological science develop to where the crimes correlated with such punishments have come to be understood as due to causes which also serve as mitigating circumstances. The replacement punishments, while unusual, may not be cruel.

A fifth benefit of the recommended approach to interpreting the Eighth Amendment is that, contrary to customary legal practice, we would not be ignoring some of the words of the Constitution, or what amounts to the same, not taking these words literally.²⁹ It is not hard to make a case that the default position should be the literal interpretation. Lawmakers don't generally choose their words to be understood metaphorically or idiomatically or to have their literal meaning always ignored in favor of an interpretation that captures the spirit of the law. The Eighth Amendment is a

conjunction and a conjunction is true when both of its conjuncts are true of the matter in question. Since the clause in question is a conjunction there is thus little “semantic room” to follow Dworkin and distinguish “concepts” from “conceptions” in order to reinterpret a logical word like “and” as was suggested might be done for words such as “impartial trial,” “just compensation,” “equal protection,” and “due process” and even “cruel” taken by itself. One might be able to debate whether a logical connective like “or” should be understood as inclusively or exclusively, but what could be a better interpretation of “and” than the one we have? Such a logical connective does not admit of reinterpretation the way “just compensation” or “impartial trials” or “unreasonable searches” does. The current interpretation of the Eighth Amendment ignores the fact that it is a conjunction and doesn’t take the sentence to be a combination of the meaning of its components. As Justice Brennan said “the Court has never attempted to explicate the meaning of the clause by parsing its words.”³⁰ But my contention is that to do justice to the Constitution, punishment is only illegal if it is cruel *and* unusual.³¹ It is not enough that it just be cruel, whatever the concept “cruel” turns out to mean. If one is going to deny that its meaning is compositional, i.e., deny that the meaning of the whole clause is built up from the meaning of its parts, one needs a very good argument for this. A case must be made that this interpretation is not only morally attractive but is so without being susceptible to the charge of judicial activism. Given the possibility of the latter, we would do well to heed the warning of Justice Black: “One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words more or less restricted in meaning.”³²

If ignoring the literal meaning of a law is to be justified without being a case of judicial

activism, it must be because the interpretation captures the *spirit of the law*. For example, a town ordinance may ban vehicles from the park. Assume that the reason for such a prohibition is that it promotes public safety. So while the letter of the law looks like it would keep out police cars and ambulances, the safety conscious spirit of the law would not. So one might likewise try to argue that the spirit of the Eighth Amendment is that unjustifiably harsh punishments rather than unusual punishments be banned. But one must be very careful when taking this approach. In the “No vehicles in the park” case, the appeal to the spirit or principle of the law is made only in exceptional cases; it is not the norm. Reading the Eighth Amendment as “unjustifiably harsh,” on the other hand, would mean *always* ignoring the literal interpretation and disregarding the fact that the clause is a conjunction. Constantly reading the clause as a ban on “unjustifiably harsh” punishments would be an invitation for judges to unwittingly impose their personal morality while ignoring a great deal of death penalty precedent on the grounds that it was not consistent with the best interpretation of the clause. The best conception of a concept should not be inconsistent with a good number and especially paradigmatic applications of that concept. If it does so diverge, I would say what is being proposed is actually a different concept rather than a better application of the same concept.

III. Banning Excessively Harsh Punishments

Despite the above worry about judicial activism, I would accept the claim that banning excessively harsh punishment is the guiding principle or spirit of the Eighth Amendment. I just think that a literal reading would better serve the spirit of the law for it doesn't invite judges to be moral

arbiters on such controversial issues as the excessiveness of certain punishments. However, outlawing excessiveness in punishment has not been recognized by many judges and legal scholars as the spirit of the Eighth Amendment. Many judges and legal scholars have read the clause as just banning the tortures of Stuart England.³³ Anthony Granucci's historical thesis, referred to frequently in Supreme Court death penalty decisions, is that while a concern with excessive harshness was indeed the English interpretation of the clause, the colonial and revolutionary Americans understood the clause just to be a ban on torturous punishments.³⁴ Although I want to avoid getting bogged down in a historical debate, I don't think that the early American understanding of the clause was oblivious to the excessiveness reading.³⁵ One crucial bit of evidence that Granucci puts forth in favor of his thesis doesn't fit it very well. He takes the before quoted passage of Representative Livermore to be evidence that the early Americans were concerned with certain methods of punishment rather than excessiveness. But the punishments Livermore mentions were not examples of barbaric Stuart tortures. In fact they were punishments like hanging that he thought we should keep which he was worried would be outlawed because they were cruel. Furthermore, he mentioned that someday they perhaps should not be allowed when more effective and more lenient better means of reform and deterrence become available. He wrote "but until this can be done we ought not be constrained..."³⁶ This suggests, contrary to Granucci's thesis, a concern with excessiveness in punishment.³⁷ For while what is torturous is always torturous, some punishments not intrinsically wrong can become objectionably excessive given the availability of alternatives.

Those historically-minded commentators who have downplayed the importance of excessiveness to the Eighth Amendment may have been misled by an emphasis on tortures in the discussions and debates prior to the adoption of the Bill of Rights. But such an emphasis makes good sense for a polemicist waging a battle to make an entire class of punishments illegal. A successful forensic strategy is to mention worst case scenarios. This might account for some of the stress on the tortures mentioned in Elliot's Debates.³⁸ Furthermore, even if most of the early American lawmakers were concerned with the prospect of tortures, this need not exclude a concern with non-torturous excessiveness. Keep in mind that all tortures are also excessive.³⁹ Being barbaric and excessive are not mutually exclusive properties.

I maintain that it would be a major mistake to exclude from one's list of fundamental constitutional principles the position that punishments shouldn't be excessive. The principle pervades the making of every law and the applications of the law whenever judges have any discretion. Whether one believes that the purpose of punishment is retribution, restitution, deterrence or even reform, lawmakers and judges don't enact or apply principles that are excessive relative to the aims of their preferred theory.⁴⁰ The fact that this opposition to excessiveness is not explicitly expressed is moot for it infuses, makes sense of and justifies *all* of explicit criminal law. How could constitutional framers and lawmakers not be guided by such a principle when writing laws about punishments and fines? Since it is absurd to deny that such a principle pervades, guides and illustrates their actions, it makes little sense to argue that it shouldn't be considered part of the law.

All judges need to construct a theory of law in order to approach cases that come before their courts. The construction of the ideal theory - a Herculean task, Dworkin would argue - results in umbrella principles that fit and justify the past practices of judges, legislators, lawyers, framers and ratifiers.⁴¹ When a hard case arises, such principles can be appealed to as part of the law. The judge need not use his discretion and rule on the case in accordance with any extra-legal standards. Dworkin illustrates this nicely with his account of the role of principle in *Riggs v. Palmer*.⁴² At the time of that case, there was no statute or precedent that prevented a person from killing someone and then inheriting the deceased's wealth. But in *Riggs*, the young man who murdered his grandfather was not allowed to inherit the deceased's wealth despite being designated as the heir in the will because this would violate the principle that one should not benefit from one's crime. If the reader believes that the unwritten principle that "one should not benefit from one's crime" is part of the law, then a fortiori, the claim that "punishments should not be excessive" should also be part of the law for it would appear to be an even more fundamental and pervasive principle than the former.

Excessiveness is not *explicitly* given its due until the dissent of Justice Field in *O'Neil v. Vermont* and then by the majority in *Weems v. United States* and it finally becomes the sole justification of finding a punishment unconstitutional in *Coker v. Georgia*.⁴³ Justice Marshall argues "that the entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'"⁴⁴ He supports this by noting that "'cruel and unusual language' of the Eighth Amendment immediately

follows language that prohibits *excessive* bail and *excessive* fines.”⁴⁵ But if this is the case, then why didn’t the writers and ratifiers of the English Bill of Rights and the various state bills of rights and the Constitutional Amendments ban *excessive* punishments instead of *unusual* punishments? The word “excessive” was thought to serve their purposes just as well when applied to unjust fines for it is found in the same sentence as the prohibition of cruel and unusual punishments. “Excessive bail shall not be required, excessive fines imposed, nor cruel *and* unusual punishments inflicted.” Is the explanation as simple as a desire on their part to avoid redundancy for “excessive” was already used twice in the sentence in question? I doubt it, but perhaps the account that follows is guilty of over-explanation, looking for more carefully thought out and sophisticated reasons and motives than was really the case. My suggestion is that “excessive” could have been conceived as too moralistic and controversial for matters involving punishment; and “unusual” would do a better job, preventing disagreement and keeping practices as they were. Such an explanation views “excessive” as having the same problem that I mentioned earlier as plaguing the interpretation of “cruel” as “unjustifiably harsh.” It is too wide open and contentious. A constitution that uses moralistic phrasing to ban injustices is not very helpful. For instance, little is gained by laws that state “unjust actions are to be banned.” Nearly all laws aim to prevent unjust acts. Constitutions and laws are helpful when they can give some non-circular guidance in determining what is unjust rather than offering blanket prohibitions of injustice or near synonyms like “excessive” and “unwarranted.” So if the aim of the terms of an amendment is to prevent unjust punishments and fines from being imposed in the future

of what is presently a just legal system, “unusual” does a better job than the more contestable concepts of “excessive” and “unjustifiably harsh.” Agreement will be more forthcoming on what is unusual than what is excessive. So again, I would maintain that there may be considerably more wisdom in the word choice of the “cruel and unusual” clause than is usually acknowledged.

But if “unusual” has benefits that “excessive” and “unjustified” do not, then why did the Bill of Rights use “excessive” in regard to “fines” and “bail?” The exact wording is “*Excessive* bail shall not be required, *excessive* fines imposed, nor cruel and unusual punishments inflicted.” Perhaps the word choice is the result of it being easier to determine excessive fines than excessive punishments. This is because the person fined was often so treated because of the financial harm s/he caused. Determining financial equivalence and deviations from it is not as difficult as reaching a consensus about the deserved degree of imprisonment or pain infliction. Furthermore, given that fines of all different sizes could be called for since the range of financial harms that occur is great, there would occur unusual amounts of harm calling for unusual remunerations. Thus “excessive” is better suited than “unusual” for doing justice in financial matters. It may also be that the passions aren’t as likely to blind judges and juries and distort their reasoning when the topic is financial crimes rather than when the subject matter is a type of crime that warrants physical punishment. In the latter, the vindictive passions are more likely to be aroused, and “unusual” could do a better job preventing too severe a punishment than the word “excessive.” There is more room for disagreement over “excessive” punishment than “unusual” punishment. Thus there is more reason for abuse to go

unnoticed by the authorities. So again, if lawmakers believe that their penal laws are basically just as they stand, the “unusual” clause would prevent abuse by future legislators and judges.⁴⁶

IV. How to Interpret the Death Penalty as not only Cruel but also Unusual

Some readers might resist my interpretation of the Eighth Amendment because they seek the abolition of capital punishment. While many abolitionists believe that the death penalty is harsh, they think it unjustifiably harsh and this makes them deaf to the more nuanced reading of “cruel.” They don’t want the standard to be “unusualness” literally construed as “uncommon” and joined with “harshness” through the devices of a compositional semantics because then the fact that executions have occurred from colonial days to the present would prevent capital punishment from being ruled unconstitutional. Such abolitionists concede to the retentionists that if the “unusual” part of the clause is heeded then the point expressed by Justice Black in *McGautha v. California* would be correct: “In my view these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted.”⁴⁷

Of course, there is no guarantee that what the law is and what one would like it to be will coincide.⁴⁸ It may just be that the best interpretation of the Eighth Amendment cannot do what abolitionists want it to do. But they may be able to find an argument against capital punishment elsewhere in the Constitution.⁴⁹ However, I do *not* think that my interpretation of the Eighth Amendment is of no use to abolitionists. While the death penalty is, unlike the rack and the wheel,

not objectively (factually) unusual given that it has been a practice for so long, there is a sense in which it may be construed as *subjectively* unusual. This latter sense of “unusual” uses as the standard of what is usual not the exact numbers and real condition of those people executed, but the public’s perception of the circumstances in which the death penalty is applied. So given the public’s beliefs about what has been occurring, the actual practice of the death penalty could be unusual if it is not at all like the public’s expectations.

There are times when “unusual” should *not* be understood to mean “what usually does not happen,” but rather should be interpreted as “what we *think* does not usually happen.” Just as there is a way in which we can construe as true the statement of a tourist that a plant is “unusual” when it is actually quite common in that region - and perhaps, unbeknownst to them, is even common in their homeland - the public can consider a punishment unusual when it is really a rather common practice. For example, if unbeknownst to most of us, every convicted petty thief has always been killed upon entering prison and has been replaced by a clone or a hologram, this would surely be unconstitutional though it was not *in fact* unusual. Basing the meaning of “unusual” on subjective expectation rather than statistical fact would render such events not only cruel but also unusual. They are the latter because such killings were not what the public *believed was the usual punishment* for theft.

I would maintain that this understanding of “unusual” is not only the best conception but is also the original one. Even if this subjective conception was not in the forefront of the minds of the Framers and ratifiers, it would be fair to say that they held it implicitly if they would have judged

cases like the above executions of petty thieves to be unconstitutionally unusual. Likewise, if the death penalty turns out to be applied in a way that strikes people as unusual for they believed that it was much more rarely applied to innocents than it actually was, this would make the punishment constitutionally unusual given people's subjective expectations.⁵⁰ As a matter of fact, throughout our nation's history, more innocent people have been put to death than lawmakers and the public have thought was occurring. It is likely that Framers, contemporary court officials and the rest of the citizenry of both yesterday and today have assumed that on a very rare occasion an innocent might be executed. But I doubt that they expected this would happen as often as it does. The Framers and ratifiers, like much of the public until very recently, were unaware of the extent that "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real."⁵¹ Evidence that the public was unaware of the extent of the flaws of our system of capital punishment can be found in the recent accounts of how startled many people have been at the rash of death row prisoners lately discovered through DNA testing. Even conservative pro-death penalty governors have declared moratoriums in response to such news. So there may very well be grounds for declaring the death penalty unconstitutional despite its statistical familiarity.

Abolitionists will find another benefit of the advocated approach to the Eighth Amendment is that it provides an easier way to defend the unconstitutionality of the death penalty than by appealing to the principle that such punishment is an offense to the dignity of men and women.⁵² And more importantly, opponents of judicial activism will be relieved that the constitutional debate over capital

punishment can take place without judges having to appeal to accounts of dignity that have not been widely held throughout our constitutional history. Justice Brennan thinks that the death penalty is an affront to a person's dignity, but no less an authority on the value of a person than Immanuel Kant thinks it is not.⁵³ There is not anything approaching a consensus about how the concept "dignity" bears on the death penalty. I wouldn't be surprised if "dignity" has been used in so many different ways in our legal history that no Dworkinian umbrella principles involving just one conception of dignity will be able to fit and justify past legal practices.⁵⁴ So while it is unclear whether capital punishment is an offense against the dignity of man, and any attempt to declare it so smacks of judicial activism, a more clear cut and compelling argument can be made that it is an unacceptable risk since innocents will be executed.⁵⁵ While I don't believe anyone upon sustained reflection would maintain the old maxim that it is better that the guilty go free than just one innocent man goes to jail - for this can only be guaranteed by abolishing prisons - I am much more confident that many people believe, and rightly so, that it is better that even those who deserve to be executed get life imprisonment than to have any innocents sent to their deaths.⁵⁶

Conclusion

Abolitionists may be attracted to the advocated reading of the Eighth Amendment because it reveals that the demand that punishments must be unusual as well as cruel to be nullified by the Supreme Court, does not entail that punishments frequently imposed throughout our history cannot be declared unconstitutional. And yet opponents of judicial activism should also find the advocated

interpretation appealing since it does not open the door for judges to impose, perhaps unwittingly, their own private conception of what punishments are unjustifiably harsh. There is considerable wisdom in the literal interpretation of the Eighth Amendment. I wouldn't be at all surprised if those who framed the clause were aware of the sage guidance that they were providing. And if they were not cognizant of the wisdom of their word choice, since we have had a few centuries to learn of the dangers of creative constitutional interpretations, we may now be ready to appreciate a literal interpretation of the Eighth Amendment.

¹. The italics are my addition.

². Radin, Margaret Jane. "The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause." *University of Pennsylvania Law Review*. vol. 126 1978 pp. 989-1064.

³. *Furman v. Georgia* at 382. For further discussion of the distinction between ordinary cruelty and Constitutional cruelty see also *Furman* 312, 382 and *In Re Kemmler* 136 U.S. 446-7.

⁴. If "cruel" is what Bernard Williams calls a "thick concept," i.e., its meaning has both

descriptive and normative components, then if some act can be factually described as cruel, condemnation of it is entailed. See Phillipa Foot's "Moral Arguments." reprinted in *Virtues and Vices*. (Ann Arbor, UMI Books on Demand, 1997). The opposing view can be found in Simon Blackburn's "Morality and Thick Concepts." *Proceedings of the Aristotelian Society*. Supplementary vol. 66 (1992) pp. 285-299. Blackburn doubts whether there are any thick concepts in which if the descriptive aspect of the content holds then this entails that the normative aspect does. The advocates of thick concepts insist that if some act has been established as cruel, treacherous etc., rude or treasonous, then it follows that it is morally wrong. But it seems possible to imagine worlds where either *prima facie*, or *all other things being equal*, rudeness, treachery, treason and cruelty are justified. (I read the phrase "all other things being equal" as more of a statistical claim while to call something "prima facie wrong" just means "on the face of it some act is wrong," without any statistical commitment being made about whether it is more often than not overridden by other considerations.) Therefore, moral condemnation cannot be part of the meaning of "cruel" or entailed by it.

⁵. In fairness to Bedau, his use of "verges" in "verges on being an oxymoron" doesn't commit him to the claim that it is logically impossible for a punishment to be cruel and usual but justifiable. See his comments in *Death is Different*. (Boston: Northeastern Press, 1987) p. 102.

⁶. *Trop v. Dulles*. 356 U.S. at 100 n. 32. Justice Warren goes on to say “the Court examines the punishment in light of the basic prohibition against inhuman treatment without regard to any subtleties of meaning that might be latent in the word “unusual.”

⁷. *Furman v. Georgia*. 408 U.S. at 277 n. 20.

⁸. *Ibid.* at 318, 331. Marshall is influenced by the historical work of Anthony Granucci. “‘Nor Cruel and Unusual Punishments Inflicted:’ The Original Meaning.” *California Law Review*. October 1969 vol. 57 no. 4. pp. 857-859. Granucci notes that earlier drafts of the English Bill of Rights called for a ban on “cruel and illegal punishment.” Since we certainly don’t need laws that make *illegal* punishments unlawful, replacing “illegal” with almost any word would be an improvement. But it is a very different matter to describe, as Marshall does, the addition of “unusual” as “inadvertent.” This is an extremely uncharitable reading. It gives the impression that the Bill of Rights is the result of a typo or something equally haphazard and insignificant.

⁹. *Furman v. Georgia*. 408 U.S. at 379.

¹⁰. In section IV, punishments that diverge from the established practices will be given a subjective construal. That is, punishments that diverge from what is *thought* to be the norm, could be considered unconstitutional, if they are also cruel. A punishment could be subjectively

unusual if, unbeknownst to the public and legislature, it has been implemented by jailors and thus was not objectively (statistically) unusual.

¹¹. 1 Annals of Congress. 754 (1789)

¹². Anthony Granucci “‘Nor Cruel and Unusual Punishments Inflicted:’ The Original Meaning.”

Op. cit.

¹³. There are couple of moves that the friends of thick concepts might resort to in order to salvage the moral component that I deny is part of the meaning of the term “cruel.” One might first argue that my examples of a cruel workout and a cruel disease are just metaphorical extensions of “cruel.” Secondly, the advocate of thickness might insist any justified cruelty during a war or even a cruel punishment of Hitler would be *prima facie wrongs* that are outweighed by other factors and thus the actions are justified by *all things considered* judgments. However, I doubt that these discussed cases are either metaphorical or *prima facie* wrong, but I can’t explore this issue here. I refer the reader to Blackburn’s “Morality and Thick Concepts.” Op. cit.

¹⁴. Justice Burger even recognizes that there is “an everyday sense of cruel” that does not intimate injustice. *Furman v. Georgia* 408 U.S. at 379. But “constitutional cruelty” does entail condemnation. See also Justice Burger’s acknowledgment “that all suffering is cruel” but not

all suffering is unconstitutional. *Ibid.* p. 382.

¹⁵. For a defense of Originalism see Robert Bork's "Neutral Principles and some First Amendment Problems" 47 *Indiana Law Journal* 1 (1971) and his *The Tempting of America: The Political Seduction of the Law*. (New York: The Free Press) Also see Rehnquist's "The Notion of a Living Constitution" 54 *Texas Law Review*. 693 (1973). For further elucidation of originalism coupled by criticism of the doctrine see the Paul Brest's "The Misconceived Quest for the Original Understanding." *Boston University Law Review*. Vol. 60 (1980) reprinted in *The Philosophy of Law: Classic and Contemporary Readings with Commentary.*" Eds. Frederick Schauer and Walter Sinnott-Armstrong. (Fort Worth: Harcourt Brace College Publishers) 1996.

¹⁶. See H. Jefferson Powell's "The Original Understanding of Original Intent." *Harvard Law Review*. Vol. 98 (1985). pp. 885-948. He discusses how British Protestant and the Enlightenment tradition formed part of the mental furniture of all literate Americans from the Declaration of Independence to John Quincy Adams' presidency. See Powell's account of how these traditions advocated loyalty to "plain meaning" of the text and hostility to "interpretation" on pp. 884-895. For evidence that James Madison did not believe that the framers' subjective understanding was authoritative in interpreting the Constitution see pp. 935-936, 938, 940-941. For the surprisingly similar views of the great Justice John Marshall see pp. 843-944. For an indication of Justice

Story's hostility to original subjective intentions as the key to Constitutional interpretation see note 325 on pp. 946-947. The framers and the ratifiers were very familiar with the common law tradition of the time which was also hostile to original subjective intentions. See pp. 894-902.

¹⁷. Ronald Dworkin has argued the case for this approach to law quite persuasively in a number of articles and books. See his *Taking Rights Seriously* (Cambridge: Harvard Press, 1977) pp. 134-37 and his magnum opus *Law's Empire*. (Cambridge: Belknap Press, 1985.)

¹⁸. Dworkin asks the reader to imagine that s/he was instructing his or her own children to always treat others fairly. Would you as a parent want your children to follow your particular conception of fairness down to the last detail - no matter how idiosyncratic and indefensible - or to always do what they think the best conception of fairness demands? Most readers, would prefer that their children do what fairness *truly* demands. Thus shouldn't the framers have had a similar attitude to the constitutional interpretation undertaken by the later generation of judges and lawmakers?

¹⁹. On this point see Brest's "The Misconceived Quest for the Original Understanding." Op. cit. It may also be that they used such abstract phrases because they wanted future generations to "fill out" the concept in their applications in changing circumstances.

²⁰. Again, "unusual" should be given a subjectivist interpretation. That is, it is thought to be

unusual by Americans, even if it is not actually unusual. More about this in section IV.

²¹. These three cases illustrate Bedau's category of frequency, offense, and offender-related arguments for being cruel and unusual and thus unconstitutional. Bedau, Hugo. *Death is Different*. Op. cit. p. 114.

²². But not all discrimination would be unusual for where there is historically established double standard, then discrimination would be the usual state of affairs. However, the equal protection clause of the Constitution should protect such people.

²³. This assumption of existing penal laws as just is not appreciated by the many scholars who ignore or downplay the presence of the word "unusual" in the Eighth Amendment. Taken out of such a context the phrase will seem less satisfactory than it really is. In context, it does much of the work that commentators fault it for not being able to accomplish.

²⁴. For somewhat analogous but earlier fears about judicial powers that surfaced in the debates over the Constitution before the Bill of Rights was added, see the *Complete Anti-Federalist* by H. Storing 1982. p. 50 note 96, 166-169, 358n note 96. Especially worth noting are the reprinted "The Essays of Brutus" pp. 417-441.

²⁵. 1 Annals of Cong. 754 (1789) Though Livermore urged the Bill of Rights be rejected for the reasons mentioned in his quote, it passed by a considerable majority.

²⁶. This would make sense if the adopters were concerned with deterrence or reform and new punishments were devised that could serve these ends better. It makes less sense if their interest is in retribution, for then punishment must be harsh to be proportional to the gravity of the crime and thus reductions in severity are unwelcome.

²⁷. A weakness of my literalist account may be revealed by a penal innovation that is not *as* cruel as existing punishments, but *still* cruel. This just as effective and yet less cruel punishment might be prohibited by my reading of the Eighth Amendment because it would be both cruel and unusual. For an illustration of an innovation that may not be *as* cruel as the existing punishment (hanging) but still qualify as cruel, see the discussions of introducing executions by shooting in *Wilkerson v. Utah*. 99 U.S. 130 (1879) and the innovation of electrocution in *In Re Kemmler*. 136 U.S. But such a “downside” may be worth accepting for it is better to err on the side of not allowing slightly less harsh punishments if doing so virtually guarantees that crueler punishments will not be introduced. However, maybe such a drawback can be avoided. Perhaps an appeal could be made to the purpose of the law. The “cruel and unusual” phrase was introduced to cover harsher than the usual punishments. So we could read it as prohibiting punishments that were

both unusual and *crueler* than existing ones. “Crueler” is still an easier concept to apply than “unjustified.” Another possibility is to insist that the determination of “cruel” is to some extent relative to the options available. It could be that something which is not intrinsically cruel becomes cruel when the end it serves can be reached in a less unpleasant manner. For instance, a \$500 fine might *not* be considered cruel if it serves to deter a certain kind of crime, but would become so if it turns out that the same crime can be deterred at much less cost. But I am a little wary of taking this approach of relativizing cruelty for two reasons. First, it would involve us maintaining that the traditional methods of execution are not cruel (reading this as “harsh”) but become so when the death can be accomplished by less severe sentences. This seems to me to be a bit of a “semantic stretch.” The second problem is that it is very difficult to distinguish this relativizing approach from the earlier rejected interpretation of “cruel” as “unjustifiably harsh.”

²⁸. This is not to say that interpreting “cruel” as “unjustifiably harsh” can’t also allow leniency.

²⁹. Recall previously mentioned statements of Warren, Brennan, Burger and Marshall in the third paragraph of the second section of this paper.

³⁰. *Furman v. Georgia*. 408 U.S. at 297 n. 20. Hugo Adam Bedau makes a similar claim arguing that the phrase should be interpreted as a “ligature designating a complex of intertwined and inseparable properties rather than one set of properties correlated with “cruel” and another with

“unusual.” See his *Death is Different: Studies in the Morality, Law and Politics of Capital Punishment*. Op. cit. 96.

³¹. A very different view about the cruel and unusual phrase is put forth by Justice White, with Justice Holmes concurring. White claimed that “the prohibition, though conjunctively stated, was really disjunctive...” *Weems v. United States*, 217 U.S. at 390, 401. One reason not to adopt this approach is that a punishment would then only have to be unusual to be unconstitutional. For example, implementing a humane innovation in punishment techniques would be unconstitutional because it was new and unusual. But if punishment has to be cruel as well as unusual to be proscribed, then a non-cruel but unusual innovation in penal practices would be acceptable.

³². *Griswold v. Connecticut* 381 U.S. 479.

³³. See *In Re Kemler* 136 U.S. 436, 446-447. *Furman v. Georgia*. 408 U.S. 377. For a long list of lower court decisions revealing the understanding that the Eighth Amendment only excluded Stuart regime tortures and barbaric punishments very similar to those, see the discussion of Justice White in his dissent in *Weems v. United States*. 217 U.S. 401-410.

³⁴. Granucci shows that it was the perjury case of Titus Oates and not the abuses of the Bloody

Assize that motivated the ban on cruel and unusual punishments in the English Bill of Rights.

The punishments in the Oates' case were not considered inherently barbaric for such punishments were appropriate for graver crimes than perjury and continued to be applied long after the and even sometimes by those who enacted the Bill of Rights. .

³⁵. Justice McKenna observes “that men like Patrick Henry who were wary of power and its abuses, surely intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.” *Weems v. United States*, 217 U.S. 372.

³⁶. 1 Annals of Cong. 754 (1789)

³⁷. For the stress on excessiveness and the unnecessary nature of capital punishment, see W. Bradford's “An Enquiry how Far the Punishment of Death is Necessary in Pennsylvania” published in 1793.

³⁸. See the comments of Patrick Henry in 3 *J. Elliot's Debates*. pp. 447-448, and those of Mr Holmes in *J. Elliot's Debates*. p. 111.

³⁹. The distinction between *torturous* and *excessive* is not the only potentially misleading distinction in the punishment debates. The Court has sometimes distinguished *unnecessary* from *excessive* punishment, putting them both forth as what the Eighth Amendment was designed to curtail by its cruel and unusual clause. Justice Marshall writes “if it violates the Constitution, it does because it is excessive or unnecessary, or because it is abhorrent to currently existing moral values.” *Furman v. Georgia*. 408 U.S. at 332-33. See also Justice White’s remarks at 312 and Justice Stewart’s at 309. But there is nothing inherently objectionable about a punishment being unnecessary if the unnecessary aspects are not excessively harsh. Having a prisoner wear a white uniform with black stripes is not necessary to the goals of punishment but since it is not a case of excessive harshness it is not unjust and unconstitutional. Thus unnecessary punishment is only problematic when it is excessively severe so it does not need to be distinguished as a distinct ground for unconstitutionality as Marshall’s quote implies.

⁴⁰. If one is a restitutionist or retributivist about punishment, then punishment must be deserved and proportional to the costs or gravity or evil of the crime. An advocate of deterrence seeks punishments that deter and any cruelty beyond that necessary to deter is considered gratuitous, even evil if one is a utilitarian. Reform theories can also be concerned with excess punishment if they believe that some pain is necessary to teach the criminal what his victim felt like when he suffered. See Jean Hampton’s “The Moral Education Theory of Punishment” in *Philosophy and*

Public Affairs. 13 vol. 3 Summer 1984

⁴¹. Dworkin, Ronald. *Law's Empire*. (Cambridge, Belnap Press, 1986)

⁴². Dworkin, Ronald. "Models of Rules I." *Taking Rights Seriously*. (Cambridge, Harvard University Press, 1977) pp. 23-28.

⁴³. *O'Neil v. Vermont*. 144 U.S. at 337. *Weems v. United States*. 217 U.S. 349 (1910). *Coker v. Georgia* 433 U.S. 584. Justice Field first wrote in *O'Neil*: "The clause is directed, not only against punishments of the character mentioned (torturous punishments) but against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged."

⁴⁴. *Furman v. Georgia*. 408 U.S. at 332.

⁴⁵. *IBID*. at 332. Italics are my addition.

⁴⁶. I repeat that I am putting this forth as a charitable interpretation, and not one steeped in historical evidence. But if the proffered explanation is too charitable, imputing more wisdom into the word choice than originally intended, this provides us now with reason to adopt such an approach.

⁴⁷. *McGautha v. California*. 402 U.S. 183, 225-26.

⁴⁸. It is a mistake to allow one's theory of jurisprudence to be driven by the results one wants on a single issue. My suspicion is that all too often the single issue obsession of abolitionists leads them to adopt a theory of constitutional interpretation that provides their desired result.

⁴⁹. For instance, the best interpretation of due process clause may rule out the death penalty. Given what is the stake, the life of the accused, the Court must go to greater lengths to guarantee a fair trial than it does when the threat is a lesser punishment. As Justice Harlan noted, "I do not concede that whatever process is 'due' an offender faced with a fine or prison sentence necessarily satisfies the requirements of the Constitution in a capital case. *Reid v. Covert*. 354 U.S. at 77. If this can't be done, if the appropriate standard for taking life cannot be reached, then the punishment should be abolished. Perhaps our legal system doesn't have the persons and resources to see to it that the innocent don't go to their deaths at an unacceptable rate. Maybe no rate other than zero is acceptable. Death means the loss of any appeal if new evidence arises. Life in jail preserves the possibility that justice can be served, though late. Justice delayed may be justice denied, but when it arrives it is still justice and quite welcome - at least if the unjustly treated is still with us. So the best interpretation of "due process" could rule out the death penalty. Margaret J. Radin defends something like this position in her "The Jurisprudence of

Death: Evolving Standards for the Cruel and Unusual Punishments Clause.” Op. cit.

⁵⁰. Readers may think that I am making a logical error in moving from the claim that a type of punishment is subjectively unusual if it is done more often than people think it is being done, to the different claim that a punishment can be construed as subjectively unusual when it is applied to innocents more often than people think it happens. I don't think there is any logical error here. Perhaps the appearance of one comes from my explicitly mentioning *innocents* who were unjustly executed in the second claim. But the first “unusual” was also referring to an injustice - executing petty thieves who should have just been briefly incarcerated. Anyway, leaving aside the innocence of the those punished in an unusual manner, the point is that in both cases what is actually occurring is not what people expect usually occurs. My argument is not resting on the fact that an injustice is being done to the *innocents* and then illegitimately annexing the execution of innocents to the execution of the *guilty* thieves whom the public thought were just being incarcerated. My point is that the ratifiers, Framers, and much of the public until recently, were not aware of how frequently a certain group of people were punished whom they did not want so punished.

⁵¹. Justice Marshall's words in *Furman v. Georgia* 408 U.S. at 367. See also 366 and notes 155,156. See the introduction to H.A. Bedau's *The Death Penalty in America*. (1967 rev. ed.) for

support of the claim that innocents have been convicted and executed. For a recent right wing argument that the death penalty should be abolished because governments cannot apply it accurately, see Carl M. Cannon's "The Problem with the Chair: A Conservative Case Against Capital Punishment." *National Review*. July 3, 2000.

⁵². The approach also enables us to avoid debates about the effectiveness of executions as deterrents.

⁵³. See Brennan's comments in *Furman v. Georgia* 408 U.S. at 286, 291, 305. Kant, Immanuel. *The Metaphysics of Morals*. tr. Mary Gregor (Cambridge University Press, 1996). pp. 104-109.

⁵⁴. For an account that our legal system is a patchwork of conflicting ideologies, often compromised and watered down, that resist the story of principled fit the Dworkin thinks possible see Andrew Altman's "Legal Realism, Critical Legal Studies and Dworkin." *Philosophy and Public Affairs*. 15 vol. 3 1986 pp. 205-235.

⁵⁵. Ernest van den Haag argues that since we accept the risk of the loss of innocent life in automobiles, airplanes, factories and mines etc., we should accept the risk of innocent people being executed to obtain the benefits of deterrence and the expressivist vindication of the rights and worth of the murdered. "In Defense of the Death Penalty: A Practical and Moral Analysis."

Criminal Law Bulletin. Vol. 14 no. 1 pp. 51-68. But deaths in planes and factories and the like are risks accepted by those who may eventually die. Only a very strained notion of tacit consent would extend such reasoning to all of those on death row. If they had been lifetime opponents of the death penalty, we can't argue that they had counterfactually accepted the risk that they would be executed when innocent in order to obtain the benefits of deterrence and expressivism that executions provide.

⁵⁶. I would like to thank Burleigh Wilkins, Heather Salazar, Christopher McMahon and an anonymous reviewer for help with this article.