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“Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning

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The histories of the prohibitions of cruel and unusual punishments found in the English Bill of Rights of 1689 and in the eighth amendment to the United States Constitution have never been adequately investigated. Judges and scholars alike have been content to accept the conclusions of the American framers that the clause was originally designed to prohibit barbarous methods of punishment and that it was not, therefore, intended as a general prohibition on merely excessive penalties. This Article will attempt to demonstrate that the conclusions of the American framers were based on a misinterpretation of the intent of the drafters of the English Bill of Rights. The Article first analyzes the positions of the American framers. It then traces the legal developments which resulted in the English Bill of Rights of 1689. It concludes with an explanation of the way in which the American framers misinterpreted English law.

I

THE AMERICAN FRAMERS ON CRUEL AND UNUSUAL PUNISHMENT

By the spring of 1776 the mood of the American colonials had “gone such Lengths, that it was a Matter of Moonshine . . . whether Independence was at first intended, or not.”¹ In early May a convention of delegates from the counties of Virginia was called to deter-

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1. Letter from George Mason to John Mercer, October 2, 1778, *cited in* R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 30 (1955) [hereinafter cited as R. RUTLAND].

mine whether the Colony of Virginia would declare itself an independent state. Nine days later the convention passed two resolutions. The first unanimously instructed Virginia's delegates to the Continental Congress to propose a declaration of independence from Great Britain. The second dealt with the internal affairs of Virginia.

*Resolved, unanimously, that a committee be appointed to prepare a DECLARATION OF RIGHTS, and such plan of government as will be most likely to maintain peace and order in this Colony, and secure substantial and equal liberty to the people.*²

To implement the resolution, a committee was formed under the leadership of Archibald Cary. George Mason, delegate from Fairfax County, was added to the committee upon his arrival in Williamsburg.³ Mason, a plantation owner, had generally shunned public office. Although he had no formal education in law, he was reported to have been well versed in English constitutional history. Whatever knowledge he possessed on this subject came from materials available in Virginia, since he had never traveled abroad. Mason, well thought of by his contemporaries, served for many years as a lay justice of the peace for Fairfax County and had a chief role in the drafting of the Virginia Non-Importation Resolutions of 1769 and the Fairfax Resolves of 1774.⁴ He soon proposed a bill of rights and a constitution for state government which "swallowed up all the rest" of the proposals.⁵

On June 12 Mason's proposals were adopted with minor amendments. Section 9 of his Declaration of Rights states:

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.⁶

The wording was a verbatim copy of a prohibition in the English Bill of Rights of 1689.

Following its inclusion in the Virginia constitution, eight other states adopted the clause, the federal government inserted it into the Northwest Ordinance of 1787, and it became the eighth amendment to the United States Constitution in 1791.⁷ The subsequent formulations, often adopted without debate, indicate that the cruel and unusual punishments clause was considered constitutional "boilerplate."⁸ Never-

2. H. GRIGSBY, *THE VIRGINIA CONVENTION OF 1776*, at 18 (1855) [hereinafter cited as H. GRIGSBY].

3. R. RUTLAND, *supra* note 1, at 32.

4. See H. GRIGSBY, *supra* note 2, at 155-66; 1 K. ROWLAND, *THE LIFE OF GEORGE MASON* (1892); R. RUTLAND, *supra* note 1, at 39-40.

5. R. RUTLAND, *supra* note 1, at 33.

6. *Id.* at 35-36, 232.

7. See generally *id.*

8. The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt,

theless, there remains in the debates of the various state conventions called to ratify the United States Constitution sufficient contemporary comment to establish the interpretation which the framers placed on the words "cruel and unusual."

In the Massachusetts convention of January, 1788, an objection was made to the lack of limitations on the *methods* of federal punishments.

[Congress will] have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check of them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.⁹

When the Virginia delegates met to consider the United States Constitution, Patrick Henry was a vehement objector to the lack of a bill of rights. Fearing the use of "tortures" and "barbarous" punishments, he specifically complained of the lack of a prohibition on cruel and unusual punishments.¹⁰

In the same discussion George Mason, drafter of the Virginia Declaration of Rights, expressed his interpretation of the cruel and unusual punishments clause, in answer to a statement that torture was not prohibited by Virginia's constitution:

Mr. George Mason replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence

were imitative, deficient, and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles—or for some of them. That task was executed in a disordered fashion that verged on ineptness. The inclusion or exclusion of any particular right neither proved nor disproved its existence in a state's colonial history.

L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 411 (1968) [hereinafter cited as L. LEVY].

9. 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881) [hereinafter cited as J. ELLIOT].

10. 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 [Virginia] declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishments. 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 that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture

3 J. ELLIOT, *supra* note 9, at 447-48.

against himself Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.¹¹

Expressions in the first congress confirm the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment. The *Annals of Congress* record the following discussion of the clause:

MR. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.

MR. LIVERMORE [of New Hampshire]—the clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it, I do not think it necessary 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 future to be prevented from inflicting these punishments because they are cruel?

The question was put on the clause, and it was agreed to by a considerable majority.¹²

Following adoption, state and federal jurists accepted the view that the clause prohibited certain methods of punishments. Since the "barbarities" of Stuart England were not used often in America, the clause was rarely invoked in the courts. Attempts to extend the meaning of the clause to cover any punishment disproportionate to the crime were rebuffed throughout the nineteenth century and commentators believed the clause to be obsolete.¹³

At the turn of the twentieth century, the Supreme Court developed an expanded view of the cruel and unusual punishments clause. In *O'Neil v. Vermont*, decided in 1892, three dissenting justices subscribed to the view that "The whole inhibition [of the eighth amendment] is against that which is excessive"¹⁴ O'Neil, a retail liquor dealer licensed in New York, accepted and filled mail orders from residents of Vermont. Charged with the illegal sale of alcoholic beverages in Vermont, he was convicted on 307 separate counts and

11. *Id.* at 452.

12. 1 ANNALS OF CONG. 782-83 (1789).

13. 1 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 694 (8th ed. 1927); see Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

14. *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892). Mr. Justice Field, long the voice of economic conservatism on the Supreme Court, see R. McCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF FREE ENTERPRISE* 72-126 (1951), felt a special sensitivity to claims of "cruel and unusual punishment." In 1897, while sitting as a circuit judge, Field applied the clause to invalidate the operation of a San Francisco city ordinance. *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (No. 6546)(C.C.D. Cal. 1879).

fined \$6,638.72. When the fine was not paid within the specified time, O'Neil was sentenced to serve over 54 years in prison.

At the oral argument before the Supreme Court, counsel for O'Neil raised for the first time a claim of cruel and unusual punishment because of the disproportion between the offense and the punishment. Speaking for a six member majority, Mr. Justice Blatchford refused to consider the claim because it had not been assigned as error at the proper time and because it had not been discussed in the briefs. The majority went on to add that, even if the contention had been properly raised, the eighth amendment only restricted the federal government and did not apply to the State of Vermont.¹⁵

In the 1909 term in *Weems v. United States*, another claim of disproportionate penalties was presented to a seven-member Supreme Court.¹⁶ Weems was sentenced to prison by a territorial court which was subject to a prohibition against cruel and unusual punishment. As in *O'Neil*, counsel for Weems failed to assign as error the claim of cruel and unusual punishment, although a discussion of the question was presented in the briefs. Weems had been convicted of a strict liability offense—making a false entry in government payroll books. There was no proof of intent to defraud nor evidence of any governmental loss. For this, he was sentenced to 15 years at hard labor to be performed in chains plus other civil disabilities. The opinion of the Court, delivered by a majority of four justices, took the position that the clause should be expanded beyond its original reach to cover any instance of disproportionate punishment. Mr. Justice Brewer, one of the three dissenters in *O'Neil*, died before the opinion was delivered; it can be assumed that he would have been a fifth vote for reversal.¹⁷ Mr. Justice White, joined by Mr. Justice Holmes, took the position that English history supported a narrow view of the clause. The decision was applauded by the *Harvard Law Review* as a triumph of enlightenment over history.¹⁸

The American framers and the dissenters in *Weems* believed that they were being faithful to the interpretation of the English Puritans who had first drafted the cruel and unusual punishments clause in 1689.¹⁹ However, a fresh look at the history of punishment in England, and especially the framing of the English Bill of Rights of 1689, indicates that the framers themselves seriously misinterpreted English law. Not only had Great Britain developed, prior to 1689, a general policy

15. 144 U.S. at 331-32.

16. *Weems v. United States*, 217 U.S. 349 (1910).

17. *See id.* at 357 n.1.

18. Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54 (1910).

19. *See* White, J., dissenting in *Weems v. United States*, 217 U.S. 349, 389-90, 394-95 (1910).

against excessiveness in punishments, but it did not prohibit "barbarous" punishments that were proportionate to an offense.

II

THE PROHIBITION OF EXCESSIVENESS IN PUNISHMENT

The prohibition of excessive punishment, through the establishment of maximum limits, was an early development in the western world. It was first expressed in the Old Testament of the *Bible* in the *Book of Exodus*. One of the laws given to Moses by the God of the Jewish nation, Yahweh, was the *lex talionis*—an eye for an eye, a tooth for a tooth.²⁰ It is generally considered a law of retribution—the product of a vengeful deity. Envisioning neither mercy nor mitigation of punishment, the *lex talionis* is, by modern standards, extremely harsh; however, it does prescribe a maximum limit on punishment. "*Talio*" is Latin for "equivalent to" or "equal."²¹ That the *lex talionis* requires punishment equal to the crime is made clear by a passage from the *Book of Leviticus*: "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."²²

A concern for equality between the offense and the punishment of the offender was expressed in early Greek philosophy. Aristotle taught that inequality, whether in favor of or against the offender, meant injustice.²³ A similar concept of equality is found in the laws of the Angles and the Saxons of pre-Norman England. The penal laws of the Germanic peoples in the Middle Ages were enforced through a system of fixed penalties, and the Norse Vikings followed such a system by listing each known crime and its appropriate penalty in the *Gulathing* and *Frustathing* Laws.²⁴ The penalties ranged from outlawry to fines of a few ora. Under the Laws of King Alfred, who reigned in England circa 900 A.D., the *lex talionis* was codified and prescribed in fine

20. THE JERUSALEM BIBLE 104 (Jones ed. 1966) (*Exodus* 21:25).

21. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1450 (unabridged ed. 1967). The word is derived from *talīs*, meaning such or like. See R. AINSWORTH, *THESAURUS LINGUAE LATINAE COMPENDIARIUS: OR A COMPENDIOUS DICTIONARY OF THE LATIN TONGUE*, not paginated (1761).

22. THE JERUSALEM BIBLE, *supra* note 20, at 162, 105 n.f. (*Leviticus* 24:19-20).

23. 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 inflicted by one party on the other. Consequently, what the judge seeks to do is to redress the inequality which is this kind of justice is identified with the 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 unequal 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).

24. T. DUFWA, *THE VIKING LAWS AND THE MAGNA CARTA* 51-52 (1963).

detail:

For a wound in the head if both bones are pierced, 30 shillings shall be given to the injured man,

If the outer bone [only] is pierced, 15 shillings shall be given. . . .

If a wound an inch long is made under the hair, one shilling shall be paid. . . .

If an ear is cut off, 30 shillings shall be paid. . . .

If one knocks out another's eye, he shall pay 66 shillings, 6 1/3 pence. . . .

If the eye is still in the head but the injured man can see nothing with it, one-third of the payment shall be withheld. . . .²⁵

The list continues with a monetary value assigned to every part of the anatomy.²⁶

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.²⁷ 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.

The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation.²⁸ Maitland said of Chapter 14²⁹ that "very likely there was no clause in the Magna Carta more grateful to the mass of the people."³⁰ Chapter 14

25. J. DAWSON, *THE DEVELOPMENT OF LAW AND LEGAL INSTITUTIONS* 44 (unpublished, Harvard Law School 1965).

26. *Id.*

27. See 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 449-62, 513-18 (2d ed. 1898). The amercement of the thirteenth century was a mandatory sum imposed in punishment of some misdeed—the equivalent of the modern fine. The fine of the thirteenth century was a voluntary offering made to the king to obtain a favor or escape his displeasure. As the fine gradually lost its voluntary character the amercement fell out of use. W. MCKENCHIE, *MAGNA CARTA* 292-93 (2d ed. 1914).

Penal imprisonment, as opposed to coercive imprisonment, did exist at the time of Magna Carta. It was restricted, however, to certain misdemeanants and to "clerks" who were able to claim the benefit of clergy. R. PUGH, *IMPRISONMENT IN MEDIEVAL ENGLAND* 385-86 (1968).

28. *MAGNA CARTA* chs. 20-22 (1215).

29. Chapter 20 of the Magna Carta (1215) was renumbered Chapter 14. The numeration used in the text originated in the third issuance of Magna Carta by Henry III in 1225. See R. PERRY, *SOURCES OF OUR LIBERTIES* 4 (1959) [hereinafter cited as R. PERRY].

30. F. MAITLAND, *PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER* xxxiv (1884).

clearly stipulated as fundamental law a prohibition of excessiveness in punishments:

A free man shall not be amerced for a trivial offence, 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 ameracements shall be imposed except by the testimony of reputable men of the neighborhood.³¹

References to amercement in *Glanvill* tend to indicate that Chapter 14 merely reaffirmed existing law.³² A writ for the enforcement of the clause emerged—the writ *de moderata misericordia*. Several successful petitions for such writs, designed to set aside excessive fines, are found in early judicial records. In 1253 a writ *de moderata misericordia* was directed to the sheriff of Northampton to see that neither a Mr. Payne nor his bailiffs were to distrain John Le Franceys “for any amercement contrary to the tenor of the great charter of liberties”³³ The monastery of St. Albans successfully petitioned for such a writ to set aside an amercement of 100 pounds. The fifth heading of its petition reads:

Fifthly, they had injured the liberty against the common charter, where it is said that free men should be amerced according to their offences, and their reputation saved, and the amercement of a hundred pounds, as is manifest to everybody, exceeded the just penalty of the offence³⁴

A fourteenth century document, which purports to be a copy of the Laws of Edward the Confessor (1042-66), extended the policy of the ameracements clause to cover physical punishments as well.

We do forbid that a person shall be condemned to death for a trifling offense. But for the correction of the multitude, extreme punishment shall be inflicted according to the nature and extent of the offense.³⁵

Thus by the year 1400, we have the expression of “the long standing principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.”³⁶ In

31. J. HOLT, *MAGNA CARTA* 323 (1965).

32. See *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* 114 (G. Hall ed. 1965).

33. F. THOMPSON, *THE FIRST CENTURY OF MAGNA CARTA: WHY IT PERSISTED AS A DOCUMENT* 46 (1925).

34. *Id.* at 47.

35. B. BARRINGTON, *THE MAGNA CARTA AND OTHER GREAT CHARTERS OF ENGLAND* 181, 199 (1900).

36. R. PERRY, *supra* note 29, at 236.

1615 the King's Bench applied Chapter 14 of the Magna Carta to a "malicious kind of imprisonment" in the case of *Hodges v. Humkin, Mayor of Liskerret*:

Here the speeches used by Hodges are very unseemly speeches, and unfit to be used by him to anyone, much less to such a person as the maior was, being a person in authority and an Officer of the King; but yet, for such words thus used, the maior ought not to use a malicious kind of Imprisonment, in regard of the time of it, when the same was, being so long time after the offence as in August for an offense in June before; and also in regard of the manner of this Imprisonment, and of the place where, he being thrown into a Dungeon, and so to be there kept, without any Bed to lie on, or any bread or meat to eat, and for all these Causes, the Imprisonment was unlawful; Imprisonment ought always to be according to the quality of the offense, and so is the Statute of *Magna Charta* cap. 14 and of *Marlbridge*, cap. 1 *secundum magnitudinem, et qualitatem delicti* the punishment ought to be, and correspondent to the same, the which is not here in this Case³⁷

The preface to a statute of 1553 repealing certain treasons and felonies expresses the official philosophy and practical reasons behind the growth of such a rule:

[T]he State of every King, Ruler and Governor of any Realm, Dominion or Commonwealth, standeth and consisteth more assured by the Love and Favor of the Subject toward their sovereign Ruler and Governor, than in the Dread and Fear of Laws made with rigorous Pains and extreme Punishment

And Laws also justly made for the preservation of the Commonwealth, without extreme Punishment or great Penalty, are more often for the most Part obeyed and kept, than Laws and Statutes made with great and extreme Punishments³⁸

Thus, prior to adoption of the Bill of Rights in 1689 England had developed a common law prohibition against excessive punishments in any form. Whether the principle was honored in practice or not is an open question.³⁹ It was reflected in the law reports and charters of England. It is indeed a paradox that the American colonists omitted a prohibition on excessive punishments and adopted instead the prohibition of cruel methods of punishment, which had never existed in English law.

37. E. BULSTRODE, *THE REPORTS OF EDWARD BULSTRODE (CASES IN KING'S BENCH, 1609-26)* 139-40 (2d ed. 1688). See further F. THOMPSON, *MAGNA CARTA* 275 n.18 (1948 [hereinafter cited as F. THOMPSON]). For a modern case involving conditions of imprisonment, see *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

38. 1 MARY, stat. 1, c. 1 (1553).

39. For comment on the general level of severity of the English criminal law in the eighteenth century, see 1 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW IN ENGLAND* 457-92 (1883).

III

THE PROHIBITION OF CRUEL METHODS OF PUNISHMENT

By 1689 England had still not developed a prohibition on cruel or barbarous methods of punishment. Although a general policy against excessiveness was expressed repeatedly, objection to particular methods of punishment (except when they were disproportionate to the crime involved) was very rare. The *lex talionis* authorized heinous punishments for heinous crimes. An objection first appears at the end of the sixteenth century, during the early struggles between the Puritans and the established Church of England.⁴⁰

In 1583 the Archbishop of Canterbury, John Whitgift, turned the High Commission into a permanent ecclesiastical court and the Commission began to use torture to extract confessions.⁴¹ Partially because of the use of such inquisitorial methods and partially because of his Puritan beliefs, Sir Robert Beale resigned his place on the Commission.⁴² Beale was born in London in 1541. A voluntary exile from England during the reign of Mary Tudor, he returned when Elizabeth I ascended the throne and by 1574 was a member of Parliament and clerk to the Privy Council. Beale had studied law at Oxford and, although he never took a degree, he served as counsel for Puritan ministers who were being deprived of their benefices.

Late in 1583 Beale published a manuscript entitled *A Book against Oaths Ministered in the Courts of Ecclesiastical Commission*.⁴³ In it be

40. Sir John Fortescue (c.1399-c.1480) did condemn the use of torture by the civil law in *De Laudibus Legum Angliae*, written c. 1466 and first published c. 1537. See F. GRIGOR, SIR JOHN FORTESCUE'S COMMENDATION OF THE LAWS OF ENGLAND 32-36 (1917) [hereinafter cited as F. GRIGOR].

41. See generally P. DAWLEY, JOHN WHITGIFT AND THE ENGLISH REFORMATION (1954).

42. See "Beale, Robert 1541-1601," 2 DICTIONARY OF NATIONAL BIOGRAPHY 3 (1921-22).

43. *Id.* Professor Leonard Levy states that the *Dictionary of National Biography* has passed off as the exact title of Beale's book a mere italicization of Whitgift's description of it. Levy further asserts that the book was not published until 1584. L. LEVY, *supra* note 8, at 462 n.7. While it is true that Beale's book was published abroad and imported into England during 1584, there is no evidence that this was the first printing. Levy assumes that Beale's book made reference to Whitgift's new High Commission, which did not begin operation until after January 1584. Since no copy of Beale's original text now survives, that assumption cannot be validated. *Id.* at 140. In fact, a royal reply to Beale's book was published by Lord Burghley and dated 1583. LORD BURGHLEY, A DECLARATION OF THE FAVORABLE DEALING OF HER MAJESTIES COMMISSIONERS, APPOINTED FOR THE EXAMINATION OF CERTAIN TRAITORS, AND OF TORTURES UNJUSTLY REPORTED TO BE DONE UPON THEM FOR MATTER OF RELIGION (1583), printed in 1 SOMER'S TRACTS 209 (W. Scott ed. 1810).

While Lord Burghley does not identify by name the "sclaunderers and seditious libellers" his tract was designed to refute, it is interesting that he selects to defend the tortures inflicted on Campion, a Jesuit priest. A royal order to torture Campion is

impugned the right of the crown to fine and imprison persons for ecclesiastical offenses and he condemned the use of torture. Whitgift, defender of the official faith against both catholicism and puritanism, had a "Schedule of Misdemeanors" drawn up against Beale and presented it to the Privy Council. The thirteenth "count" of the schedule was:

He condemneth (without exception of any cause) the racking of grievous offenders as being cruel, barbarous, contrary to law, and unto the liberty of English subjects.⁴⁴

Beale was unique in using Chapter 14 of Magna Carta to argue against the deprivation of ministers.⁴⁵ His objections to this deprivation and to cruel punishments in general were also unique in that he even condemned the use of torturous methods when authorized by the royal prerogative. This constituted a significant step beyond other English jurists who, while denying the existence of torture at common law, personally inflicted it upon royal command.⁴⁶ Beale thus appears to be the founder of a second principle—that cruel methods of punishment are unlawful.⁴⁷ Beale's objections to the use of torture and inquisitorial methods became more and more strident—one of his contemporaries described Beale as "*homo vehemens, et autere acerbus*"⁴⁸

dated July 30, 1581 and addressed, *inter alia*, to Robert Beale. See D. JARDINE, A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND 87-88 (1837) [hereinafter cited as D. JARDINE].

44. 1 J. STRYPE, THE LIFE AND ACTS OF JOHN WHITGIFT 402 (1822). The "Schedule of Misdemeanors" is not included in the 1718 edition of Strype's work. "Count" 14 of the "Schedule of Misdemeanors" also involves the royal use of torture:

14. He (Beale) thereupon giveth a caveat to those in the Marches of Wales, that execute torture by virtue of instructions under her Majesty's hand, according to a statute, to look unto it, that their doings be well warranted.

According to L. LEVY, *supra* note 8, at 148-49, Beale's "caveat" was a direct criticism of Whitgift's use of torture in 1579 when he was Vice President of the Council of the Marches of Wales.

45. F. THOMPSON, *supra* note 37, at 221. Beale also played an important role in securing the right against self-incrimination. "He invented the fiction, which grew in time to the stature of an article of constitutional faith, that Magna Carta outlawed forcing a man to be a witness against himself." L. LEVY, *supra* note 8, at 140.

46. See generally D. JARDINE, *supra* note 43. Jardine takes the position that early denunciations of torture were meant to be limited to the sanctions which common law courts imposed after trial and were not meant to deny the right of the king to inflict torture under his royal prerogative. Such a distinction, similar to the one drawn between pretrial methods to force a plea and judicially imposed punishments following conviction, was quite consistent with the acts and political philosophies of Englishmen who lived 400 years ago, according to Jardine.

Jardine's case is persuasive but may be overstated. See Sir John Fortescue's refusal to make such distinctions, F. GRIGOR, *supra* note 40, at 35-36.

47. Unfortunately, Beale's relevant work is not available, and I have been unable to verify Archbishop Whitgift's charge or to ascertain whether Beale drew on earlier sources for his ideas.

48. M. Hume, The History of the Oath Ex Officio in England 92 (unpublished thesis in the Harvard Library 1923).

and he was eventually banished from the Royal Court in 1592.

A prohibition of cruel methods of punishment was first written into law in America by another Puritan attorney, the Rev. Nathaniel Ward of Ipswich, Massachusetts. Ward was born the son of a minister in Haverhill, England, about 1578.⁴⁹ He was educated at Emmanuel College at Cambridge, taking the A.B. degree in 1600 and the A.M. degree in 1603. In 1607 Ward was admitted to the Lincoln's Inn Society and was called to the bar in 1615. Ward soon abandoned law for the ministry. Following a long trip to the continent he became the rector at Stondon Massey in 1628.

Ward's Puritan beliefs brought him to the attention of the hierarchy of the Church of England. He was a signer of a petition to Bishop Laud supporting the views of Thomas Hooker, a nonconforming minister who later came to America. As the pressures to conform mounted, Ward helped members of his congregation make arrangements to "escape" to the colony of Massachusetts Bay. In late 1632 Ward was suspended, excommunicated and deprived of his benefice. His wife died soon thereafter, and there was nothing to keep Ward in England. In June 1634, Ward set sail for Massachusetts. He arrived in the autumn and took up the church at Ipswich, then a frontier community.

In early 1634 the colony was in a period of political unrest. The Charter of 1629 provided for a government consisting of a governor, a deputy governor, and eighteen assistants (also known as magistrates).⁵⁰ The freemen of the colony assembled in a General Court, but the assistants had the power to make laws and inflict punishments. In May 1634, before Ward's arrival, the General Court stripped the assistants of their lawmaking power, and a battle ensued over the assistant's power to veto the General Court's enactments.

One of the major complaints of the freemen was the lack of fundamental laws binding the judicial discretion of the magistrates. Winthrop records in his journal for May 6, 1635:

The deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed, that some men should be appointed to frame a body of grounds of laws, in re-

49. While all sources agree on the events of Ward's life, there are minor disagreements on the relevant dates. See generally S. MORISON, BUILDERS OF THE BAY COLONY 217-43 (1930); J. W. DEAN, A MEMOIR OF THE REV. NATHANIEL WARD, A.M. (1868); "Ward, Nathaniel v. 1578-Oct. 1652", 19 DICTIONARY OF AMERICAN BIOGRAPHY 433-34 (1943); "Ward, Nathaniel 1578-1652", 20 DICTIONARY OF NATIONAL BIOGRAPHY 785 (1899); S. Harvey, Nathaniel Ward: His Life and Works (unpublished thesis in the Harvard University Library 1936).

50. W. WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 2 (1889) [hereinafter cited as W. WHITMORE].

semblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws.⁵¹

The first two committees failed to agree and a third attempt was made in 1638. By this time Ward had given up the ministry at Ipswich because of poor health, but being far from incapacitated, he was named to the committee. By 1639 both Rev. Ward and the Rev. John Cotton submitted draft codes to the General Court. The drafts were circulated throughout the colony and in 1641 Ward's draft was enacted into law under the title *Body of Liberties*.⁵² Clause 46 of the document read: "For bodily punishments we allow amongst us none that are inhumane, barbarous or cruel."⁵³

While use of the words "barbarous" and "cruel" by both Ward and Beale appears to be sheer coincidence, it seems quite possible that Ward's prohibition of methods of punishment owes a debt to the writings of Robert Beale.⁵⁴ Ward was near 23 when Beale died and he must surely have had access to Beale's work during his schooling. Certainly Beale was well known among Puritan law students and attorneys. It would be interesting to know if Ward's library contained any works by Beale, or whether it contained any "Magna Chartas" from other plantations or colonies.

Despite Ward's return to England in 1646, his Massachusetts *Body of Liberties* was never published there. The residents of the Massachusetts colony were fearful that their company's owners would consider the code a violation of the Charter of 1629 which stated that no laws repugnant to the law of England could be made. Ward's code was well ahead of contemporary English law.⁵⁵ As a substitute, the Rev. Cotton's proposed code, *Moses His Judicials*, was published in England instead.⁵⁶ Cotton's code was based entirely on Old Testament scripture and was, therefore, unoffensive. Although Cotton's code was not adopted in Massachusetts, it was used in New Haven as the fundamental

51. *Id.* at 5.

52. *Id.* at 8. See also F. Gray, *Early Laws of Massachusetts*, in *COLLECTIONS* 8 (Massachusetts Historical Society, 3d Ser. 1843).

53. R. PERRY, *supra* note 29, at 153.

54. Clause 45 of Ward's *Body of Liberties* allows for the use of torture under certain circumstances. R. PERRY, *supra* note 29, at 153. With the exception of the Salem witchcraft trials, however, torture was never used in Massachusetts to extract confessions. See E. POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS* 88 (1966).

55. G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 129-30 (1960). "In several respects the *Body of Liberties* went well beyond protecting the traditional rights of Englishmen, as the colonists knew them. For instance . . . it prohibited cruel and barbarous punishments . . ."

56. W. WHITMORE, *supra* note 50, at 1.

law of that colony for about 25 years.⁵⁷ The success of a book by Ward, *The Simple Cobler*, published in London in 1647, made him a celebrity in England. He dabbled in politics for a short time, then retired, and died in 1652.

IV

THE PHRASE "CRUEL AND UNUSUAL PUNISHMENTS"

Fifty years after the drafting of the Massachusetts *Body of Liberties*, and nearly 100 years before the Virginia Declaration of Rights of 1776, the phrase "cruel and unusual punishments" came into being. In the spring of 1688 the shaky reign of King James II was coming to an end. In April he tried and failed to grant a new Declaration of Indulgence to English Catholics. Seven bishops of the Church of England petitioned the King not to publish the declaration and James resolved to have them prosecuted for their insubordination. Their subsequent acquittal by the King's Bench was an accurate reflection of public sentiment towards the King.⁵⁸

In June the Queen, Mary of Modena, gave birth to a son, an heir to the throne. The birth signaled the coming of the Glorious Revolution. The opposition to James, especially that of William of Orange, could have afforded to await his death and the extinction of the House of Stuart. With a new heir, however, action was needed. On the last day of September, William declared that he would accept the invitation of several English peers to save their nation from "popery." By November 5, 1688 he had crossed the channel with an invasion fleet and risings began in his favor. The King, paralyzed by indecision, let the situation worsen until finally the Queen and baby prince were sent to France for safety. In December James followed, after throwing the great seal of England into the Thames.⁵⁹ Lord Chancellor Jeffreys, who had stayed at his post till the end, was captured by rioting mobs and sent to the Tower of London.⁶⁰

The peers of the realm called a parliament to determine the succession to the throne. While debate centered on whether James had abdicated or merely vacated the throne—a point of law crucial to the position of the infant prince—a declaration of rights was drafted which the new monarchs, William and Mary, would ratify. The tenth declaratory clause of the bill reads:

57. S. MORISON, *BUILDERS OF THE BAY COLONY* 229 (1930).

58. See P. HELM, *JEFFREYS* 168-70 (1966) [hereinafter cited as P. HELM]. For an account of the state of the judiciary during this period see Havighurst, *James II and the Twelve Men in Scarlet*, 69 L.Q. REV. 522 (1953).

59. P. HELM, *supra* note 58, at 176-77.

60. *Id.* at 177-78. See also G. KEETON, *LORD CHANCELLOR JEFFREYS AND THE STUART CAUSE* 452-54 (1965) [hereinafter cited as G. KEETON].

That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.⁶¹

That clause was transcribed verbatim into the Virginia Declaration of Rights of 1776 and, with the substitution of "shall" for "ought," now appears in the eighth amendment to the United States Constitution.

Noting the obvious linguistic link between the Virginia Declaration of Rights and the English Bill of Rights, legal historians have searched for the types of punishments which the drafters of the latter document sought to prohibit. Most historians point to the treason trials of 1685—the "Bloody Assize"—which followed the abortive rebellion of the Duke of Monmouth,⁶² and the opinion that the cruel and unusual punishments clause was directed to the conduct of Chief Justice Jeffreys during these trials is still in vogue.⁶³ After Charles II died in February 1685, his brother succeeded him as James II. Charles' eldest illegitimate son, the new King's nephew, James, Duke of Monmouth, was in exile in Holland at the time. Monmouth, a fervent Anglican, had been associated with the Whigs of the Country Party. An invasion was planned and executed from Holland, where Monmouth was allowed the use of Dutch ports by William, Prince of Orange.⁶⁴

A small force led by Monmouth landed in western England on June 11, 1685. He proclaimed himself King, but his army was quickly defeated at the Battle of Sedgemoor. Within a month Monmouth was taken prisoner and was executed in London. The abortive rebellion had caused the cancellation of the autumn assize of 1685 and the King appointed Chief Justice Jeffreys of the King's Bench to head a special commission to travel the western circuit and try the captured rebels.⁶⁵

The assize began in late August with the trial of Alice Lisle, a 71 year-old widow, for the crime of harboring rebels.⁶⁶ John Lisle, her late husband, had been the President of Cromwell's High Court of Justice and had participated in the events leading to the execution of Charles I. Lisle had been excepted from the restoration and had been murdered abroad by royalist agents in 1664.⁶⁷ Mrs. Lisle was convicted and sentenced to be burned alive, the traditional penalty for woman felons. The King commuted her sentence to beheading. When the Jeffreys commission reached Dorchester, it became apparent that to try each rebel separately would require an inordinate amount of time. At this

61. R. PERRY, *supra* note 29, at 247.

62. See S. RUBIN, H. WEIHOFEN, G. EDWARDS, S. ROSENSZWEIG, *THE LAW OF CRIMINAL CORRECTION* 363-64 (1963); 24 *HARV. L. REV.* 55 (1910).

63. See I. BRANT, *THE BILL OF RIGHTS* 155 (1965).

64. See generally W. EMERSON, *MONMOUTH'S REBELLION* (1951).

65. G. KEETON, *supra* note 60, at 301, 306.

66. See generally *id.* at 301-31; P. HELM, *supra* note 58, at 127-45.

67. P. HELM, *supra* note 58, at 134.

point, Sir Henry Pollfexen, a Whig attorney who had been appointed chief prosecutor for the special commission, and the Chief Justice engaged in mass plea-bargaining.⁶⁸ Pollfexen let it be known that no one who pleaded guilty would suffer the death penalty. The penalty for treason at that time consisted of drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered.⁶⁹ Word of Pollfexen's proposal spread and in a matter of days over 500 trials were completed. Those who had pleaded not guilty but were found guilty were immediately executed. No one who pleaded guilty was executed during the period of the commission itself.⁷⁰ However, the bargain was not fully kept. Almost 200 prisoners who had pleaded guilty were executed during the winter. Jeffreys signed the death warrants himself before his return to London, where James II rewarded him with the Lord Chancellorship.

The assize was widely publicized by Puritan pamphleteers after 1689. One influential version was by Titus Oates, of whom we shall hear more, and was titled *The Western Martyrology or, The Bloody Assize*. The persuasive effect of the Puritan propaganda made Jeffreys the scapegoat for the abuses of the Stuart period and influenced later historians like G. M. Trevelyan to write: "The revenge taken upon the rebels, first by Kirke and his barbarized soldiers from Tangier, and then Judge Jeffreys in his insane lust for cruelty, was stimulated by orders from the King."⁷¹ Propaganda prevailed, and history has recorded that the cruel and unusual punishments clause was in answer to the "Bloody Assize." A close examination of the legislative history of the Bill of Rights produces a quite different conclusion.

Parliament was summoned in late January, following the flight of James II. The *Journals of the House of Commons* record that on January 29, 1689⁷² a committee was appointed to draft general statements containing "such things as are absolutely necessary to be considered for the better securing of our religion, laws and liberties."⁷³ On the second of February, Sir George Treby, spokesman for the committee, presented a draft of a declaration to the Commons. Clause 19

68. *Id.* at 139; G. KEETON, *supra* note 60, at 321.

69. 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *92.

70. G. KEETON, *supra* note 60, at 325.

71. 2 G.M. TREVELYAN, HISTORY OF ENGLAND 467 (Illus. ed. 1956). Colonel Kirke's command was nicknamed "the Tangier Regiment" because of their white uniforms. The barbarized soldiers were not in fact from Tangier. G. KEETON, *supra* note 60, at 306.

72. The dates used in this paper are in the Old Style, without the correction of days. However, the year is given in the New Style, with the year beginning on January 1 rather than on March 25.

73. 10 H.C. JOUR. 15 (1688-1689).

read:

19. The requiring excessive bail of persons committed in criminal cases and imposing excessive fines, and illegal punishments, to be prevented.⁷⁴

The Commons agreed to all points without discussion and the report went to the House of Lords.⁷⁵ The final draft (enacted into law on December 16, 1689) was agreed to in the House of Commons on February 12th. The relevant sections of the statute read:

Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom [By various evil acts] And whereas excessive fines have been imposed; and illegal and cruel punishments inflicted All which are utterly and directly contrary to the known laws and statutes and freedoms of this realm

And thereupon the said lords spiritual and temporal, and commons do in the first place (as their ancestors in like case have usually done) for the vindication and asserting their ancient rights and liberties, declare

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.⁷⁶

The original draft of February 2 speaks of illegal punishments. The document of February 12 complains of "illegal and cruel punishments" and then continues to prohibit "cruel and unusual punishments." No contemporary document gives any reason for the change in language. Indeed, John Somers, reputed draftsman of the Bill of Rights,⁷⁷ wrote later of the "horrible and illegal" punishments used during the Stuart regime.⁷⁸ The final phraseology, especially the use of the word "unusual," must be laid simply to chance and sloppy draftsmanship. There is no evidence to connect the cruel and unusual punishments clause with the "Bloody Assize." On the contrary, everything points away from any connection.

First, none of the "cruel" methods of punishment which were employed in the "Bloody Assize" ceased to be used after the passage of the Bill of Rights. Executing male rebels by drawing and quartering con-

74. *Id.* at 17.

75. See 14 H.L. JOUR. 125 (1688-1689).

76. R. PERRY, *supra* note 29, at 245-47.

77. See H. GRIGSBY, *THE VIRGINIA CONVENTION OF 1776*, at 163 (1855); 18 *DICTIONARY OF NATIONAL BIOGRAPHY* 630 (1922). It is clear that Somers presided over the drafting committee, but neither he nor his biographer claim credit for the wording. See J. SOMERS, *A VINDICATION OF THE LATE PARLIAMENT OF ENGLAND* (1690); *MEMOIRS OF THE LIFE OF JOHN LORD SOMERS* (1716).

78. J. SOMERS, *A VINDICATION OF THE LATE PARLIAMENT OF ENGLAND* 3 (1690).

tinued with all its embellishments until 1814, when disembowelling was eliminated by statute.⁷⁹ Beheading and quartering were not abolished until 1870.⁸⁰ The burning of female felons continued in England until the penalty was repealed in 1790.⁸¹

The Whigs punished rebellion with the same ferocity as the Stuarts. After the Jacobite rebellion of 1715 over 1,000 rebels were transported. Following the second Jacobite rebellion of 1745-46, 80 rebels were executed in the traditional manner and 1,500 were transported. The Scottish countryside had been so devastated that it was "possible to travel for days through the depopulated glens without seeing a chimney smoke, or hearing a cock crow."⁸²

Second, a leading member of the committee which drafted the Bill of Rights was Sir Henry Pollfexen,⁸³ the chief prosecutor of the "Bloody Assize." Although a Puritan, Pollfexen was a close friend of Jeffreys and acted as executor of his estate.⁸⁴ It seems unlikely that he would have drafted a document condemning his own previous actions. Indeed, when the House of Commons debate on the Bill of Rights touched the "illegal" acts of James' reign, Pollfexen supported the allegations of other speakers.⁸⁵ This would seem to indicate that Pollfexen, at least, did not view the "Bloody Assize" as "illegal."

Third, the "Bloody Assize" is mentioned only once in the Commons debate. At issue was a bill of indemnity for the followers of James II. Because of the assize and other complaints, Lord Chancellor Jeffreys, who had died in the tower, was posthumously excepted from the indemnity and attainted.⁸⁶ The assize is not referred to as either "cruel," "unusual," or "illegal."

The foregoing negates any causal connection between the "Bloody Assize" and the cruel and unusual punishments clause. For positive evidence of what the framers of the Declaration of Rights intended to prohibit, we must look to Titus Oates and the infamous "Popish Plot" of 1678-79.

By 1678 the "honeymoon" between the restored monarch, King Charles II, and Parliament had ended. A new Whig party was forming, combining the Presbyterians, old Cromwellians, and a group known as

79. 54 Geo. 3, c. 146 (1814).

80. 33 & 34 Vic., c. 23, § 31 (1870).

81. 30 Geo. 3, c. 48 (1790). See generally 2 J. PATERSON, COMMENTARIES ON THE LIBERTY OF THE SUBJECT 292-95 (1877).

82. P. HELM, *supra* note 58, at 199-200; G. KEETON, *supra* note 60, at 307-08.

83. See authority cited in note 73 *supra*.

84. G. KEETON, *supra* note 60, at 492.

85. See 2 R. CHANDLER, THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 202-03 (1742).

86. 9 A. GRAY, DEBATES IN THE HOUSE OF COMMONS FROM THE YEAR 1667 TO THE YEAR 1694, at 383 (1763).

the "Country Opposition." This combination, the Country Party, was headed by the Earl of Shaftesbury. As with all political organizations a cause was needed to coalesce the factions of the Country Party. The most inflammatory issue of the day was the threat of "Popery." Although King Charles was a Protestant, his brother James (later James II) and Queen Catherine were both Catholics. The needed spark came in September of 1678 when one Titus Oates, a minister of the Church of England, proclaimed the existence of a plot to assassinate the King.⁸⁷

According to Oates, two Jesuit priests were to shoot the King with silver bullets, four "Irish Ruffians" had been hired to stab him, and if all failed, the Queen's doctor, Sir George Wakeman, was to poison him. The assassination was to be followed by an invasion of Catholic armies which would put the King's brother, James, on the throne. Oates claimed to have learned this by attending a Jesuit meeting at the White Horse Tavern in the Strand on April 24, 1678. Oates was an inveterate perjurer and the "Popish Plot" a complete hoax, but the Earl of Shaftesbury, seeing political profit in such a plot, gave Oates his support. On September 28, Oates swore to all this before a London magistrate, Sir Edmund Berry Godfrey. Within ten days Godfrey was murdered. The crime has never been explained. The Catholics accused Oates; Shaftesbury and Protestant England accused the Jesuits.

In the hysteria that followed 15 Catholics were executed following convictions for treason. Among the victims were Edward Coleman, secretary of the Duchess of York, Thomas White or Whitebread, provincial of the Jesuit order in England, and Richard Langhorne, a Catholic barrister. The trials continued into July 1679, when Sir George Wakeman, doctor to the Queen, was acquitted because of internal contradictions in Oates' story. Participating in all the trials as a court officer was the Recorder of the City of London, George Jeffreys, later Chief Justice.

In 1685, following the succession of James II, evidence of Oates' perjury abounded. It had been learned that Oates was not even in England on April 24, 1678, when the famous meeting at the White Horse Tavern was supposed to have occurred. He was indicted on two counts of perjury and tried before the King's Bench, Chief Justice Jeffreys presiding. When evidence of his perjury mounted, Oates tried to defend himself by asserting that everyone involved, including Recorder Jeffreys, had believed his story. He was convicted on both counts.⁸⁸ Jeffreys was heard to lament that the death penalty was no

87. See P. HELM, *supra* note 58, at 39-54; G. KEETON, *supra* note 60, at 124-34; J. POLLOCK, *THE POPISH PLOT* (1903).

88. A transcript of the trials was prepared at the direction of Chief Justice Jeffreys. See *THE TRYALS, CONVICTIONS AND SENTENCE OF TITUS OATES* (1685).

longer applicable to the crime of perjury. Oates was sentenced to (1) a fine of 2,000 marks, (2) life imprisonment, (3) whippings, (4) pillorying four times a year and (5) to be defrocked.⁸⁹ Following the revolution of 1688, Oates petitioned both houses of Parliament for a release from the judgment, calling it "inhumane and unparalleled."⁹⁰

The House of Lords rejected Oates' petition. A minority of the Lords dissented in a statement which sheds light on the original meaning of the words "cruel and unusual."

1. For that the king's bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only.
2. For that the said judgments are barbarous, inhuman, and unchristian; and there is no precedent to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him.
3.
4. For that this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter, unless this judgment be reversed.
5. Because sir John Holt, sir Henry Pollexfen, the two chief justices, and sir Robert Atkins chief baron, with six judges more (being all that were then present), for these and many other reasons, did, before us, solemnly deliver their opinions, and unanimously declare, That the said judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed.
6. Because it is contrary to the declaration on the twelfth of February last, which was ordered by the Lords Spiritual and Temporal and Commons then assembled, and by their declaration engrossed in parchment, and enrolled among the records of parliament, and recorded in chancery; whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.⁹¹

The House of Commons agreed with the dissenting Lords. Sir Robert Howard addressed the Commons:

89. 2 *id.* at 60. For a contemporaneous opinion of Oates' punishment see authority cited in note 97 *infra*.

90. T. OATES, TO THE RIGHT HONORABLE LORDS SPIRITUAL AND TEMPORAL THE HUMBLE PETITION OF TITUS OATES, D.D. 1 (1689).

91. 10 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS col. 1325 (T. Howell ed. 1811). This action by the House of Lords was cited by Justice White in his dissent in *Weems v. United States*, 217 U.S. 349, 390-92 (1900). However, Justice White failed to recognize the differences between the Oates case and his own conclusion that the cruel and unusual punishments clause was a total prohibition of "inhuman bodily punishments of the past."

The Lords have affirmed the judgment in the King's Bench against Dr. Oates and that a minister of the Church of England may be degraded of his priestly and canonical habit there: I hope the gentlemen of the Church of England are not of this opinion. This was a temporal judgment and Lord Chief Justice Jeffreys gave it.⁹²

Howard's speech was followed by a motion by Mr. Hawles. "I would have this judgment against Oates called 'cruel and illegal,' and so to vote it."⁹³

The Oates affair presented the only recorded contemporary uses of the terms "cruel and unusual" and "cruel and illegal." What does it explain about the original meaning of those words? It is clear that no prohibition on methods of punishment was intended. None of the punishments inflicted upon Oates amounted to torture. Life imprisonment is used widely today and probably would not be considered excessive in a case of perjury which had resulted in erroneous executions. Whipping did not constitute a cruel method of punishment in England at the time of Oates' conviction. It continued in use in England until 1948.⁹⁴ As late as 1963 the Supreme Court of Delaware held that the imposition of 20 lashes for a robbery conviction was not cruel or unusual.⁹⁵ While a fine of 2,000 marks may have been excessive⁹⁶ and the defrocking of Oates unusual, neither was inherently cruel. In the context of the Oates' case, "cruel and unusual" seems to have meant a severe punishment⁹⁷ unauthorized by statute and not within the jurisdiction of the court to impose.⁹⁸

92. A. GRAY, *supra* note 86, at 287. For a full treatment of the life of Howard, see H. OLIVER, *SIR ROBERT HOWARD* (1963).

93. A. GRAY, *supra* note 86, at 290. Oates had filed a petition for relief in each house of Parliament. A jurisdictional dispute ensued and he was not freed until the Parliament was prorogued on August 20, 1689. See "Oates, Titus 1649-1705", 14 *DICTIONARY OF NATIONAL BIOGRAPHY* 746 (1921-22).

94. *State v. Cannon*, 55 Del. 587, 596, 190 A.2d 514, 518 (1963).

95. *Id.*; *Balser v. State*, 195 A.2d 757 (Del. 1963).

96. A mark is a weight equivalent to two-thirds of a pound. It was used as late as 1770 to measure the amount of a fine—one mark equalling two-thirds of a pound sterling or 160 pence. 6 *OXFORD ENGLISH DICTIONARY* 169 (1933).

97. John Evelyn recorded in his diary some contemporary opinion on the whippings which Oates received.

Oates, who had but two days before been pillored at several places, and whipped at the Carts tail from Newgate to Aldgate; was this day placed in a sledge (being not able to go by reason of his so late scourging) and dragged from prison to Tyburn, and whipped again all the way, which some thought to be very severe and extraordinary, but in case he were guilty of the perjuries, and so of the death of many innocents, as I fear he was; his punishment was but what he well deserved.

4 *THE DIARY OF JOHN EVELYN* 445 (E. DeBeer ed. 1955).

98. Some courts use an analogous standard today, holding that if a punishment is authorized by statute it cannot be "cruel and unusual." "[I]t is well settled that a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment . . ." *Martin v. United States*, 317 F.2d 753, 755 (9th Cir. 1963).

This interpretation should not seem strange. In the seventeenth century, the word "cruel" had a less onerous meaning than it has today. In normal usage it simply meant severe or hard. The *Oxford English Dictionary* quotes as representative Jonathan Swift, who wrote in 1710, "I have got a cruel cold, and staid within all this day."⁹⁹ Sir William Blackstone, discussing the problem of "punishments of unreasonable severity," uses the word "cruel" as a synonym for severe or excessive.¹⁰⁰

The English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties. Nevertheless, it is clear that the American framers read into the phrase the meaning of Beale and Ward. How, then, did the American framers obtain their interpretation of the cruel and unusual punishments clause, an interpretation opposite to that of the English view?

V

THE AMERICAN MISINTERPRETATION

George Mason and the framers of the American Constitution misinterpreted the meaning of the cruel and unusual punishments clause of the English Bill of Rights of 1689. In its place they substituted the principles subscribed to by Robert Beale and Nathaniel Ward. The shift in meaning was apparently not deliberate; either Mason copied the clause without any understanding as to its original meaning, arbitrarily intending his own interpretation drawn from colonial sources, or he and his contemporaries had a distorted notion of its meaning derived from the English legal treatises available at the time.

Long before 1776, England's American colonies had created a substantial amount of law. The Massachusetts Code of 1648 has been called the first modern statutory codification.¹⁰¹ The influence of the Code of 1648 was felt in both Connecticut and New Haven when those colonies drafted their first laws.¹⁰² Since the Code of 1648 incorporated large sections of Nathaniel Ward's *Body of Liberties*, including clauses 45 and 46 on torture and punishments,¹⁰³ the possibility exists

99. 2 OXFORD ENGLISH DICTIONARY 1216 (1933).

100. 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *16-17 (8th ed. 1778).

101. See generally Haskins, *Codification of the Law in Colonial Massachusetts: A Study in Comparative Law*, 30 IND. L.J. 1 (1954).

102. Haskins & Ewing, *The Spread of Massachusetts Law in the Seventeenth Century*, 106 U. PA. L. REV. 413 (1958).

103. See THE LAWS AND LIBERTIES OF MASSACHUSETTS (Farrand ed. 1929); Wolford, *The Laws and Liberties of 1648*, 28 B.U.L. REV. 426 (1948).

that George Mason learned of Ward's work through an intercolonial process of diffusion.¹⁰⁴

It appears, however, that Ward's ideas relevant to the drafting of the cruel and unusual punishments clause did not spread. Clauses 45 and 46 do not appear in the Connecticut Code of 1650 or the New Haven Code of 1656.¹⁰⁵ Since these codes were used by Richard Nicolls, governor of the newly conquered colony of New York, to draft the "The Duke's Laws" of 1664, it is not surprising that "The Duke's Laws" do not contain any provisions comparable to Ward's prohibitions on torture and cruel punishments.¹⁰⁶ It seems justifiable, therefore, to take Mason at his word when he said that he believed that his Declaration of Rights "was the first in America."¹⁰⁷

An examination of several legal treatises available in the colonies in 1776 reveals a persuasive explanation of how the misinterpretation came about. Five sources from which American colonists gained their understanding of English law were Charles Viner's 24 volume *Abridgment of Law and Equity* (1763 ed.); Matthew Hale's *History and Analysis of Common Law* (1713) and *History of the Pleas of the Crown* (1736); Thomas Wood's *Institute of the Laws of England* (1763); Henry Care's *English Liberties or, The Freeborn Subject's Inheritance* (1721); and volume four of Blackstone's *Commentaries on the Laws of England* (1768).¹⁰⁸

Viner has been called the West Publishing Company of his

104. See generally Haskins & Ewing, *supra* note 102.

105. *Id.* at 415 n.23, 417 n.31. Clauses 45 and 46 of the Massachusetts *Body of Liberties* do appear, with slight revision, in the 1673 edition of the Connecticut Code. See G. BRINLEY, THE LAWS OF CONNECTICUT, AN EXACT REPRINT OF THE ORIGINAL EDITION OF 1673, at 58, 65 (1865). By 1702, however, all references to torture had been dropped (see ACTS AND LAWS OF CONNECTICUT (1702)) and by 1769 all references to cruel punishments had also disappeared. See ACTS AND LAWS OF HIS MAJESTY'S ENGLAND COLONY OF CONNECTICUT, IN NEW-ENGLAND, IN AMERICA (1769).

106. See generally M. PENNYPACKER, THE DUKE'S LAWS: THEIR ANTECEDENTS, IMPLICATIONS AND IMPORTANCE (Anglo-American Legal History Series, New York University School of Law Ser. 1, No. 9, 1944). A complete text of "The Duke's Laws" can be found in 1 NEW YORK HISTORICAL SOCIETY, COLLECTIONS 305-97 (1811). A recent description of law in colonial New York is contained in Note, *Law in Colonial New York: The Legal System of 1691*, 80 HARV. L. REV. 1757 (1967).

107. H. HILL, GEORGE MASON CONSTITUTIONALIST 138 (1938).

108. For an interesting discussion of the works of Viner and Blackstone see A. SUTHERLAND, THE LAW AT HARVARD 16-27 (1967). For a complete treatment of Blackstone, his works and the professorship he held, see H. HANBURY, THE VINERIAN CHAIR AND LEGAL EDUCATION (1958). Care's *English Liberties*, published in Boston in 1721 by James Franklin, was a handbook for radical colonists. See R. RUTLAND, *supra* note 1, at 5 n.4. Sir Mathew Hale's accomplishments as a systematizer of English law are described in Shapiro, *Law and Science in Seventeenth Century England*, 21 STAN. L. REV. 727 (1969). Hale's *The History of the Pleas of the Crown* (2 vols. 1736) should not be confused with Hale's *Pleas of the Crown* (1678) which appears to be merely an analytical outline of the later work. Shapiro, *supra*, at 745.

age.¹⁰⁹ However, his opus does not contain one reference to the Bill of Rights of 1689.¹¹⁰ Hale's *History and Analysis of the Common Law* does not discuss punishments or their limitations. Volume two of Hale's *History of the Pleas of the Crown* recites the traditional penalties for felony without mention of the Bill of Rights.¹¹¹ In chapter five of book four of his *Institute*, Wood gives a dreary catalogue of the types of punishment in use in England in the middle of the eighteenth century. Included are all the barbarities which George Mason seemed to think were forbidden by the Bill of Rights of 1689. Wood's commentary does not acknowledge any limits on punishment, either statutory or at common law.¹¹² Care's pocket edition, printed by the Franklin brothers in Boston in 1721, does contain the complete text of the Bill of Rights of 1689.¹¹³ However, there are no explanatory notes included.

The only treatise which discussed the topic of punishment was the fourth volume of Blackstone's *Commentaries*. Volume four was published in London in 1768 and sent to the colonies soon thereafter. Demand for Blackstone's work was heavy in the colonies and his influence on the formation of American law was great. In 1775 Edmund Burke is reported to have told the House of Commons that almost as many copies of the *Commentaries* had been sold in America as in the whole of England.¹¹⁴

Chapter 29 of volume four is entitled "Judgment and Its Consequences." The chapter begins with a description of the methods available to arrest a judgment in a criminal case. The next three pages, which are quoted here in full, contain the germ of a misinterpretation which still infects our view of the eighth amendment.

If all these resources fail, the court must pronounce that judgment which the law has annexed to the crime, and which has been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these 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, embowelling alive, beheading and quartering; and in murder, a public dissection.

109. A. SUTHERLAND, *supra* note 108, at 19.

110. R. KELHAM, AN ALPHABETICAL INDEX TO VINER'S ABRIDGMENT (1763). This book, by a student at Lincoln's Inn, is bound with the edition of Viner's *Abridgement* in the Harvard University Library.

111. 2 HALE, THE HISTORY OF THE PLEAS OF THE CROWN 399 (1736).

112. T. WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 674-87 (1763).

113. H. CARE, ENGLISH LIBERTIES OR, THE FREEBORN SUBJECT'S INHERITANCE 110-12 (1721).

114. A. SUTHERLAND, *supra* note 108, at 25.

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 enbowelled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration 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 moveables, 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. And it is moreover one of the glories of our English law, that the nature, though not always the quantity or 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 law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the 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 consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge of his actions.¹¹⁵

It should be noted that Blackstone's England draws, beheads, burns, and quarters, slits noses and mutilates felons. Those other pun-

115. 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 369-72 (1st ed. 1769).

ishments that "savor of torture or cruelty" are prohibited, not by statute, but by the "tacit consent" of the English people. There is no citation to the Bill of Rights of 1689 for such a prohibition. Blackstone continues with a discussion of discretionary punishment, especially the fine.

The discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, viz. by fine or imprisonment, is in these cases fixed and determinate: though the duration and quantity of each must vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. The quantum, in particular, of pecuniary fines neither can, nor ought to be, ascertained by an invariable law. The value of money itself changes from a thousand causes; and in all events what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every person, that struck another, five and twenty denarii: this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomever he pleased, and then tender them the legal forfeiture. Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offense to be punished by fine, in general, without specifying the certain sum; which is fully sufficient, when we consider that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of King's Bench, in the reign of King James the second) and the same statute further declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory, throughout, of the old constitutional law of the land: and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby many time undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.¹¹⁶

In his discussion of fines Blackstone finds it necessary to cite the Bill of Rights—a citation he had not found necessary when discussing torture—to show that fines are regulated by law. He completes his quote of the excessive fines clause with the cruel and unusual punishments clause. This is followed by a parenthetical statement explaining the origin of the clauses. "[They] had a retrospect to some unprece-

116. *Id.* at 372-73.

dented proceedings in the court of King's Bench, in the reign of King James the second."

Blackstone's reference to proceedings in the King's Bench immediately brings to mind the figure of Chief Justice Jeffreys, but in what context? The "Bloody Assize" was not a proceeding in the court of King's Bench. It was conducted by Jeffreys under a special commission from the King.¹¹⁷ The trials of Titus Oates for perjury, on the other hand, were regular proceedings in the King's Bench. Given Blackstone's failure to cite the Bill of Rights when discussing torture and given the contemporary references to the trials of Oates as "cruel and unusual," it can be concluded that Blackstone was referring to those trials.¹¹⁸

But Blackstone can be misread as citing the cruel and unusual punishments clause for a prohibition of the tortures catalogued on the preceding page of the chapter. The passages quoted above were so read by the Supreme Court of Delaware in a recent case upholding the use of lashes as a punishment in that state.

It seems to be generally accepted that such provisions [prohibiting cruel and unusual punishments] in early Constitutions, particularly in those of the original Thirteen States, were intended to prohibit the punishments prohibited in England by 1 Wm. and Mary, Ch. 2, the so-called Bill of Rights of England. 3 Story on the Constitution, sec. 1896; *In re Kemmler*, 136 U.S. 436. These were the cruel and barbarous punishments on occasion formerly imposed in England by the Crown. They were punishments considered at the time to be unnecessarily cruel and bordering on outright torture such as breaking on the wheel, public dissection, and the like. IV Blackstone's Commentaries 376¹¹⁹

If such an unjustified reading of Blackstone can be made in 1963 by the Supreme Court of Delaware, a similar reading could have been made by George Mason and others at the Virginia Convention of 1776. It is submitted that such a reading explains the American framer's interpretation of the cruel and unusual punishments clause; an interpretation which spawned the American doctrine that the words "cruel and unusual" proscribed not excessive but torturous punishments.

117. G. KEETON, *supra* note 60, at 312.

118. Sir James F. Stephen had also concluded that the Oates trials gave rise to the cruel and unusual punishments clause. "No doubt the floggings to which Oates and some others were sentenced were the 'cruel punishments' which Parliament referred to" 1 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW IN ENGLAND* 490 (1883).

119. *State v. Cannon*, 55 Del. 587, 591, 190 A.2d 514, 515-16 (1963).