Law, Politics, and the Eighth Amendment

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In *City of Grants Pass v. Johnson*,[1] the Supreme Court held that an Oregon city's anti-camping ordinance did not violate the Eighth Amendment's Cruel and Unusual Punishments Clause. The ordinance authorized fines or short prison terms for violations. The Ninth Circuit had previously found this ordinance unconstitutional on the ground that it effectively criminalized the "status" of homelessness. If a homeless person in Grants Pass, Oregon, did not have access to adequate indoor accommodations, the Ninth Circuit reasoned, her decision to sleep in a public park was "involuntary" and thus the ordinance punished her "status" rather than her "conduct." For this reason, the Ninth Circuit had held that the case was controlled by the Supreme Court's previous decision in *Robinson v. California*,[2] which had held that it is cruel and unusual to punish someone for the status of being a drug addict.

The Ninth Circuit's decision, like so many Ninth Circuit decisions, was constitutionally dubious and its reversal surprised no one. But *Grants Pass* is an important case nonetheless, for the Supreme Court's reasoning demonstrates a key uncertainty about the current Court: Will it be a serious originalist Court or merely a conservative political one? If the former, its decisions may endure. If the latter, they will be written in sand. As we will see below, the *Grants Pass* opinion gives us some reasons to be hopeful, but also significant reasons to worry.

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[1] 144 S. Ct. 2202 (2024).

[2] 370 U.S. 660 (1962).

Grants Pass in the Lower Courts

Homelessness is a serious problem.[3] By some accounts, more people lack housing today than at any point in the last 15 years. The causes of homelessness are complicated. A large majority of homeless people suffer from mental illness and/or drug addiction. Others become homeless because of a temporary financial or health crisis, or because of a lack of affordable housing.

Cities have responded to this crisis in a variety of ways: through social services, mental health and addiction treatment, homeless shelters, and housing subsidies. Many of these services are provided through private, often religious, charitable organizations.

Nonetheless, large homeless encampments have cropped up in many American cities, particularly on the West Coast. Some homeless people join these encampments for a sense of safety or companionship. Many others join because the camps provide ready access to illegal drugs. And some join because the camps allow them to engage in other criminal activity (for example, sexual assault or theft) with relative impunity. As a result, these encampments have become a danger to public health and safety, both to those living in the encampments and to others who work or live in the city.

Cities have encouraged these encampments to disperse by offering social services and shelters, but these efforts have not been successful. Many encampment dwellers prefer to live on the street rather than in a shelter because the street offers a greater sense of freedom and does not require them to seek medical treatment, stop using illegal drugs, or follow other rules.

To reinforce the "carrot" of shelter and social services, a number of cities have turned to the "stick" of anti-vagrancy laws. Laws like these have been widely used in the English and American legal systems since at least the 14th century. They allow cities to impose trespass orders on people who occupy public property or public spaces contrary to city law, and to enforce such orders with arrest. In other words, anti-vagrancy laws allow municipalities to forcibly clear homeless encampments when the encampments' residents refuse to leave voluntarily.

[3] The following factual discussion is derived from the Supreme Court's majority opinion in *Grants Pass*.

Grants Pass is among these cities. It has passed laws prohibiting sleeping "on public sidewalks, streets, or alleyways," "occupying a campsite" on public property, and "[c]amping" or [o]vernight parking" in city parks. The ordinance defines a campsite as any place in which bedding or a fire has been placed "for the purpose of maintaining a temporary place to live." Penalties for violating these laws escalate from fines, to orders banning repeat violators from city parks, to criminal trespass with a maximum sentence of 30 days in prison and a $1,250 fine.

The *Grants Pass* plaintiffs filed suit to enjoin enforcement of these statutes on the ground that they impose cruel and unusual punishments on those homeless people against whom they are enforced. Both the district court and the Ninth Circuit agreed, holding that these statutes criminalized the status of homelessness because they prohibited homeless people from camping in public without providing "adequate indoor accommodations." This holding was based on two prior Supreme Court cases (*Robinson v. California* and *Powell v. Texas*) and a prior Ninth Circuit case (*Martin v. City of Boise*).[4]

Background Cases

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."[5] In *Robinson v. California*,[6] the Supreme Court held that it would be cruel and unusual to punish a defendant for the "status" of being addicted to drugs. The majority opinion contained no analysis of the text or history of the Cruel and Unusual Punishments Clause. In fact, it contained little legal analysis of any kind. Rather, the Court simply asserted:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel

[4] Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019), *abrogated by Grants Pass*, 144 S. Ct. at 2226.

[5] U.S. Const. amend. VIII.

[6] 370 U.S. 660 (1962).

> and unusual punishment in violation of the Eighth and Fourteenth Amendments.[7]

The Court held that because addiction was a disease like mental illness or leprosy, a person could not be punished for having this status: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[8]

Justice Byron White dissented, faulting the majority for elevating its own moral intuition over both the terms of the Constitution and the judgment of state and federal legislatures:

> I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.[9]

Six years later, in *Powell v. Texas*,[10] the Court was forced to deal with the logical implications of its decision in *Robinson*. In *Powell*, the defendant was a chronic alcoholic who had been convicted of public drunkenness. He argued that alcoholism was a disease, like drug addiction, and that his compulsion to drink robbed him of the free will necessary for criminal responsibility. Thus, he argued, it was cruel and unusual to punish him for being drunk in public. Justice Thurgood Marshall wrote the plurality opinion rejecting this argument. His opinion distinguished *Robinson* on the ground that public drunkenness required an act—appearing in public while drunk—while the crime of addiction did not. He also rejected the defendant's attempt to create a constitutional mens rea standard

[7] *Id.* at 666.

[8] *Id.* at 667.

[9] *Id.* at 689 (White, J., dissenting).

[10] 392 U.S. 514 (1968).

based on modern psychology, for this would be inconsistent with "[t]raditional common-law concepts of personal accountability and essential considerations of federalism."[11] He wrote that the Court could not "cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds."[12]

Justice White concurred in the result. Although he had dissented in *Robinson*, he believed that the logic of *Robinson* prohibited punishment not only for a "status" like drug addiction or alcoholism, but also for conduct compelled by that status. Thus, he opined that *Robinson* might well prohibit punishing an alcoholic for getting drunk, and if the alcoholic were homeless, it might prohibit punishing him for public drunkenness: "For [homeless alcoholics] I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."[13] But because there was no showing that the defendant's alcoholism compelled him to appear in public while drunk, White agreed that it was constitutional to punish him for doing so.[14]

In *Martin v. City of Boise*,[15] the Ninth Circuit held that an anti-camping ordinance was cruel and unusual under *Robinson* and *Powell*. It treated Justice White's opinion in *Powell* as controlling because both White and the four *Powell* dissenters had agreed that it was unconstitutional to punish a homeless alcoholic for public drunkenness.[16] Similarly, the Ninth Circuit held, it was unconstitutional to punish homeless people for sleeping in public "so long as there is a greater number of homeless individuals in a jurisdiction

[11] *Id.* at 535 (plurality opinion).

[12] *Id.* at 535–36.

[13] *Id.* at 551 (White, J., concurring in the judgment).

[14] *See id.*

[15] 920 F.3d 584 (9th Cir. 2019), *abrogated by Grants Pass*, 144 S. Ct. at 2226.

[16] *Id.* at 616. This was an odd position to take, since a Supreme Court majority had subsequently endorsed *Powell*'s plurality opinion in a number of cases. *See, e.g.*, Kahler v. Kansas, 589 U.S. 271, 280 (2020).

than the number of available beds in shelters."[17] Since sleep is a universal human necessity, the court held, it was cruel and unusual to punish those who slept outside due to lack of access to adequate indoor shelter.

In *City of Grants Pass v. Johnson*, the Ninth Circuit applied this reasoning to a similar anti-camping ordinance and found the ordinance unconstitutional.[18] Before we discuss what the Supreme Court did with all of this, let's take a step back and look at the Court's Eighth Amendment jurisprudence more generally.

The Court's Anti-originalist Approach to the Cruel and Unusual Punishments Clause

Recall the *Robinson* Court's assertion that "at this moment in history" and "in the light of contemporary human knowledge," a law that punished disease "would doubtless be universally thought" cruel and unusual.[19] Two things stand out about this assertion: First, the Court appeals to contemporary rather than traditional standards to determine the constitutionality of a given punishment. Second, the Court uses no data other than its own imagination ("it would doubtless be thought") to determine the content of contemporary standards.

This reasoning is characteristic of the approach the Supreme Court took to the Cruel and Unusual Punishments Clause in the second half of the 20th and the beginning of the 21st centuries. This approach was first set forth in 1958, when a plurality opinion in *Trop v. Dulles* announced that the Court would not interpret the Clause in light of its original meaning, but according to the "evolving standards of decency that mark the progress of a maturing society."[20] History is inherently progressive, the *Trop* plurality seemed to believe, and if history is progressive then the Constitution should be as well. We should not be tied to the barbaric standards of our primitive

[17] *Martin*, 920 F.3d at 617 (internal citations and punctuation omitted).

[18] 72 F.4th 868 (9th Cir. 2023). In reaching this conclusion, the *Grants Pass* panel interpreted *Martin* as excluding shelters with a "mandatory religious focus" from the count of available beds on the ground that including these shelters would violate the Establishment Clause. *Id.* at 877 (quoting *Martin*, 920 F.3d at 609–10).

[19] *Robinson*, 370 U.S. at 666.

[20] Trop v. Dulles, 356 U.S. 86, 101 1958 (plurality opinion).

and superstitious past. We should focus instead on the enlightened standards of today.

The evolving standards of decency test has some surface appeal, and not just for progressives. A number of punishments used at the time of the Founding seem inconsistent with current cultural norms. For example, branding and nostril slitting were sometimes used to mark an offender and warn others that he was dangerous. The ducking stool and the pillory were used to publicly humiliate some offenders, including poor, elderly women convicted of the now-unpalatable crime of being a "common scold." "The First Congress authorized the death penalty for crimes we now consider relatively minor, such as counterfeiting."[21] Sometimes cultural standards really do change over time. For this reason, Justice Antonin Scalia once described himself as a "faint-hearted originalist" and publicly doubted whether he could uphold punishments such as branding or bodily mutilation, were a legislature to revive them.[22]

The evolving standards of decency test suffers from three fatal flaws, however: It is based on a mistaken view of history; it fails to specify how current "standards of decency" are to be determined; and it violates basic separation of powers principles.

First, history. Perhaps it was possible in the 1950s to assume that history inevitably moves in the direction of greater enlightenment and that a "mature" society will treat criminal offenders with greater kindness and "decency" than in the past. But anyone familiar with American history since the 1960s knows that this simply isn't true. We have had a wave of crime panics—first about crime rates generally, then drug crime, then "juvenile superpredators," and most recently sex offenders. Legislatures have responded by ratcheting up the harshness of punishment to demonstrate that they are in control

[21] John F. Stinneford, *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1742 (2008).

[22] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989). Later in his career, Justice Scalia became less faint hearted. *See* Marcia Coyle, The Roberts Court: The Struggle for the Constitution 165 (2013); Jennifer Senior, *In Conversation: Justice Scalia*, N.Y. Mag., Oct. 14, 2013, at 24 ("[W]hat I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional.").

of the problem. As a result, we now imprison more people, and for longer periods of time, than at any prior point in our history. There certainly are punishments from the 1790s that we would consider cruel today, but overall, the criminal punishment system is much harsher now than it was then.

Second, data sources. The Supreme Court has never specified any authoritative data set to determine current standards of decency. Sometimes it has looked to jury verdicts and legislative actions, because these two bodies might be thought reliable indicators of current standards of decency. After all, juries are composed of a cross section of the people, and legislatures are elected by the people to represent their values. But the Court has never limited itself to these sources. Sometimes it has looked to the opinion of professional associations like the American Bar Association, sometimes it has looked to international opinion, and sometimes—as in *Robinson*—it has simply relied on its own imagination.

Third, separation of powers. As punishment became harsher—with strong public support—in the final decades of the 20th century, the Supreme Court found itself in a bind. Under the evolving standards of decency test, strong public support for a punishment meant, ipso facto, that the punishment was constitutional. The only punishments that could be invalidated were those that were already unpopular. But of course, these were the punishments least likely to be imposed in the first place. What was the Court to do if the government sought to impose a punishment that was both extremely harsh and broadly popular?

The Court responded to this problem with subterfuge, finding increasingly implausible ways to pretend that public opinion was opposed to a punishment that it actually supported. Sometimes, as in *Robinson*, the Court appealed to a hypothetical public opinion of its own imagining. Sometimes it engaged in creative state-counting to find a "trend" against a given punishment.[23] Sometimes (as noted above) it appealed to public opinion among

[23] *E.g.*, Roper v. Simmons, 543 U.S. 551, 588 (2005) (O'Connor, J., dissenting); *id.* at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.").

professional elites, or in foreign countries.[24] As this approach became increasingly untenable, the Court started openly asserting its right to use "independent judgment" to find punishments unconstitutional.[25] In practice, that meant judgment independent of any external constitutional standard, including current societal consensus.[26]

The "independent" turn in Eighth Amendment jurisprudence made the Court's decisions obviously illegitimate. It is one thing for the Court to enforce a standard that comes from the Constitution, or even from current public opinion. It is quite another thing for the Court to strike down democratically authorized punishments in the name of its own moral intuitions. To use a now-hackneyed term, such a move turns the Court into a "superlegislature," contrary to Articles I and III of the Constitution.

Paradoxically, the Court's unconstitutional arrogation of authority to itself resulted in *less* protection for criminal offenders than would a standard based on original meaning. Although the Court sometimes used the "evolving standards of decency" test to strike down applications of the death penalty that it didn't like, it declared an almost-total "hands off" policy concerning prison sentences.[27] The Court seems to have realized that a decision putting thousands of offenders on the street, based on nothing other than the Court's will, could turn public opinion decisively against the Court itself. Ultimately, less than one-thousandth of one percent of criminal offenders benefited from the evolving standards of decency test, as the Court contented itself with occasional virtue signaling concerning the death penalty.

[24] *E.g.*, *Trop*, 356 U.S. at 102 (plurality opinion) (referencing "the international community of democracies").

[25] *E.g.*, *Roper*, 543 U.S. at 564.

[26] *See generally id.* at 587–607 (O'Connor, J., dissenting); *id.* at 607–30 (Scalia, J., dissenting).

[27] "[F]ederal courts should be reluctant to review legislatively mandated terms of imprisonment, and . . . successful challenges to the proportionality of particular sentences should be exceedingly rare." Hutto v. Davis, 454 U.S. 370, 374 (1982) (internal quotation marks and citations omitted) (citing Rummel v. Estelle, 445 U.S. 263, 272, 274 (1980)).

Conservative Responses to the Evolving Standards of Decency Test

The "evolving standards" regime lasted over half a century, despite being both unprincipled and ineffectual. One reason for this was conservatives' failure to present a well-grounded, principled alternative. Sometimes conservatives responded to the left's willingness to make up new constitutional standards by making up new standards of their own, and sometimes they presented "originalist" arguments that were not well-grounded in text or history. These arguments seemed mainly designed to limit the reach and effectiveness of the Cruel and Unusual Punishments Clause.

The most egregious example of a made-up conservative constitutional standard is what I call the "pick your poison" requirement. During the first decade and a half of this century, anti-death-penalty activists sought to make executions impossible by persuading courts to declare the three-drug lethal injection protocol unconstitutional. Their argument was not frivolous. The three-drug protocol typically involves a barbiturate to make the offender unconscious, a paralyzing agent to render the offender (including the offender's lungs) immobile, and a heart-stopping agent to cause cardiac arrest.[28] The argument against this protocol was that if the barbiturate were improperly administered, the remaining drugs would make the offender feel like he was being simultaneously drowned and burned to death from the inside. Death by torture is a classic example of a cruel and unusual punishment. Ultimately, however, the Supreme Court found that the risk of improper administration was not significant enough to invalidate the three-drug protocol.

Anti-death-penalty activists responded to this defeat by instituting a largely successful campaign to pressure drug manufacturers to stop providing barbiturates for use in capital punishment.[29] The idea was that if states were denied barbiturates, they would have to either stop executing people or substitute a less-effective drug

[28] *See* Baze v. Rees, 553 U.S. 35, 44 (2008) (plurality opinion) (describing the three-drug protocol).

[29] By May 2016, "every FDA-approved drug company [had] ban[ned] the sale of drugs for such purposes," Pfizer having "clos[ed] off the last remaining open-market source of drugs used in executions." Stephen A. Saltzburg et al., Criminal Law: Cases and Materials 391 (4th ed. 2017) (quoting Erik Eckholm, *Pfizer Prohibits Use of Its Drugs for Executions*, N.Y. Times (May 13, 2016), https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html).

to render offenders unconscious. If a state chose the latter course, activists could then challenge the new three-drug protocol with the less-effective drug as cruel and unusual. This is precisely what happened. Faced with an inability to obtain barbiturates, Oklahoma announced a new protocol that used an anesthetic called midazolam to eliminate pain.[30] When a challenge to the new punishment reached the Supreme Court in the 2015 case *Glossip v. Gross*, the Court held that, to successfully challenge a method of execution, an offender must "identify an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[31] Under this requirement, the state could order the cruelest method of punishment imaginable—for example, it could order than an offender be chased down and torn to death by wild beasts—and the offender would not be permitted to challenge that punishment unless he could devise an alternative means for his own execution that the courts considered both "feasible" and "readily implemented."[32]

This "pick your poison" requirement has no basis in the text or history of the Eighth Amendment, nor in any precedent. The requirement was first articulated in 2008 in an opinion that attracted the support of only three Justices.[33] The requirement's real justification was political: By forcing offenders to identify an acceptable method of execution, the *Glossip* Court checkmated death penalty abolitionists' effort to eliminate the death penalty by eliminating all acceptable methods of execution. But the price of this victory was the forfeiture of any claim to be more principled than advocates of the evolving standards of decency test.[34]

Conservatives have also advanced "originalist" interpretations of the Cruel and Unusual Punishments Clause based on incomplete textual and historical analysis. The focus of these interpretations has been to impose bright-line rules limiting the scope of the Clause. For example, in *Harmelin v. Michigan*,[35] Justice Scalia argued that the

[30] *See id.* at 393.

[31] Glossip v. Gross, 576 U.S. 863, 877 (2015).

[32] *Id.*

[33] *See Baze*, 553 U.S. at 52 (plurality opinion).

[34] This discussion is drawn from John F. Stinneford, *The Original Meaning of 'Cruel,'* 105 GEO. L.J. 441, 451–56 (2017).

[35] 501 U.S. 957 (1991).

original meaning of the Clause contained no proportionality principle. Under that view, the Clause prohibited only those methods of execution that would have been considered cruel at the end of the 18th century. Justice Clarence Thomas opined in *Baze v. Rees* that a method of execution could only be cruel and unusual if it were "deliberately designed to inflict pain"[36] beyond the pain inherent in death itself. Justice Thomas also argued in *Hudson v. MacMillian*[37] and *Helling v. McKinney*[38] that poor prison conditions could not violate the original meaning of the Cruel and Unusual Punishments Clause because the conditions were not "part of the sentence for a crime."[39] As I have shown elsewhere, these opinions are characterized by a highly selective (and sometimes nonexistent) review of the historical record combined with a hefty dose of abstract policy-oriented reasoning.[40]

These opinions appear to use historical analysis instrumentally, to further the policy goal of limiting judicial discretion. If proportionality analysis has permitted free-floating judicial lawmaking, then it is useful to read the Clause as excluding proportionality analysis. If botched execution or prison conditions cases have allowed courts to improperly invade the province of the executive branch, then it is useful to limit the Clause to cover only sentences whose explicit terms exhibit cruel intent. But as we will see below, and as I discuss extensively in other articles,[41] the best evidence indicates that the original meaning of the Clause *does* contain a proportionality principle, does *not* require a showing of cruel intent, and likely governs at least some prison conditions cases. Properly understood, the Clause also constrains judicial discretion in these areas sufficiently to eliminate the danger of judicial lawmaking.

[36] *Baze*, 553 U.S. at 94 (Thomas, J., concurring in the judgment).

[37] 503 U.S. 1, 17 (1992) (Thomas, J., dissenting).

[38] 509 U.S. 25, 37 (1993) (Thomas, J., dissenting).

[39] *Hudson*, 503 U.S. at 18 (Thomas, J., dissenting).

[40] *See, e.g.*, Stinneford, *supra* note 21, at 1763–65; John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 934–38 (2011); Stinneford, *supra* note 34, at 453 n.61, 475 n.197, 481 n.239. In addition to providing extensive textual and historical analysis, I have been informed that these articles are excellent sleep aids.

[41] *See, e.g.*, articles cited *supra* note 40.

The Original Meaning of the Cruel and Unusual Punishments Clause

As I have shown in prior articles, the phrase "cruel and unusual punishments" was a legal term of art at the end of the 18th century. "Cruel" meant "unjustly harsh," and "unusual" meant "contrary to long usage." Thus, the phrase "cruel and unusual" originally meant "unjustly harsh in light of longstanding prior practice."[42]

The word "unusual" is key to the meaning and application of this phrase. To understand this word, we need to understand what the common law is—or at least, what the Founding generation thought it to be. Today, most lawyers are taught that judges "make" the common law based on their views of public policy. We think this because Justice Oliver Wendell Holmes said it.[43] His long bushy mustache and talent for aphorisms have cast a spell over the American legal community. But prior to Holmes, no one claimed that judges had the authority to make law. The common law was not considered judge-made law, but rather customary law: the law of "custom and long usage."[44] The basic idea was that the customs of a free people are likely to conform to natural law—to be "just" and "reasonable"—and therefore can be enforced as law. In fact, customary law was considered normatively superior to legislatively enacted law because "long usage" had shown customary law to be just and reasonable, and to enjoy the consent of the people. A new law that violated rights established through long usage was called "unusual," a term used in both England and America as a synonym for "unconstitutional."[45] For example, during the American Revolution, colonists used the terms "unusual"

[42] This discussion is based on the articles cited *supra* note 40, as well as John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 Wm. & Mary L. Rev. 531, 536, 577 (2014), and John F. Stinneford, *Experimental Punishments*, 95 Notre Dame L. Rev. 39, 48 (2019).

[43] *See* Oliver Wendell Holmes, Jr., The Common Law 1 (Little Brown & Co. 1923) (1881) ("[T]he intuitions of public policy, avowed or unconscious . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed."); *id.* at 5 (describing the process by which the common law developed at a high level of generality).

[44] Stinneford, *supra* note 21, at 1790.

[45] Stinneford, *supra* note 34, at 471 & n.179 (citing Stinneford, *supra* note 21, at 1799–800).

and "unconstitutional" interchangeably to describe British efforts to tax Americans without giving them representation in parliament and to deprive Americans of the right to a jury trial.[46] Both of these efforts violated longstanding common-law rights.

The Supreme Court's dilemma in adjudicating cases under the Eighth Amendment arises in part because the very purpose of punishment is to inflict pain. How do we draw the line between acceptable punishments and unconstitutional ones? Under the original meaning of the Clause, the answer is to compare the challenged punishment to those traditionally given for the same or similar crimes. If the challenged punishment is not significantly harsher than the traditional baseline, it is constitutional. If it is significantly harsher, it may be cruel and unusual.

Although this standard does not reduce Eighth Amendment cases to the certainty of a math problem, it significantly constrains judicial discretion and deprives the Supreme Court of the ability to remake the criminal punishment system in its own image. Moreover, the insight behind this standard seems a good one: The multigenerational consensus reflected in longstanding practice is more likely to be just than the public opinion of a given moment, whether that moment occurs in 1790 or today.

The original meaning of the Cruel and Unusual Punishments Clause has several additional implications for current jurisprudence.

First, the original meaning of the Clause allows for legal development over time, albeit development driven by the people rather than by judges. The great common-law thinker Edward Coke wrote, "custome loses its being if usage failes."[47] To put this idea in modern terms, when traditional punishments fall out of usage for a period of multiple generations, they have failed the test of time. If a legislature seeks to reintroduce them, they will be considered new punishments and will be judged in light of the tradition as it has survived up to that moment. This reasoning solves Justice Scalia's "faint-hearted originalist" problem.[48]

[46] *See* Stinneford, *supra* note 21, at 1778, 1795.

[47] *Id.* (cleaned up) (quoting Edward Coke, The Compleat Copyholder (1630), *reprinted in* 2 The Selected Writings & Speeches of Sir Edward Coke 563, 564 (Steve Sheppard ed., 2003)).

[48] *See* articles cited *supra* note 23.

Second, the original meaning of the Clause covers disproportionate punishments as well as inherently cruel methods of punishment. The evidence in both England and Founding-era America demonstrates that imposing a major punishment for a minor crime could be considered cruel and unusual. Indeed, the phrase "cruel and unusual punishments" was first written into the English Bill of Rights in response to a disproportionate punishment (life imprisonment, whippings, the pillory, a huge fine, and defrocking) inflicted on a very bad man (Titus Oates) who did a very bad thing (frame innocent people for a capital offense), but whose crime of conviction (perjury) was a mere misdemeanor. The punishment inflicted on Oates would not have been disproportionate to the crime of treason, but because it was unprecedentedly harsh for the crime of perjury, it was cruel and unusual.[49]

Notice that this standard constrains judicial discretion. Judges do not determine proportionality by relying on their own moral intuitions, but by comparing the challenged punishment to traditional punishments for the same or similar crimes.

Third, the original meaning of the Clause does not require a showing of cruel intent, and likely covers at least some prison conditions cases. Prison was invented as a mode of punishment after the ratification of the Eighth Amendment, so prison conditions were not discussed in the debate over that Amendment. But Founding-era cases make clear that when a given punishment significantly increases the risk of disproportionate suffering beyond the risk entailed by traditional punishments, that punishment may be considered cruel and unusual. For example, a Virginia court held in 1799 that it would be cruel and unusual to impose a joint fine in a criminal case. The court noted that the common law prohibited joint fines in criminal cases because default on a fine could result in incarceration. If one defendant defaulted on his portion of the joint fine, the other defendants could be incarcerated or forced to pay his portion, resulting in disproportionate punishment. It did not matter that the disproportionate penalty was neither intended by the sentencer nor a formal part of the sentence. Because the punishment departed from tradition in

[49] For further discussion of the Titus Oates case and its historical importance, see Stinneford, *supra* note 21, at 1759–63, and John H. Langbein, Renee Lettow Lerner, & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 649–52 (2009).

a manner that significantly increased the risk of unjust suffering, it was cruel and unusual. The same principle would apply in prison conditions cases. If a given prison condition—extreme overcrowding, for example—significantly heightened the risk of violence or disease, it might be considered cruel and unusual.

Grants Pass in the Supreme Court

Grants Pass is an easy case under the original meaning of the Cruel and Unusual Punishments Clause. Anti-vagrancy laws like the one at issue in *Grants Pass* have been used in England and America since at least the 14th century.[50] Their use has been widespread throughout American history, up to and including today. Such laws have traditionally imposed much harsher punishments than the modest fines and prison sentences at issue in *Grants Pass*. There is thus no plausible argument that the anti-camping laws in *Grants Pass* are "unjustly harsh in light of longstanding prior practice."[51]

The Supreme Court did not engage in this originalist analysis in *Grants Pass*, possibly because the Court's main focus was deciding whether to overrule, limit, or extend *Robinson*.[52] The Court was particularly skeptical of the argument that the Cruel and Unusual Punishments Clause might limit the conduct that a legislature could make criminal, as opposed to limiting the punishment that might flow from such conduct. Although the Court was highly critical of *Robinson*'s holding to this effect, it opted to limit *Robinson* rather than overrule it.[53] The Court found that because the Grants Pass anti-camping statute required proof of an act, like the public intoxication statute in *Powell*, it did not punish the "status" of homelessness and was distinguishable from *Robinson*.[54]

[50] *See* Brief of Professor John F. Stinneford as *Amicus Curiae* in Support of Petitioner at 3, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175); *Grants Pass*, 144 S. Ct. at 2216.

[51] Stinneford, *supra* note 34, at 464.

[52] *See Grants Pass*, 144 S. Ct. at 2220 (declining "to extend *Robinson* beyond its narrow holding").

[53] *See id.* at 2218.

[54] *Id.*

In dicta, the Court used language that came close to endorsing some of the faulty conservative opinions discussed above. In his majority opinion, Justice Neil Gorsuch wrote that the "Clause has always been considered, and properly so, to be directed at the method or kind of punishment a government may impose for the violation of criminal statutes."[55] This statement could be interpreted to agree with Justice Scalia's view that the Eighth Amendment prohibits only barbaric methods of punishment, not disproportionate punishments.[56] Justice Gorsuch also wrote that the punishments in *Grants Pass* were not cruel because they were not "designed to superadd terror, pain, or disgrace,"[57] echoing Justice Thomas's claim that a constitutional violation requires a showing of cruel intent.[58]

The *Grants Pass* Court also recognized, however, that a punishment can become unusual by falling out of usage. As discussed above, this is a corollary to the original meaning of "unusual," not the original meaning itself. This recognition in *Grants Pass* is not a wholehearted embrace of the original meaning of the Cruel and Unusual Punishments Clause, but it might be a start.

If the Court continues down a politically conservative but textually and historically questionable path, its holdings will disappear as soon as two conservative Justices are replaced by liberals. For example, Justice Scalia's claim that the Clause does not contain a proportionality principle not only runs contrary to text and history but makes the Clause unnecessarily ineffective. What should the Court do when some legislature authorizes a life sentence for a strict liability recordkeeping offense? Is it plausible that the liberty-loving Framers would draft the Clause to exclude such a scenario? It is much more practical and more principled to recognize that when a new punishment is cruelly disproportionate to the crime in light of prior practice, that punishment is cruel and unusual.

[55] *Id.* at 2215 (internal quotation marks and punctuation omitted) (quoting Powell v. Texas, 392 U.S. 514, 531–32 (1968) (plurality opinion)).

[56] *See, e.g.*, *Roper*, 543 U.S. at 626 (Scalia, J., dissenting).

[57] *Grants Pass*, 144 S. Ct. at 2216 (cleaned up) (quoting Bucklew v. Precythe, 587 U.S. 119, 130 (2019)).

[58] *See, e.g.*, *Baze*, 553 U.S. at 97 (Thomas, J., concurring in the judgment) ("Embellishments upon the death penalty designed to inflict pain for pain's sake also would have fallen comfortably within the ordinary meaning of the word 'cruel.'").