Cruel and Unusual Corporate Punishment

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The right to be free from cruel and unusual punishment is one of the most basic and possibly universally agreed-upon rights that Americans have. However, there is a large amount of debate about what constitutes "cruel and unusual" punishment. This debate often revolves around the death penalty, but it also surfaces in many other contexts. One question that has received little attention since the heightened corporate protections granted in Citizens United is whether a corporation could argue against being subjected to "cruel and unusual" punishment.

Under the Eighth Amendment of the United States Constitution, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Discussion exists regarding the corporate applicability of the "excessive fines" portion of the Amendment but very little exists regarding the actual "cruel and unusual punishments" provision. At first blush, this may seem unsurprising since fines are the dominant way that a corporation is punished. Nevertheless, scholars and jurists are calling for more creative (and arguably more effective) means of punishing a corporation, up to and including the so-called corporate death penalty. Given the increased usage and potential need for these punishments and the increased rights granted to corporations, it is important to examine the applicability and limitations of the Eighth Amendment as related to corporations.

> *I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as a civilized society to remain ever under the regimen of their barbarous ancestors.*
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> – Thomas Jefferson[1]

1. *Quotations: Thomas Jefferson Memorial Inscriptions; Southeast Portico*, NAT'L PARK SERV., https://www.nps.gov/thje/learn/photosmultimedia/quotations.htm. (last updated Apr. 10, 2015) (excerpted from a letter to Samuel Kercheval in July 12, 1816).

I. INTRODUCTION

The Eighth Amendment of the Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] This amendment has been interpreted in numerous ways over the centuries, recognizing different rights for different groups at different times. This right has not been extended to corporations. In this Article, I argue that it should be, if necessary.

To understand why it could be necessary, begin by considering a hypothetical. Imagine an environmental regulation involving how much quadrizin (a fictitious chemical) a company can release into the water system. The law exists because quadrizin causes water to turn green and develop an unpleasant odor if a certain amount is reached. However, it does not kill or even significantly harm anyone. Further, quadrizine can be cleaned up from the water system at a cost of $1 million per ton over the acceptable limit. However, the law says that there is a penalty of $10 million per ton over the limit. Further, if a violation occurs, the CEO must be terminated and a permanent overseer must be placed in the corporation. In this situation, it is possible that the corporation may spend millions of dollars more than the cost of cleaning quadrizine trying to avoid the penalty. For example, if the equipment could be insulated to a level that virtually guarantees no spill but at a cost significantly higher than cleaning up any spill. Furthermore, if there is a spill, the resulting fine could put the corporation out of business even though the harm may be completely contained at a fraction of the cost. This is a specific example of over deterrence, where the law can create an incentive to use resources in a way that causes more harm than good—or at least that causes an inefficient use of resources. The quadrizin example (if real) may not have involved cruel and unusual punishment, but the question should at least be available for inquiry. Otherwise, either shareholders would not get the return that they should on their investments or in the second situation, shareholders would lose everything, as would all the workers and possibly the surrounding community that depended upon that corporation for a living. Clearly, this is an intentionally extreme scenario, but the extreme is what the Eighth Amendment is designed to protect against, and it is why it should apply to corporations.

Punishments against corporations can be extreme and not limited to monetary fines, even though fines can be extreme and possibly cruel and unusual. For example, in 2017 over 20 corporate penalties have involved over 100 million and five penalties over one billion, with the highest being over seven billion dollars.[3] All of these crimes, while very

2. U.S. CONST. amend. VIII.

3. Violation Tracker, [Search Results], GOOD JOBS FIRST, https://violationtracker.goodjobsfirst.org/prog.php?parent=&major_industry_sum=&primary_offense_sum=&agency_sum=&hq_id_sum=&company_op=starts&company=&major_industry%5B%5D=&all_offense%5B%5D=&penalty_op=%3E&penalty=100000000&agency_code%5B%5D=&pen_year%5B%5D=2017&free_text=

serious, were nonviolent. Yet, they resulted in punishments of a magnitude almost unimaginable to most people. In addition to fines, other types of punishments have been endorsed and some applied against corporations, including judicial surveillance, the confiscation of assets, exclusion from public procurement, closure of one or more corporations' establishments, the imposition of independent compliance monitors, and, ultimately, dissolution of the corporation.[4] Monitoring, which can be punitive (in many instances control of the corporation is actually in the hands of the monitor), has been forced upon more than 40% of all companies that entered into a settlement or plea bargain on Foreign Corrupt Practices Act (FCPA) charges from 2004 to 2010.[5]

In addition, as the Court has stated in the context of punitive damages, the severity of a penalty should be predictable, enabling someone to know what the stakes are when he or she decides to take a certain course of action.[6] As the Supreme Court stated, "[t]he common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances."[7] The Court pointed out that while there are differences, there are also many similarities between punitive damages and criminal sanctions in that they both advance punishment and deterrence.[8]

In arguing that corporations should receive protection against cruel and unusual punishment, this Article examines the differences between natural and artificial entities and the inherent difficulties of applying a criminal system meant for one to the other. This Article examines the history of both corporate criminal liability and the history of the Eighth Amendment going back to its early English precursor in the 15th Century. This Article also examines the history of corporations in the United States and the process through which they obtained constitutional rights over the last century. It specifically argues that while the underlying reasoning for the Eighth Amendment is not spelled out in history or in our legal system, the rationales of the criminal justice system, which the Amendment serves, are, should be used to determine if the Eighth Amendment applies to corporations. Finally, this Article argues that due to both retributive and utilitarian rationales, the justice system and individuals themselves would be well served by granting corporations the right to be free from cruel and unusual punishments.

II. CORPORATE FOUNDATIONS

A. Corporations and Human Beings Compared and Contrasted

Corporations dramatically vary in terms of their structure, their purposes, and their size. "A corporation may have a very large group of shareholders and separate management if it is a public corporation with stock that is listed, or it may be a very large corporation with private owners."[9] On the other hand, the vast majority of corporations are very

&case_type=&ownership%5B%5D=&hq_id=&naics%5B%5D=&state=&city= (last visited Dec. 15, 2017) (compiling data from multiple federal government agency websites).

4. Caroline Kaeb, *A New Penalty Structure for Corporate Involvement in Atrocity Crimes: About Prosecutors and Monitors*, 57 HARV. INT'L L.J. 20, 22 (2016).

5. F. Joseph Warin et al., *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA J. BUS. L. 321, 322 (2011).

6. Exxon Shipping Co. v. Baker, 554 U.S. 471, 502 (2008).

7. *Id.* at 503.

8. *Id.* at 504.

9. Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 105 (2014).

small.[10] The purposes of corporations also vary greatly: GE, Ford, Facebook, the Guardian Angels, at least one chapter of the Black Panthers, and some Ku Klux Klan chapters are all organized as corporations.[11] We should also bear in mind the differences between publicly and privately held corporations, and also between private corporations with large and small numbers of shareholders.[12] In one case, "[t]he Court noted the difficulty in categorizing firms, which range from media companies to small closely held corporations to large public companies, and recognized that they exist for a wide range of purposes."[13]

Over the centuries, corporations have changed from simple organizations with specific purposes to sometimes very complex organizations owned by thousands (or more) that are managed by people hired from outside and with near-unlimited purposes.[14] Originally corporations came out of European joint stock companies created for a limited period of time, for a specific purpose and chartered by the monarch.[15] At the beginning of the Nineteenth Century, there were only 335 corporations chartered in the U.S.[16] Today, "[c]orporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises."[17] Possibly as far back as 1886, the Court unanimously held[18] that under some circumstances, the word person in the Constitution applied to corporations, and this was so clear that the Court even refused to hear arguments about the question.[19] Some claim that regardless of the personhood status of a corporation, it is bound by reciprocity to accept the responsibilities and burdens, including legal criminal liability, that come with legal personhood and the advantages that entails.[20] However, some also think that the now famous (or infamous) case of *Citizens United* improperly recognized corporate personhood in the first place.[21]

Some have claimed that to determine if a corporation is entitled to constitutional rights, an evaluation of corporate personhood is required.[22] Arguably, the Court has never settled upon exactly what a corporation is for constitutional purposes and, hence, has never had a consistent test for determining if a constitutional right applies to a corporation.[23] In

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10. *Id.*

11. Darrell A. H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 906 (2011).

12. Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 83 (2013), http://cornelllawreview.org/files/2013/12/99CLRO70 -November.pdf.

13. Garrett, *supra* note 9, at 98–99 (discussing Citizens United v. F.E.C., 558 U.S. 310 (2010)).

14. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 934 (2005).

15. Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 112 (2010).

16. *Citizens United*, 558 U.S. at 426 n.53.

17. Hale v. Henkel, 201 U.S. 43, 76 (1906).

18. This refers to a controversial headnote from Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886) that is not found in the body of the decision but seems to reflect the thinking of the court.

19. *Santa Clara Cty.*, 118 U.S. at 396.

20. Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73, 73 (2011).

21. Amy J. Sepinwall, Citizens United *and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 578 n.5 (2012) [hereinafter Sepinwall, Citizens United].

22. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 579 (1990).

23. Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 807, 795 n.54 (1996) (citing for comparison "First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) *with id.* at 823–24 [sic]

fact, courts and scholars have used varying theories of corporate personhood to attempt to resolve various arguments about what rights a corporation should have.[24] One view of corporations is that they are artificial entities created by the law and owing their existence to the sovereign.[25] Chief Justice John Marshall called a corporation "an artificial being, invisible, intangible, and existing only in contemplation of law," but he also felt that corporations were extremely able "to realize the 'charitable or other useful' and 'beneficial' goals of their creators."[26] Another view of corporations is that they are simply groupings of individuals that make them up and hence get the rights that the individuals would possess.[27] This view was supported early on by the U.S. Supreme Court in *Santa Clara County v. Southern Pacific Railroad Co.*[28] when the Court said that a corporation has rights and duties conferred upon it due to the rights and duties of its human members.[29] The third main view of corporations is that it is an entity in and of itself.[30]

Today, corporations are treated in many ways as though they were natural people. For example, they can own property, participate in binding legal contracts, can be sued in court (and in turn sue others), and can be prosecuted and held responsible for criminal actions.[31] Personality analysis is not only used to determine what constitutional rights corporations have, but also whether they should have rights and duties under international human rights doctrines.[32] But, as far back as *New York Central*, the Supreme Court has rejected the anthropomorphizing of corporations,[33] and the practice has been called into question repeatedly. For example, it has been pointed out that "[i]n *Citizens United*, . . . the Court did not discuss whether a corporation is a pure creature of state law, as Justice Sotomayor suggested; a 'real entity' that can exercise all or most of the legal rights of an individual person; or an aggregate entity that helps groups of people realize their interests."[34] Furthermore, Justice Stevens has stated that "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]heir 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."[35] In addition, scholars have claimed that "[c]orporations are neither humans nor citizens. They are not values in themselves, but tools to human ends. . . . [T]here is no reason that we should respect their claims to autonomy unless we also conclude that corporate autonomy is useful to real human beings."[36] "Legal scholars

(Rehnquist, J., dissenting)").

24. James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1571 (2013).

25. *Id.* at 1570.

26. Garrett, *supra* note 9, at 107–08 (quoting Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636–38 (1819)).

27. Nelson, *supra* note 24, at 1569–70.

28. Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

29. *Id*. at 396.

30. Nelson, *supra* note 24, at 1572.

31. Kathleen F. Brickey, *Corporate Liability*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 600, 601 (Gerben Bruinsma & David Weisburd eds., 2014).

32. Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. 531, 544 (2002).

33. Henning, *supra* note 23, at 797.

34. Garrett, *supra* note 9, at 98–99.

35. Citizens United v. F.E.C., 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part).

36. Kent Greenfield et al., *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875, 878 (2007).

have long found the Supreme Court's lack of a coherent approach or engagement with theoretical questions concerning the nature of the firm deeply disturbing, calling the Court's rulings 'ad hoc,' 'right-by-right,' 'arbitrary,' 'sporadic,' inconsistent, and incoherent."[37] Furthermore, since *Citizens United*, "scholarly objections to the Court's rulings concerning corporate constitutional rights have only increased.'[38] The basic holding of *Citizens United* is that the government cannot prohibit a speaker from talking in a political context based on the fact that the speaker is a corporation.[39] Part of the justification for *Citizens United* was that "[c]orporations and other associations . . . are participants in the marketplace of ideas."[40] The Court rejected the idea that natural personhood is a requirement for First Amendment protection.[41]

Scholars have suggested that personhood theories are simply outcome determinative.[42] In addition, a problem with corporate personhood is that it can lead to absurd conclusions when people try to emphasize how different natural people are, for example in the instances of people getting licenses to marry a corporation.[43] Finally, trying to identify and ascribe personhood may also be a herculean task when one considers that philosophers have been asking for two millennia what is necessary and sufficient for personhood, without definite conclusion.[44]

How to handle corporate crime is one of the most important legal issues in the modern age.[45] The Founding Fathers, especially Thomas Jefferson, already recognized the large threat posed by vast accumulations of economic power.[46] It has even been pointed out that "nothing can destabilize the nation's financial system more than fraud and similar financial crimes."[47] Some have also claimed that accumulation of economic and political power by large corporations has enabled them to influence the government to drop criminal investigations and/or prosecutions into their alleged criminal activity.[48] Corporations can be more powerful than governments at times.[49] Yet, corporations are not inherently evil. Most churches are established as non-profit corporations[50] and there is a significant level of variation among corporations.

But, economists have noted for centuries that those with vast wealth would try to obtain inappropriate control over government action.[51] At the same time, both the existence

37. Garrett, *supra* note 9, at 99.

38. *Id.*

39. *Citizens United*, 558 U.S. at 341.

40. Miller, *supra* note 11, at 898.

41. *Citizens United*, 558 U.S. at 342.

42. Nelson, *supra* note 24, at 1572.

43. *See* Angelo Guisado, *When Harry Met Sallie Mae: Marriage, Corporate Personhood, and Hyperbole in an Evolving Landscape*, 49 U.S.F. L. REV. 123, 123–24 (2015).

44. Sepinwall, Citizens United, *supra* note 21, at 580. Questions about what makes a person have plagued philosophers, who have addressed the question in wide-ranging contexts including abortion, fetal rights, reproductive rights, and animal rights, to name a few.

45. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 799 (2013).

46. MARY KREINER RAMIREZ & STEVEN RAMIREZ, THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET 1 (2017) [hereinafter "CORPORATE DEATH PENALTY"].

47. *Id.*

48. *Id.* at 172–73.

49. Miller, *supra* note 11, at 891.

50. Wood & Scharffs, *supra* note 32, at 548.

51. CORPORATE DEATH PENALTY, *supra* note 46, at 212.

and appropriate level of corporate criminal liability has been debated for over a century.[52] Originally, corporations were not subject to the criminal law.[53] William Blackstone thought that this position was so obviously correct that he did not even need to explain or defend it.[54] Early in our country's history, American courts basically came to the same conclusion and held that only individuals could be charged criminally.[55] However, almost 200 years after Blackstone, the Supreme Court disagreed in *New York Central & Hudson River Railroad Co. v. United States*.[56] In *New York Central*, the Court used the respondeat superior principle to determine guilt.[57] The Court concluded that some laws could not be enforced if only individuals were subjected to punishment for violations when the corporation was receiving the benefit.[58] Today, other than physical crimes like rape, which require a natural person,[59] courts hold corporations liable for virtually any crime.[60]

Using the respondeat superior standard, a corporation can be found criminally liable if three elements are established: (1) an agent of the corporation acted with the necessary mental state, (2) the agent acted "within the scope of his employment," and (3) the agent "intended to benefit the corporation."[61] The requirement that an employee be working in the scope of his or her employment has been applied so broadly that it is virtually no requirement at all,[62] and "courts have all but read the 'intent to benefit' element out of the law."[63] For example, the agent could have intended to "benefit the corporation" when that was not his only motivation and in fact, in the end his acts did not benefit the corporation at all.[64] Corporate liability is so broad that virtually anyone in the corporation can subject the entity to liability regardless of the types of efforts that the corporation takes to stop the person.[65] Furthermore, some federal courts have imposed liability on a corporation based on a theory of collective mens rea, where there was no culpable individual but the company as a whole was deemed to have had the requisite mental state.[66] The government is then

52. *See* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 415 (2011) (arguing for a retributivist theory of corporate crimes); *see also* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1478 n.2 (1996) (outlining different approaches to corporate liability).

53. Khanna, *supra* note 52, at 1479.

54. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009) (commenting on William Blackstone's opinion that "[a] corporation cannot commit treason, or felony, or other crime" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *476 (1765)).

55. Brickey, *supra* note 31, at 601–02.

56. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492–95 (1909). For a discussion of the case, see Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. 225, 230–32 (2012).

57. *N.Y. Cent.*, 212 U.S. at 494 (imposing penalties on the corporation for an act committed by an employee on the premises).

58. *Id.* at 495.

59. A court has defined a natural person as "[a] human being, as distinguished from an artificial person created by law." Utica Mut. Ins. Co. v. Precedent Cos., 782 N.E.2d 470, 476 (Ind. Ct. App. 2003) (citation omitted).

60. Khanna, *supra* note 52, at 1488.

61. *Id.* at 1489–90.

62. Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1320 (2007).

63. Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1662 (2007).

64. Khanna, *supra* note 52, at 1490.

65. Weissmann, *supra* note 62, at 1320.

66. Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on*

effectively prosecuting a crime with no mental state. Punishment without mens rea is basically a strict liability offense and many people still view strict liability crimes as "fundamentally unjust."[67] Vicarious liability has led, in some instances, to a corporation being held criminally liable even when it had an express corporate policy against what the individual did.[68] Clearly, it is possible for a corporation to have a facial policy against some conduct, but still effectively endorse the conduct and hence be appropriately subject to liability. However, the law has not made this kind of distinction. A corporation today is subject to criminal liability whether the policy is sincere or a façade, which effectively creates strict liability corporate crimes.

Partly in response to some of the criticism of respondeat superior, some courts and some other nations have also used the "[i]dentification theory," which only allows a conviction if the actions were carried out by people classified as the "directing minds" of the corporation.[69] Similarly, some states have adopted, either by statute or through the common law, a requirement that "high managerial agents" must be involved to bring liability upon the corporation.[70]

Even if there are some arguments dealing with whether and how to hold corporations criminally liable, most would argue that as they acquire more rights and privileges, it becomes even more appropriate to hold them criminally responsible, just as we would a human.[71] It has been pointed out that corporations are becoming more and more legally indistinguishable from humans.[72] In the case establishing criminal liability for corporations, the Court stated that "the law should have regard to the rights of all, and to those of corporations no less than to those of individuals . . . ."[73]

Over the course of conferring greater rights upon corporations, the Court may have started with looking at the theory of personhood, but also went on to the history of any given amendment in question and the underlying purposes of the amendment.[74] In recent years, the Court has increasingly rejected the personhood concept and looked more to the nature and purpose of the right.[75] Some claim that in certain circumstances, it is more reliable to focus on the right rather than the relationship of the corporation and the state.[76] In fact, numerous judges and scholars have argued that there is a modern trend in some of the Justices' writings to zero in on the right in question rather than the entity.[77] "One could imagine that each right might apply in different ways to individuals and organizations, or

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Corporate Moral Agency, 33 AM. BUS. L.J. 489, 501 (1996).

67. Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1081 (2014).

68. Weissmann, *supra* note 62, at 1319 (citing United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004–07 (9th Cir. 1972); United States v. Am. Radiator & Standard Sanitary Corp., 433 F.2d 174, 204–05 (3d Cir. 1970)).

69. Poonam Puri, *Sentencing the Criminal Corporation*, 39 OSGOODE HALL L.J. 611, 615 (2001).

70. Sarah Kelly-Kilgore & Emily M. Smith, *Corporate Criminal Liability*, 48 AM. CRIM. L. REV. 421, 426 (2011); ARIZ. REV. STAT. ANN. § 13-305 (West 2004); MONT. CODE ANN. § 45-2-311 (2009); MODEL PENAL CODE § 2.07(1)(c) (Am. Law Inst. 2007).

71. Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73, 82 (2011).

72. *Id.* at 73.

73. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909).

74. Mayer, *supra* note 22, at 629.

75. *Id.* at 634.

76. Garrett, *supra* note 9, at 108.

77. Miller, *supra* note 11, at 927.

apply to only some types of organizations. Instead, the Court keeps constant the substantive content of rights when litigated by organizations. The Court largely avoids organizational theory and focuses on constitutional theory."[78] In its fairly recent[79] opinion in *Citizens United*, the Court raised deeper questions about the constitutional rights of corporations than any previous case.[80] A number of those dissatisfied with its outcome have asked for constitutional amendments to overturn *Citizens United*.[81]

B. How Corporations Are Punished

Just as there has been an evolution of the way corporations are viewed, there has also been an evolution of punishments applied to corporations. After World War II, there was a bipartisan understanding of the harm that white collar crime could inflict and an intolerance of activities that could threaten the economy.[82] However, the level of corporate criminal prosecution did not really increase for several decades. In the late 1980s, half of all federal white collar crime convictions resulted in probation only, which was corrected by the sentencing guidelines and subsequent laws that increased penalties.[83]

The Organizational Sentencing Guidelines, a subset of the Federal Sentencing Guidelines, provide for numerous punishments such as community service, disgorgement, probation, required compliance programs, and fines—including ones designed to be large enough to remove all of the corporation's net assets.[84] The most obvious corporate penalty is a fine, but some scholars have pointed out that a fine may be viewed like a tax—just another cost of doing business.[85] However, fines can be a violation of both the Excessive Fines Clause and the Cruel and Unusual Punishment Clause.[86] Multiple courts have stated that fines can be cruel and unusual punishment,[87] and in fact, the earliest application of the phrase seems to have recognized exactly that.[88]

Still, most people see a difference between punishments that impact their wallets and

78. Garrett, *supra* note 9, at 100.

79. A more recent decision, *Hobby Lobby*, addressed corporations exercising their religious freedoms, but was not analyzed in relation to the constitution. Rather, *Hobby Lobby* analyzed the right under the Religious Freedom Restoration Act (RFRA) and the Court specifically states that in an "effort to effect a complete separation from First Amendment case law," Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." See Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 696 (2014) (quoting 42 U.S.C.A. § 2000cc-5) (internal citations omitted). The court also pointed out that "[b]y enacting RFRA, Congress went far beyond what this Court has held is constitutionally required" and stated that to determine who a "person" is, the Court does not look back to the Constitution, but rather refers to the dictionary definition under the Dictionary Act. See *Hobby Lobby*, 573 U.S. at 706–08. Therefore, while *Hobby Lobby* is an important case in terms of religious rights of corporations, it does little to help elaborate upon what rights the Constitution either does or should grant to a corporation.

80. Garrett, *supra* note 9, at 96.

81. Sepinwall, Citizens United, *supra* note 21, at 575.

82. CORPORATE DEATH PENALTY, *supra* note 46, at 29.

83. *Id.* at 30.

84. Ramirez, *supra* note 14, at 943–45.

85. Paul J. Larkin, Jr. & John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7, 15 (2016).

86. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. L. REV. 1739, 1811 (2008).

87. Whitney Stores, Inc. v. Summerford, 280 F. Supp. 406, 411 (D. S.C. 1968).

88. Weems v. United States, 217 U.S. 349, 373 (1910).

those that impact their physical liberty, and they give liberty-restricting punishments greater scrutiny.[89] While everyone recognizes that one cannot physically put a corporation in jail, some have argued that one can do the "structural equivalent" by limiting what kinds of business in which it can engage , putting it in receivership, reorganizing it, or even forcing a revocation of its charter.[90] Additionally, corporations can be dissolved (possibly equal to a corporate death penalty), prohibited from engaging in certain business, and placed on probation, during which time their activities can be restricted and monitored by the court or others.[91] Civil settlements are also possible after questionable behavior, like after the housing crisis when Bank of America settled with the Department of Justice for $16.65 billion, "'the largest civil settlement with a single entity in American history.'"[92]

In addition, in specific areas of the economy, even more penalties are available. In some sectors, "regulators hold the power to order spin–offs . . . and to dismiss managers" that allowed criminal activity.[93] In others, regulators can ban or disqualify firms or corporations from participating in that sector.[94] Specifically, in the banking industry even more punishments are possible because the FDIC can put a bank into receivership where it "seizes control of the institution [and] terminates management" in addition to the Office of the Comptroller of the Currency having the ability to "revoke the charter of any national bank."[95] At an individual level, managers can be prohibited from participating in that industry "even if they themselves did not commit crimes,"[96] and various forms of a corporate death penalty have been suggested.[97] For example, some have proposed three-strike rules for corporations, such that after the third offense the government either removes the top management and board or imposes dissolution.[98] Finally, only in the fictitious world[99] of the corporate entity is it possible to continue punishing a corporate entity even after the so-called death by continuing to impose liability for various periods of time.[100] Even with all these mechanisms for punitive actions, some do not think it is enough and have claimed that "rather than the [current] 'carrot-and-stick' approach . . . what is . . . needed is a 'baseball bat.'"[101]

In addition to all these formal punishments, there are also mechanisms that could avoid the courts altogether. The vast majority of criminal convictions in the United States are made by plea agreement.[102] The Department of Justice also frequently uses Non-Prosecution and Deferred Prosecution Agreements, which are contracts between the

89. Larkin, *supra* note 67, at 1071.

90. Michael J. Kelly, *Grafting the Command Responsibility Doctrine Onto Corporate Criminal Liability for Atrocities*, 24 EMORY INT'L L. REV. 671, 672 (2010).

91. Weissmann, *supra* note 62, at 1325.

92. CORPORATE DEATH PENALTY, *supra* note 46, at 2 (quoting statements by the Department of Justice).

93. *Id.* at 10.

94. *Id.*

95. *Id.* at 11–12.

96. *Id.* at 10–11.

97. *See generally* Ramirez, *supra* note 14.

98. *Id.* at 942.

99. This refers to a world in which the law is often forced to treat a noncorporeal entity in the same manner as it would treat a natural human being who does possess a body.

100. Kelly-Kilgore & Smith, *supra* note 70, at 430.

101. Ramirez, *supra* note 14, at 962.

102. Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. R. 1065, 1114 (2015).

government and the corporation that allow the corporation to avoid a trial.[103] In exchange for avoiding trial, the corporation agrees to various institutional changes, fines, restitution, and additional reporting duties during the probationary period.[104] If the corporation keeps up its end of the agreement, "it can avoid [a] criminal indictment."[105] The use of NPAs and DPAs is often motivated or at least justified by the desire to avoid collateral consequences like a possible collapse, as seen with Arthur Anderson.[106] Some corporations seem to have been forced into agreements with the government to avoid the virtual death penalty that Arthur Anderson experienced following the Enron Scandal.[107] Arthur Anderson's conviction ultimately resulted in the company being forced out of business. Over 28,000 people lost their jobs, almost all of whom were certainly innocent of any wrongdoing.[108] While it is clearly possible that a criminal conviction can lead to the liquidation of a corporation, as it may have for Arthur Anderson, it is far from certain.[109]

Nonetheless, the question remains whether agreeing to enter into deferred or non-prosecution agreements are really choices at all, given the alternatives.[110] NPAs and DPAs can have other serious requirements as well, like removing high-level members of the organization or terminating any employee deemed culpable.[111] In one study, researchers found that 30% of DPAs require some degree of change at the board level.[112] The federal government can also force a corporation to investigate and supply evidence of individual defendants' culpability as a requirement for getting a deal.[113] Some groups consider DPAs and NPAs as either too harsh, because they impose unfair restrictions on corporations, or too mild and a mere slap on the wrist.[114]

Whether a penalty against a corporation (either via DPA or jury sentence) is excessive remains unclear. The Eighth Amendment does not define what is excessive, and what one person finds excessive another may find appropriate.[115] There is some evidence that corporations will face greater sentences than natural people.[116] Some studies have shown that penalties for corporations tend to be far higher than for individuals.[117] Reportedly, there is a connection between higher-penalty awards and the "wealth and unpopularity of the defendant."[118] When people feel that they have less in common with

103. Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 BUS. LAW. 61, 63 (2014).

104. *Id.*

105. *Id.*

106. *Id.* at 69–70.

107. Larkin, Jr. & Seibler, *supra* note 85, at 31 (citing, for example, Bank of America's agreement to pay over $16 billion to resolve financial fraud allegations).

108. *Id.* at 17.

109. Markoff, *supra* note 45, at 797–98.

110. John N. Gallo & Daniel M. Greenfield, *The Corporate Criminal Defendant's Illusory Right to Trial: A Proposal for Reform*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 525, 539 (2014).

111. Kaal & Lacine, *supra* note 103, at 89.

112. *Id.* at 95.

113. Larkin & Seibler, *supra* note 85, at 9.

114. Markoff, *supra* note 45, at 801.

115. JOHN D. BESSLER, CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 194–95 (2012).

116. Puri, *supra* note 69, at 622.

117. *Id.*

118. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 18 (1990) (citation omitted).

the criminal defendant, the support for severe penalties increases.[119] And how much less in common could one have than with a fictional entity? However, one must also bear in mind that larger penalties may have legitimate and appropriate reasons. "As legal economists have observed, imposing a particularly severe penalty on a small percentage of rule breakers is one way to deter violations."[120] Justice Scalia points out that for a deterrent penalty to work, a crime that may be less serious, but more difficult to prosecute or detect may justify a significantly higher penalty.[121] Corporate crimes are much more difficult to investigate than typical "street" crimes.[122] Furthermore, the Court has stated that sentences can be based on behavior over an extended period of time, potentially allowing even extreme sentences for seemingly small offenses.[123] Finally, it is perfectly justifiable for a state to punish a repeat offender more harshly than a first-timer,[124] and corporations can be notoriously recidivistic.[125]

However, none of the foregoing avoids the fact that corporate penalties have increased, which several decades ago led to the observation that the increase of corporate sanctions and their escalating severity would likely lead to corporations trying to invoke the Eighth Amendment right to be free from cruel and unusual punishments.[126] To determine the appropriate application or nonapplication of the Eighth Amendment of the Constitution, it is helpful to look at how the Constitution is generally applied to corporate entities.

III. CORPORATE CONSTITUTIONAL STANDING

A judge on the Court of Appeals for the Seventh Circuit claimed that "[c]orporations do not have fundamental rights; they do not have liberty interests, period."[127] Originally, corporations did not have a significant role in the Constitution. According to Justice Stevens, the Founding Fathers "had little trouble distinguishing corporations from human beings."[128] Corporations are not even named in the U.S. Constitution,[129] and only four states named them in their original constitution (Connecticut, Pennsylvania, Massachusetts, and Vermont).[130] Additionally, centuries ago, corporations did not have the protections of the Bill of Rights and actually had numerous conditions applied to their very existence.[131] Early on, both American and English corporations had limited constitutional

119. Epps, *supra* note 102, at 1104.

120. *Id.* at 1084 (quoting A. Mitchell Polinksy & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 886–87 (1979)).

121. Harmelin v. Michigan, 501 U.S. 957, 989 (1991).

122. Larkin & Seibler, *supra* note 85, at 26.

123. Rummel v. Estelle, 445 U.S. 263, 284 (1980).

124. Solem v. Helm, 463 U.S. 277, 296 (1983).

125. Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1, 72 (1988).

126. Mayer, *supra* note 22, at 652.

127. Nat'l Paint & Coatings Ass'n v. City of Chi., 45 F.3d 1124, 1129 (7th Cir. 1995).

128. Citizens United v. FEC, 558 U.S. 310, 428 (2010) (Stevens, J., concurring in part and dissenting in part).

129. Mayer, *supra* note 22, at 579.

130. Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 239–40 (2011).

131. *See, e.g.*, Alexander Polikoff, *So How Did We Get Into This Mess? Observations on the Legitimacy of* Citizens United, 105 NW. U. L. REV. COLLOQUY 203, 206 (2011).

protections.[132]

In recent decades, many scholars and jurists have proposed numerous reasons that a corporation should not be granted rights under the Constitution. In *First National Bank of Boston v. Bellotti*, Justice White stated in dissent:

> Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.[133]

Another argument against corporate rights is that corporations do not fully participate in the nation and hence do not deserve rights to the same degree as those that do participate.[134] Similarly, corporations have been compared to children or at least incompetent adults due to the fact that they do not participate in things like jury duty, military service, or voting just as children do not.[135] Even more recently, in the dissenting opinion of *Citizens United*, Justice Stevens specifically emphasized that corporations do not always have to be treated identically to natural persons.[136]

On the other hand, there are also arguments for granting corporations constitutional rights. "A central lesson from the jurisprudence of constitutional litigation by organizations-perhaps sobering to those who value the individual's day in court-is that constitutional rights may be at their strongest when non-individualized and readily litigated by groups and not just individuals."[137] Furthermore, as the majority in *Belotti* said,

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect.[138]

Additionally, there is the fact that business entities have long held numerous constitutional rights, including those under the First, Fourth, Fifth, Sixth, and Seventh Amendments, as well as the Contracts Clause, Due Process Clause, and Equal Protection Clause of the Fourteenth Amendment.[139] In the 1930s, corporate property rights were

132. Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 204–05 (1946).

133. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting).

134. Sepinwall, Citizens United, *supra* note 21, at 606.

135. *Id.* at 605.

136. *See, e.g.*, Citizens United v. F.E.C., 558 U.S. 310, 394 (Stevens, J., concurring in part and dissenting in part).

137. Garrett, *supra* note 9, at 164.

138. *First Nat'l Bank of Bos.*, 435 U.S. at 776.

139. Garrett, *supra* note 9, at 97.

expanded to include speech rights in connection with corporate newspapers,[140] and after *Citizens United*, corporations have more extensive First Amendment rights to free speech. However, even though *Citizens United* led to claims that other constitutional rights could arguably now be applied to corporations,[141] it was not the first case to grant free speech rights to corporations. In *Bellotti*, the Court pointed out that the purpose of the First Amendment was to protect the inherent value of speech and its ability to inform the public, and also ruled that this ability was not dependent on the nature of the speaker and should be protected.[142] The Court did expand upon this right by way of increasing the focus on the purpose of the amendment, and as Justice Scalia stated, "[t]he [First] Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals . . . ."[143]

Justice Stevens (apparently jokingly) suggested that after recognizing First Amendment rights in *Citizens United*, to be consistent the Court would have to give all the other constitutional rights to corporations.[144] It has also been argued that once a corporation is established as a "person" for one right, one needs to explain why that is not the case for another.[145] However, many rights are focused on individuals and would not make sense as applied to corporations. That includes the right to serve on a jury, run for public office, marry, or procreate.[146] It is also possible that rather than simply asking whether a corporation should be granted a constitutional right, we should ask how much protection the corporation should have.[147] The closest thing to a general principle describing corporate constitutional rights thus far provided by the Supreme Court is that a corporation is entitled to those rights except for "certain 'purely personal' guarantees" and other exceptions depending upon the "nature, history, and purpose of the particular constitutional provision."[148] It is possible that the only way for a clear resolution of corporate rights to emerge would be through a constitutional amendment.[149] Until such an amendment is passed, we must use the sparse guidance given to determine which of the constitutional protections should be granted to corporations. The Court has not answered whether corporations should receive Eighth Amendment protection from cruel and unusual punishments.[150] Since *Citizens United* the question has only been asked in a rhetorical manner,[151] and analysis of the subject has been lacking until now.

140. Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 48 (2014).
141. Miller, *supra* note 11, at 889–90.
142. *First Nat'l Bank of Bos.*, 435 U.S. at 777.
143. Citizens United v. F.E.C., 558 U.S. 310, 392–93 (2010) (Scalia, J., concurring).
144. Garrett, *supra* note 9, at 98.
145. Miller, *supra* note 11, at 915.
146. Garrett, *supra* note 9, at 98.
147. Henning, *supra* note 23, at 886.
148. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978).
149. Mayer, *supra* note 22, at 660.
150. Garrett, *supra* note 9, at 135.
151. Tushnet, *supra* note 12, at 71.

IV. CRUEL AND UNUSUAL PUNISHMENT

A. The History of Cruel and Unusual Punishment

One of the most often repeated and esteemed adages in American legal thought is the idea that it is "better that ten guilty persons escape, than that one innocent suffer."[152] However, few people have tried to say why, and there is a noticeable lack of historic and logically based support for the position.[153] Similarly there is little explanation of why the Eighth Amendment exists. There is considerable discussion as to what is prohibited,[154] but not much as to why, or as to whether the Amendment should apply to entities other than natural human beings. "The provision is applicable to the States through the Fourteenth Amendment."[155] The clause is only 16 words but has generated significant controversy and litigation.[156] The actual phrase "cruel and unusual punishment" dates back nearly 100 years before the Eighth Amendment,[157] and the underlying concepts go back much further than that. The idea of prohibiting excessive punishments arguably, "was first expressed in the Old Testament of the Bible, in the Book of Exodus."[158] The first bill of rights enacted by the federal government under the Articles of Confederation already contained a prohibition on cruel and unusual punishment,[159] and almost all of the states in some variation prohibit cruel and unusual or at least "cruel" punishment.[160] The Court has explained that "[a]t the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights."[161] However, this gives little guidance as to what the protections should look like.

Early definitions of "cruel and unusual" punishment were sometimes limited to acts involving torture or some form of "lingering death."[162] Another definition of cruel used by the Court is "severe or excessive."[163] The Court has clearly established that unusual alone is not enough.[164] That still leaves us with the question of what "cruel" means. Cruel can be, and has been, used by many people including the Founding Fathers in trivial ways, such as that it may be cruel to hurt someone's feelings or cruel to "tax their patriotic zeal any farther."[165] In more modern settings, the phrase cruel and unusual is still often used in common and trivial situations, such as by a child made to eat her vegetables or a party guest forced to sit by someone rude or boring.[166] It is also possible that under the right

152. Epps, *supra* note 102, at 1067 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *352).
153. *Id.* at 1069.
154. *See infra* Part IV.B.
155. Roper v. Simmons, 543 U.S. 551, 560 (2005).
156. BESSLER, *supra* note 115, at 193.
157. Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 852 (1969).
158. *Id.* at 844 (citing *Exodus* 21:25).
159. BESSLER, *supra* note 115, at 167.
160. *Id.* at 181.
161. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989).
162. Weems v. United States, 217 U.S. 349, 370 (1910).
163. Solem v. Helm, 463 U.S. 277, 285 (1983).
164. *In re* Kemmler, 136 U.S. 436, 447 (1890).
165. BESSLER, *supra* note 115, at 183.
166. Stinneford, *supra* note 86, at 1748.

circumstances the forced cutting of a man's hair may be deemed "cruel."[167]

Part of the reason for ambiguity is the fact that the first Congress spent very little time debating the Eighth Amendment.[168] In fact, other than two Founding Fathers making brief comments, there was almost no debate at all.[169] Some early jurists and the Founding Fathers thought that the prohibition on cruel and unusual punishment would be of little consequence because it had no clear and precise significance.[170] One of the legislators involved in drafting the Bill of Rights, Samuel Livermore, said,

> The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. . . . 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?[171]

Historically cruel and unusual punishment has included punishments such as "burning at the stake, crucifixion breaking on the wheel . . . quartering, the rack and thumbscrew . . . and in some circumstances even solitary confinement . . . ."[172] But, in cases dating back over 100 years the Court said that it had not been decided what constitutes "cruel and unusual" punishment.[173] The Court has stated that originally the primary purpose of the cruel and unusual clause was to prohibit punishments that were barbaric or were effectively torturing the convicted criminal.[174] The idea was that the clause was focused exclusively on punishments like those for treason where the penalty was "drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disemboweled and his bowels burnt before him, and then beheaded and quartered."[175] However, there is evidence to the contrary, including the fact that this sentence was continued well after the doctrine was accepted.[176] We may get some perspective on what the clause means by examining its historic predecessor.

The Court said: "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments."[177] The Court pointed out that the Eighth Amendment was "based directly on Art. I, § 9, of the Virginia Declaration of Rights," which "adopted verbatim the language of the English Bill of Rights."[178] When the House of Commons originally drafted its Bill of Rights, it had the famous case of Titus Oates in mind and hence it is "a good illustration of the original meaning of the English

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167. Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 56 (1910).
168. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989).
169. Stinneford, *supra* note 86, at 1809.
170. BESSLER, *supra* note 115, at 151.
171. Stinneford, *supra* note 86, at 1808.
172. Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) (internal quotation marks omitted).
173. Weems v. United States, 217 U.S. 349, 368 (1910).
174. Estelle v. Gamble, 429 U.S. 97, 102 (1976).
175. Granucci, *supra* note 157, at 854.
176. *Id.* at 856.
177. Solem v. Helm, 463 U.S. 277, 286 (1983).
178. Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989).

Cruel[] and Unusual[] Punishments Clause."[179]

> In 1685 Titus Oates, a Protestant cleric whose false accusations had caused the execution of 15 prominent Catholics for allegedly organizing a "Popish Plot" to overthrow King Charles II in 1679, was tried and convicted before the King's Bench for perjury. Oates' crime, "bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed," had, at one time, been treated as a species of murder, and punished with death. At sentencing, Jeffreys complained that death was no longer available as a penalty and lamented that "a proportionable punishment of that crime can scarce by our law, as it now stands, be inflicted upon him." The law would not stand in the way, however. The judges met, and, according to Jeffreys, were in unanimous agreement that "crimes of this nature are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or member." Another justice taunted Oates that "we have taken special care of you." The court then decreed that he should pay a fine of "1000 marks upon each Indictment," that he should be "stript of [his] Canonical Habits," that he should stand in the pillory annually at certain specified times and places, that on May 20 he should be whipped by "the common hangman" "from Aldgate to Newgate," that he should be similarly whipped on May 22 "from Newgate to Tyburn," and that he should be imprisoned for life.[180]

In response to the punishment given to Oates the dissent stated:

> 1st, [T]he King's Bench, being a Temporal Court, made it a Part of the Judgment, That Titus Oates, being a Cleric, should, for his said Perjuries, be divested of his canonical and priestly Habit . . .; which is a Matter wholly out of their Power, belonging to the Ecclesiastical Courts only. 2dly, [S]aid 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. . . . 6thly, Because it is contrary to the Declaration, on the Twelfth of February last, . . . that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual Punishments afflicted.[181]

Every punishment given Oates (other than defrocking) was in common usage and not considered barbaric.[182] In addition, the Court has repeatedly said that an evaluation of the Eighth Amendment has to go beyond the historical conception and evaluate the mores of society as they change, because "extreme cruelty . . . necessarily embodies a moral judgement."[183] Scholars have pointed out that some punishments that had been acceptable in the past cease to be tolerable as public opinion changes.[184] Furthermore, many historians agree that originally "cruel and unusual punishments" referred to "hideously painful

179. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 933 (2011).

180. Harmelin v. Michigan, 501 U.S. 957, 969–970 (1991).

181. *Id.* at 971 (quotation marks omitted).

182. Stinneford, *supra* note 179, at 934.

183. Graham v. Florida, 560 U.S. 48, 58 (2010) (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008)).

184. Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1824 (2013).

punishments, sanctions not authorized by Parliament, or penalties that were grossly disproportionate to the crime."[185] However, Justice Scalia and other originalists have claimed that the Cruel and Unusual Punishments Clause only prohibits barbaric types of treatment.[186] He argued that the clause prevents legislatures from authorizing types or forms of punishments that are cruel and not regularly or typically used.[187] The Court had said that a punishment is "cruel when [it] involve[s] torture or a lingering death."[188] But by the early 20th century, the majority on the Supreme Court had rejected a limited definition of "cruel and unusual" that only encompassed "disembowelment, burning alive, physical torture, or methods causing a lingering death."[189]

The Court evolved over a series of cases to hold that the cruel and unusual clause prohibits more than just barbaric treatment.[190] In numerous cases, the Court has reaffirmed that it in fact "long ago abandoned the original meaning of the Eighth Amendment, holding instead that the prohibition of 'cruel and unusual punishment' embodies the 'evolving standards of decency that mark the progress of a maturing society.'"[191] An idea for which there is general consensus is that we should not simply look at which specific punishments were considered cruel and unusual at the time of the founding. Thus, even an ardent originalist, the late Justice Scalia, said that "in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging."[192] Recently, the Court held "that the Amendment bars not only a barbaric punishment but also a punishment that is excessive, *i.e.*, a punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[193] A 2011 article established for the first time that the cruel and unusual punishment clause originally prohibited not only barbaric punishments, but also excessive ones, and therefore, the proportionality argument may even be appropriate using Scalia's originalist approach.[194] Therefore, arguably both the Framers of the Constitution and its early interpreters understood the clause to mean that punishments that were "excessive in light of prior practices" were prohibited.[195] Given this information, both originalists and those that believe in the evolving standards of decency could agree that punishments that are disproportional to the crime would be unconstitutional. This makes application to corporations considerably easier, if not mandated. It is arguable whether corporations could be subjected to barbaric treatment, but it is clearer that they could be subjected to disproportional punishments.

The three clauses of the Eighth Amendment should be taken together as a prohibition

185. Larkin, *supra* note 67, at 1102.
186. Stinneford, *supra* note 179, at 904.
187. Harmelin v. Michigan, 501 U.S. 957, 976 (1991).
188. Estelle v. Gamble, 429 U.S. 97, 102 (1976).
189. Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 764 (2015).
190. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).
191. Miller v. Alabama, 567 U.S. 460, 510 (2012) (Alito, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
192. Bennion, *supra* note 189, at 773.
193. Coker v. Georgia, 433 U.S. 584, 592 (1977).
194. Stinneford, *supra* note 179, at 901.
195. *Id*. at 942.

against excessive criminal sentences.[196] The Court pointed out: "The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: 'excessive Bail ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted.'"[197] The Court recognized "that the Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments, and the text is explicit that bail and fines may not be excessive."[198] However, some have argued that the Excessive Fines Clause and the Cruel and Unusual Clause have different scopes, and in fact the Fines Clause is a broader clause possibly extending to non-criminal cases.[199]

In the early years of our country there seems to have been at least some understanding about what constituted acceptable punishment, and in fact over 75 years passed between the adoption of the Eighth Amendment and the first Supreme Court case dealing with a claim of excessive punishment.[200] Most of the Supreme Court's jurisprudence about the Cruel and Unusual Punishment Clause over the last 50 years has dealt with the death penalty and a few life imprisonment cases.[201] However, even if review has been limited to a relatively small number of situations, the clause is still contentious and often difficult to interpret. This could be traced to the fact that merely three words, "cruel and unusual," impose a potentially large constitutional limitation.[202] As mentioned, the Court has expanded beyond the simple prohibition of "barbarous physical treatment" and is interpreting those three words "in a flexible and dynamic manner."[203] Now the clause proscribes all punishments that while not actually barbaric, "involve the unnecessary and wanton infliction of pain," (which includes those that are 'totally without penological justification') "or are grossly disproportionate to the severity of the crime."[204] The Court stated, "[t]he prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design."[205] It may not be easy, and in fact may be impossible, to find a principled rationale for Eighth Amendment jurisprudence.[206] However, the Supreme Court has said that "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power . . ."[207] and "[t]he purpose . . . was to limit the government's power to punish."[208] But, how does it accomplish that goal in the modern era?

196. *Id.* at 938 (citation omitted).
197. Solem v. Helm, 463 U.S. 277, 285 (1983).
198. *Id.* at 289 (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)).
199. Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1235 (1987).
200. Stinneford, *supra* note 179, at 947.
201. Larkin, *supra* note 67, at 1103–04.
202. Rhodes v. Chapman, 452 U.S. 337, 345–46 (1981).
203. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 171 (1976)).
204. *Id.*
205. Roper v. Simmons, 543 U.S. 551, 560 (2005).
206. BESSLER, *supra* note 115, at 26.
207. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989).
208. Austin v. United States, 509 U.S. 602, 609 (1993).

B. Application of the Proportionality Principle to Cruel and Unusual Punishment

The Court has stated that the Eighth Amendment's Cruel and Unusual Clause does three things: 1) limits the kinds of punishments that can be inflicted; 2) limits what can be made criminal and punished in the first place; and 3) prohibits punishments that are significantly disproportionate to the crimes committed.[209] The previous Part discussed the kinds of punishments that cannot be inflicted and how early in American legal history that seemed the sole purpose of the clause. However, even early on there were some Justices that did believe that the prohibition was not only against torture, but also against exceedingly long or severe punishments that were disproportionate to the crime committed, so in essence it was a prohibition against excess, whether in bail, fine, or other punishment.[210]

Something may also be cruel and unusual if selected for injury in a seemingly capricious or random manner similar to how "being struck by lightning is cruel and unusual."[211] Clearer limits to what can be made criminal can be seen in *Robinson v. California*, which was the first case to hold that the Eighth Amendment was applicable to state court judgments and held that even one day in prison for being addicted to drugs would be cruel and unusual punishment.[212] Justice Fortas once stated in a dissent: "*Robinson* stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[213] The Supreme Court at one point held that imprisoning an individual for addiction to narcotics was cruel and unusual.[214] According to Justice Douglas, the cruel and unusual punishment aspect was not the imprisonment but rather the conviction of an addict for the crime of being an addict.[215] This prohibition on certain acts being deemed criminal is often classified as a third limitation imposed by the Eighth Amendment, and it could also be viewed as an application of the proportionality requirement imposed by the Cruel and Unusual Clause. In fact, Justice Douglas said that the same principle that prohibits the death penalty for a trivial offense also prevents imprisonment, or even just a fine, for being sick.[216]

The Court has said that "[t]he concept of proportionality is central to the Eighth Amendment."[217] The prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. However, the Court's willingness to evaluate proportionality claims has varied during different times and contexts.[218] Although

209. Ingraham v. Wright, 430 U.S. 651, 667 (1977).
210. Weems v. United States, 217 U.S. 349, 372 (1910).
211. BESSLER, *supra* note 115, at 5 .
212. Harmelin v. Michigan, 501 U.S. 957, 1013 (1991) (White, J., dissenting).
213. Powell v. Texas, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting).
214. Robinson v. California, 370 U.S. 660, 666–67 (1962).
215. *Id.* at 676 (Douglas, J., concurring).
216. *Id.*
217. Miller v. Alabama, 567 U.S. 460, 469 (2012).
218. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3104 n.44 (2015). She explains:

> For example, from 1983, when [Solem v. Helm, 463 U.S. 277 (1983)], was decided, until [Graham v. Florida, 560 U.S. 48 (2010)], the Court did not invalidate any sentence of imprisonment for disproportionality under the Eighth Amendment. But since 1977, the Court has invalidated capital

occasionally engaging in proportionality analysis, the Court has never actually defined proportionality, or said by what standard it should be measured.[219] Justice O'Connor explained that "proportionality—at least as regards capital punishment—not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness."[220] Other Justices have opined that constitutionally proportionate punishment must be "tailored to a defendant's personal responsibility and moral guilt."[221] At least one prominent legal scholar points out that the Constitution protects criminal defendants from being punished when they are not culpable.[222] Once a criminal has been punished in accordance with his culpability, any more punishment would be the same as punishment with no culpability and hence unconstitutional.[223] For some scholars, the role of proportionality is necessary for a democratic government in that it helps restrain the government and deters oppressive or arbitrary actions.[224] The Court stated: "Although the precise scope of this provision is uncertain, it at least incorporated 'the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.'"[225]

After incarceration replaced death as the preferred sentence, the concept of proportionality was applied to incarceration as well.[226] "The principle that a punishment should be proportionate to the crime is deeply rooted in western legal thought and frequently repeated in common-law jurisprudence."[227] Justice Powell pointed out: "The principle of disproportionality is rooted deeply in English constitutional law. The Magna Carta of 1215 ensured that '[a] free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity.'"[228] Five hundred years later, James Madison agreed that we should "proportion the terror of the punishment to the degree of the offense."[229]

Legal philosophers have also defended proportionality for many centuries. In doing so from a utilitarian standpoint Cesare Beccaria (a famous 16th century philosopher) claimed,

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sentences for rape of an adult, Coker v. Georgia, 433 U.S. 584 (1977); for felony murder by one who did not personally kill or intend or attempt to kill, [Enmund v. Florida, 458 U.S. 782 (1982)]; for rape of a child, Kennedy v. Louisiana, 554 U.S. 407 (2008); and for persons with mental retardation, Atkins v. Virginia, 536 U.S. 304 (2002), or who were juveniles at the time of the conviction offense, Roper v. Simmons, 543 U.S. 551 (2005). In *Graham* the Court held unconstitutional a life without parole sentence for a juvenile convicted of a non-homicide offense; in [*Miller*, 132 S. Ct. at 2455], the Court held unconstitutional mandatory life without parole sentences for juveniles convicted of homicide, concluding that imposition of such a sentence required individualized consideration.

219. Stinneford, *supra* note 179, at 904.
220. *Enmund*, 458 U.S. at 815 (O'Connor, J., dissenting).
221. Harmelin v. Michigan, 501 U.S. 957, 1023 (1991) (White, J., dissenting).
222. Stinneford, *supra* note 179, at 908.
223. *Id.*
224. Jackson, *supra* note 218, at 3108.
225. Solem v. Helm, 463 U.S. 277, 285 (1983) (citations omitted).
226. *Id.*
227. *Id.* at 284.
228. Rummel v. Estelle, 445 U.S. 263 288–89 (1980) (Powell, J., dissenting).
229. BESSLER, *supra* note 115, at 122.

> [T]he purpose of punishment is neither to torture and afflict a sentient creature nor undo a crime already done . . . . The aim, then, of punishment can only [be to] prevent the criminal [from] committing new crimes against his countrymen, and to keep others from doing likewise. Punishments, therefore, and the method of inflicting them, should be chosen *in due proportion to the crime* so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal.[230]

In addition, Jeremy Bentham endorsed proportionality when he said that since punishment is in itself negative, if one can reach the same goal with less punishment, that lesser amount or type should be used.[231]

Some justices have also described proportionality as a part of retributive theories of justice,[232] and using a proportionality analysis when dealing with criminal punishments may increase the amount of justice in our criminal law system.[233] In *Rummel v. Estelle*, the dissent's four members said: "[D]isproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender. The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal."[234] Even though the Supreme Court did not state this outright, recent decisions suggest the acceptability of punishments under either retributive or utilitarian justifications.[235]

Since justices in varying settings have described the proportionality aspect differently, establishing a consistent guideline is complex. A further complicating element is the fact that proportionality can change depending upon which theory of punishment is being used.[236] A punishment may be proportional from a deterrence perspective, but radically unproportioned from a retributive one. "Retributivism is backwards-looking. It justifies the harshness of a punishment by examining the severity of the crime. Retributivists consider the harm suffered by a victim and the blameworthiness of the criminal."[237] The "cruel" prohibition could encompass retributive proportionality, which would in turn mean if the punishment is greater than the culpability of the criminal, it is cruel and prohibited.[238] On the other hand, "Proportionality review based on utilitarian principles ('utilitarian review') examines the future benefit of the punishment to determine whether it is working toward the goal of deterring future crime, incapacitating the offender, or reforming the criminal."[239] One additional argument for proportionality from a utilitarian perspective is the desire to avoid over-deterrence.[240] However, this analysis is also not limited to the specific instances of the criminal activity. Almost 100 years ago, the Court stated that when

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230. William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. IN BRIEF 61, 64–65 (2011).

231. Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 45 (2008).

232. *Id.* at 40.

233. Jackson, *supra* note 218, at 3194.

234. Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

235. Glidden, *supra* note 184, at 1841.

236. *Id.* at 1839.

237. *Id.*

238. Berry, *supra* note 230, at 68–69.

239. Glidden, *supra* note 184, at 1840 (citation omitted).

240. Berry, *supra* note 230, at 65.

evaluating proportionality, one should look not only at the one offense and harm caused in the single instance, but rather at the aggregate of harm possibly caused by the offense potentially being repeated.[241]

The Supreme Court established when looking at proportionality that,

> courts should be guided by objective factors that our cases have recognized. First, we look to the gravity of the offense and the harshness of the penalty. . . . Second, it may be helpful to compare the sentences imposed on other *criminals* in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. . . . Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.[242]

When establishing the factors to be considered, the Court did not focus on the defendant (or at least his nature beyond his status as a criminal), but rather looked more at the crimes and punishments involved.

However, even with an established framework for evaluating proportionality claims, the Court seems reluctant to do so. Justice Scalia has described successful proportionality challenges as exceedingly rare and involving punishments of a unique nature.[243] The Supreme Court seems more likely to apply proportionality in death penalty cases, and looks for extreme scenarios of disproportionality in all other cases and rarely finds it.[244] The Court has stated "that the Eighth Amendment 'does not require strict proportionality between crime and sentence'; rather, 'it forbids only extreme sentences that are grossly disproportionate to the crime.'"[245] Other than those regarding capital punishment, there have only been a few challenges to proportionality that were successful because courts usually defer to "Congress's 'authority to determine the types and limits of punishments for crimes.'"[246] In [f]act, the Court has said, "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[247]

However, the Supreme Court is arguably inconsistent in its proportionality jurisprudence.[248] For example, the Court said that "fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."[249] Also, at least a few sentences that were considerably less than death sentences have been found to be disproportionate. In *Trop v. Dulles*, a case from over half a century ago, the Court established that cruel and unusual punishment can occur when the defendant is not tortured or possibly even confined at all: in that case the Court determined that deprivation of

241. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919).

242. Solem v. Helm, 463 U.S. 277, 290–91 (1983) (citations omitted) (emphasis added).

243. Harmelin v. Michigan, 501 U.S. 957, 963 (1991).

244. Jackson, *supra* note 218, at 3186.

245. Graham v. Florida, 560 U.S. 48, 87 (2010) (Roberts, J., concurring in the judgment) (quoting Ewing v. California, 538 U.S. 11, 23 (2003)) (internal quotations omitted).

246. United States v. McGarity, 669 F.3d 1218, 1256 (11th Cir. 2012) (quoting United States v. Johnson, 451 F.3d 1239, 1242–43 (11th Cir. 2006)).

247. Rummel v. Estelle, 445 U.S. 263, 272 (1980).

248. Stinneford, *supra* note 86, at 1741.

249. Trop v. Dulles, 356 U.S. 86, 100 (1958).

citizenship or denationalization can be cruel and unusual.[250] The Court found that denationalization violated those civilized standards. The Court said:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.[251]

Proportionality usually is applied more often in death penalty cases, but actual proportionality review has been used more for striking down excessive fines than in other areas of punishment.[252] The analysis is also applied to imprisonment if for no other reason than, as the Court said: "It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not."[253]

The Court also appears to change its mind more frequently in this area than in others, which has led some to claim that the Court seems to flip-flop in a matter of years.[254] However, this appearance may be accounted for by the Court's recognition of the evolving-standards view.[255] Perhaps more so than any other aspect of the Constitution, the interpretation of the Eighth Amendment should not be static, or, as Justice Stevens indicated, it would not even stop the execution of seven-year-old children.[256] However, evolving standards do not always trend toward leniency. As Professor Stinneford pointed out,

> Societal moral standards do not necessarily get more humane and decent over time. Sometimes they move in the opposite direction. When public opinion becomes enflamed and prone to cruelty, the evolving standards of decency test can do little to stop the resulting cruel punishments, for the very popularity of such punishments is a strong indicator that they comport with current standards of decency.[257]

In one dissent, several Justices stated: "A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency."[258] One problem with the evolving-standards test is that it leaves the defendant dependent on current public opinion, even if recent events have driven public opinion to extreme levels of severity.[259]

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250. *Id.* at 87.
251. *Id.*
252. Glidden, *supra* note 184, at 1846.
253. Solem v. Helm, 463 U.S. 277, 289 (1983).
254. BESSLER, *supra* note 115, at 196.
255. Trop v. Dulles, 356 U.S. 86, 100–01.
256. BESSLER, *supra* note 115, at 21.
257. Stinneford, *supra* note 86, at 1816.
258. Miller v. Alabama, 567 U.S. 460, 495 (2012) (Roberts, J., dissenting).
259. Stinneford, *supra* note 179, at 906.

C. The Case for Applying the Cruel and Unusual Punishments Clause to Corporations

Before continuing the discussion, it is useful to gain a basic understanding of the reason why we prosecute corporate (or for that matter any) criminal behavior. The Supreme Court has said that punishment can be justified by rehabilitation, deterrence, or retribution.[260] A deterrence justification may be more appropriate for corporations due to the possibility that they likely respond to incentives more in line with what one would expect from a rational economic actor than the average individual.[261] General deterrence refers to punishing one person or entity in the belief that other people or entities will witness the punishment and not behave in the same manner.[262] Specific deterrence deals with the person or institution that committed the offense and attempts to deter that specific entity from committing the same or similar acts in the future[263] by either increasing the cost of the behavior or incapacitating by physically preventing the entity from engaging in the behavior. Deterrence and rehabilitation are basically consequentialist theories that consider the outcome of applying the punishment, while retribution is more focused on the behavior of the wrongdoer and an attempt to account for actions and balance the scales of justice. The Supreme Court has held that corporations can be appropriately considered blameworthy and hence proper subjects for retributive justice.[264]

Since it has been established that corporations are proper subjects for punishment, what punishment and what limitations to that punishment should apply? Virtually no scholars have addressed how courts should apply the Eighth Amendment to corporations.[265] Initially, it would seem like an easy question because most people associate the Eighth Amendment with punishments like the rack and whipping, and since the corporation has "no body to kick,"[266] the protection would not apply. However, as mentioned earlier, the Eighth Amendment has a much broader application.[267] That said, there are some references to human dignity and bodily attributes to which the Court has referred over the years without implying that those are necessary considerations.[268]

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260. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

261. Puri, *supra* note 69, at 611.

262. Brickey, *supra* note 31, at 606.

263. *Id.*

264. *See e.g.*, N. Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909) (recognizing that corporations are liable for the criminal misdeeds of its agents).

265. A few student notes have addressed aspects of the matter, but they either predated important jurisprudence such as *Citizens United* or did not squarely answer the question. *See e.g.*, Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313 (1996); Drew Isler Grossman, Note, *Would a Corporate Death Penalty Be Cruel and Unusual Punishment*, 25 CORNELL J.L. & PUB. POL'Y 697 (2016).

266. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

267. *See supra* Part IV.

268. For example: "Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.' Brown v. Plata, 563 U.S. 493, 510 (2011) (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)). Some of what the Court has said about the Eighth Amendment could be used to argue both for and against granting the right to corporations. For example, the Court opined: "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." Roper v. Simmons, 543 U.S. 55, 560 (2005). Certainly, some applications of this principle only relate to humans. For example, unnecessarily and wantonly inflicting pain by deliberately showing indifference to medical needs of prisoners is prohibited by the Eighth Amendment, Bennion,

While these somewhat general endorsements of "man's dignity" and "human attributes" are clearly a part of the Eighth Amendment case law, Justice White, among others, has pointed out that words left out of the Amendment itself are meaningful—for example, leaving out "criminal" allows the amendment to be applied in other scenarios.[269] A common canon of statutory and constitutional interpretation, *expressio unius est exclusio alterius*, counsels that the expression of one premise comes at the exclusion of others, and vice versa. It is noteworthy that the words "man", "human", "individual", or like words were left out of the actual Amendment. Furthermore, even in terms of the language in the case law, there is no indication of necessity in any of the passages where the Court refers to more natural considerations than may be applicable to corporations. Other than generally applicable warnings like Justice Alito's against essentially using the Eighth Amendment's Cruel and Unusual Punishments Clause to cut off or circumvent the democratic process[270]—and the general fact that some people find granting corporations any constitutional protections troubling[271]—there is minimal justification for not granting corporations this protection. Alternatively, there are affirmative reasons to grant them the protection.

One must begin by reminding oneself that while economies cannot prosper without a steady rule of law that applies to both individuals and corporations,[272] the law sometimes needs to change over time. A new understanding emerged during the New Deal that as a capitalist economy grows, the law must also evolve to account for increased complexity and ensure trust and transparency.[273] The Court emphasized in *Weems* that Eighth Amendment jurisprudence specifically is flexible when it stated as follows: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital, must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."[274] The *Weems* Court also pointed out that the Eighth Amendment is not static, but will acquire new meaning as public opinion changes.[275] Constitutions (and other laws) are written to address a specific evil, "but its general language should not, therefore, be necessarily confined to the form that evil had theretofore

supra note 189, at 764 (2015). And the Court has stated that "[t]he touchstone of the Eighth Amendment inquiry is the effect upon the imprisoned." Rhodes v. Chapman, 452 U.S. 337, 366 (1981) (Brennan, J., concurring) (internal quotations omitted). In other cases, the Eighth Amendment also protected prison inmates against bad food or inadequate room temperatures. Glidden, *supra* note 184, at 1815. If the Eighth Amendment were only concerned with the "dignity of man" or the bodily needs of the imprisoned, that would most likely eliminate corporations from its protection. However, the Eighth Amendment is not so limited. There is nothing inconsistent with the Amendment referring to protections of bodily integrity as sufficient but not necessary. The exact boundaries of the right are, however, difficult to determine. Both commentators and the Court itself, as mentioned, have found "human dignity" to be one of the touchstones of the Eighth Amendment BESSLER, *supra* note 115, at 17. The Court has explained: "The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." Trop v. Dulles, 356 U.S. 86, 99 (1958). The Eighth Amendment requires the state to "respect the human attributes even of those who have committed serious crimes." Graham v. Florida, 560 U.S. 48, 59 (2010).

269. Ingraham v. Wright, 430 U.S. 651, 685 (1977) (White, J., dissenting).

270. Kennedy v. Louisiana, 554 U.S. 407, 462 (2008) (Alito, J., dissenting).

271. *See, e.g.*, Guisado, *supra* note 43, at 125.

272. CORPORATE DEATH PENALTY, *supra* note 46, at 4.

273. *Id.* at 5.

274. Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc., 492 U.S. 257, 273 (1989) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

275. *Weems*, 217 U.S. at 378.

taken."[276] However, how do we know when it is time to change our understanding of the Eighth Amendment?

The Supreme Court looks at public opinion and legislative action, but also independently considers the proportionality of the punishment and specifically "whether the punishment measurably contributes to legitimate penological goals."[277] In other contexts, it has been asserted that when evaluating the Eighth Amendment the penalty should be reviewed for excessiveness and "in light of its asserted purpose."[278] So in order to answer the question of whether a penalty is violating the Eighth Amendment, you need to consider what the law that is being violated is trying to accomplish.[279] The Court has confirmed that one must look at why the punishment is being imposed, and if it does not serve that purpose, it should be considered disproportionate[280] and hence unconstitutional. In addition, courts are often instructed to treat corporations as human persons unless the context of the law indicates that they should not be.[281]

It is difficult to ascertain the purpose of the Eighth Amendment because so much of the literature in the area is focused on what is prohibited and not why that is so. However, at least one potential answer is:

> The Cruel and Unusual Punishments Clause focuses on "new" punishments because the core purpose of the Clause is to prevent government from acting on a temporarily enflamed desire to inflict pain on criminal offenders. The government has a pronounced tendency to react to perceived crises by ratcheting up the harshness of punishments. Such crises occur in a variety of circumstances. Sometimes a person commits a crime in an outrageous manner, provoking an outcry for extreme punishment. Sometimes the government "has it in for" a political enemy or a member of a disfavored group and inflicts cruel punishments out of animosity or prejudice.[282]

Another possible purpose involves a desire to avoid new and untried types of punishments. The term "unusual" has received much less attention than cruel, but at least one scholar has demonstrated that, historically, it has referred to a practice that has not enjoyed long usage, i.e., an innovative or new punishment.[283] Justice Scalia mentioned the origin of the clause, which seemed more concerned with the "invent[ion]" of new or special penalties that had neither statutory authorization nor a common-law precedent.[284] Justice Scalia argued that the proportionality argument is incorrect and used the Oates case to show that the historic root of the clause was simply a concern about punishments that had not been authorized.[285] Both of these purposes could have significant impacts in this setting; corporations are often the target of activists and legislatures, and both judges and

276. *Id*. at 373.

277. Larkin, *supra* note 67, at 1110.

278. Glidden, *supra* note 184, at 1816.

279. However, a taken opposing position is that focusing on the purpose of the right, and not the nature of the party, in fact assumes that corporations and natural persons are equivalent. Miller, *supra* note 11, at 943.

280. Graham v. Florida, 560 U.S. 48, 71 (2010).

281. Wood & Scharffs, *supra* note 32, at 553.

282. Stinneford, *supra* note 179, at 969 (quoting Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35, 38–39 (2008)).

283. Stinneford, *supra* note 86, at 1745.

284. Harmelin v. Michigan, 501 U.S. 957, 968 (1991).

285. *Id*. at 971–73.

commentators develop new punishments for corporations fairly frequently,[286] so there is an above-average possibility that corporations would be subject to innovative and extreme punishments.

While it is difficult to establish the specific purpose of the right, one can helpfully look at the purposes of the underlying criminal law and how they argue either for or against application of the right. The *Graham* Court said: "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals."[287] In the same case, the Court explained that retribution was a valid reason to impose punishment, to express condemnation of the actions at bar, and to repair the moral imbalance created.[288] Retribution traditionally does not care about the consequences of the action, but rather focuses on the culpability of the actor as a basis for punishment.[289] "[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[290]

For Eighth Amendment purposes, the Court usually analyzes the relationship between the "punishment and the offense"[291] as opposed to the nature of the offender, with exceptions such as that of children. The Court has looked at individual characteristics such as the reduced culpability that a juvenile is afforded compared to an adult due to the difference in development.[292] The Court explained that because retribution relates to blameworthiness, seeking retribution for a minor makes less sense than for an adult.[293] A plurality of the *Roper* Court stated in relation to minors that "the lesser culpability of offenders under 16 made the death penalty inappropriate as a form of retribution, while the low likelihood that offenders under 16 engaged in 'the kind of cost-benefit analysis that attaches any weight to the possibility of execution' made the death penalty ineffective as a means of deterrence."[294] In this situation, the Court evaluated both retribution and deterrence.[295]

At least one scholar has pointed out that

> [i]n assessing the need for deterrence and retribution, a corporation is fundamentally different than an individual in an important and overlooked respect that warrants limiting imposition of criminal liability for the actions of employees. Companies, unlike most individuals, cannot control absolutely the people's conduct for which they can be criminally liable. It is commonplace that the criminal law's moral basis is called into question whenever individuals with no practical ability to comply with its obligations are punished for their

286. Robert E. Wagner, *Mortal Democracy: When Corporations Bribe*, 13 N.Y.U. J. L. & BUS. 193, 233 (2016).
287. Graham v. Florida, 560 U.S. 48, 67 (2010).
288. *Id.* at 71.
289. Robson, *supra* note 15, at 125.
290. *Graham*, 560 U.S. at 71.
291. Rummel v. Estelle, 445 U.S. 263, 290 (1980) (Powell, J., dissenting).
292. *Graham*, 560 U.S. at 68.
293. Miller v. Alabama, 567 U.S. 460, 470 (2012).
294. Roper v. Simmons, 543 U.S. 551, 562 (2005).
295. *See id.*

actions.[296]

Behavior in a corporation can range from high-level participation, to willful ignorance, or down to innocent oversight. In the different scenarios, a different level (if any) of culpability should attach.[297] It is impermissible under the Eighth Amendment for the state to treat two defendants who are not alike and have different levels of culpability as though they are in fact the same.[298] Therefore, since culpability is an important factor in establishing a proportional, and hence constitutional punishment, and since there are at least questions as to the culpability properly attributable to corporations, there is a strong argument in favor of analyzing corporate punishments under the Eighth Amendment. One should keep in mind that this does not mean that the Eighth Amendment prohibits any particular punishment; rather, this Article suggests that the types of questions addressed by the Amendment are applicable to corporations.

In addition to retribution, deterrence theories of punishment have been the most accepted justification for corporate criminal liability.[299] The Court has been aware of and concerned with the consequences of extending constitutional rights to corporations since the earliest cases on corporate rights.[300] Corporate decisions are not usually driven by any form of social responsibility, but rather simply by a cost-benefit analysis,[301] which gives more weight to the use of deterrent theories of justice in determining proper punishments in this context. However, some of the criticism of corporate criminal liability has been based on a utilitarian premise that what is good is what maximizes utility for everyone and then focused on the inefficiencies involved with corporate criminal liability.[302] If, as has been claimed, corporations are given more severe penalties, the possibility of over-deterrence could be significant. If greater costs are associated with avoiding the action than are caused by the action, this type of over-deterrence would not maximize utility and hence not comply with the utilitarian premise. Sanctions that over-deter possible defendants "cause[] them to forgo activities that have a net social benefit[]."[303] Therefore, the deterrence purpose of the criminal law also justifies affording corporations the right to be free from cruel and unusual punishments.

An additional argument in favor of affording corporations Eighth Amendment protection is the fact that other protections against extreme punishments may not be as effective in this setting. It has been argued that in modern times, with the reduced occurrence of capital punishment, less concern needs to be given to the possibility of conviction errors and less caution is needed when punishing.[304] A related argument in favor of harsh punishments is that they help to encourage those tasked with determining guilt to give serious consideration to the consequences of the pronouncement.[305] However, it is

296. Weissmann, *supra* note 62, at 1327.

297. *Id.* at 1326–27.

298. Enmund v. Florida, 458 U.S. 782, 798 (1982).

299. Robson, *supra* note 15, at 121.

300. Henning, *supra* note 23, at 881.

301. Ramirez, *supra* note 14, at 935.

302. Robson, *supra* note 15, at 110.

303. David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 8 (1990).

304. Epps, *supra* note 102, at 1085.

305. For example, John Stuart Mill remained in favor of the death penalty in part because it motivated judges to avoid erroneous convictions. *Id.* at 1083. *See also* Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L.

unclear if this harshness will be taken into account by a jury or if it will matter in relation to corporations. After all, the old fear of damnation faced by jurors if they incorrectly condemned an innocent defendant to death[306] will likely not apply to corporate sentencing. Finally, "extending constitutional rights to corporations may not only protect the fairness of adversary proceedings, but also can enable corporations to trade on their rights to obtain leniency with prosecutors by cooperating to ensure that individual wrongdoers are punished."[307]With the increased use of DPAs and NPAs discussed earlier, it may be useful to give corporations at least a defense to the extreme sentences they may be facing if they do not enter into these types of agreements.

VI. CONCLUSION

As Justice Rehnquist stated, the general language in parts of the Constitution allows interpretations that can encompass situations that the Framers may not have foreseen.[308] It is safe to say that they did not predict the application of much, if any, of the Bill of Rights to corporate entities. However, since constitutional rights in relation to corporations are developing in unexpected and complicated ways,[309] this Article argues that one way they should evolve is to grant to corporations the right to be free from cruel and unusual punishments. Just as in relation to individuals, the Eighth Amendment is unlikely to avert many punishments for corporations, but it may be a useful protection in circumstances in which draconian penalties may be considered or when DPA possibilities play a role.

If one looks at the two primary reasons for criminal law, retribution and deterrence, they both support applying the protection to corporations. In some ways, a corporation may have reduced culpability, meaning that retribution is less effective, and hence a more intense level of scrutiny of punishments may be warranted. In terms of deterrence, one should also be concerned with cruel and unusual punishments, in particular as the proportionality test is used. Both the problem with over-deterrence and unintended consequences are why the deterrence rationale also supports protecting corporations from the possibility of cruel and unusual punishments. While the specific optimal ways to apply the Eighth Amendment to corporate crime deserve exploration in future work, at this stage it is worth acknowledging that the protection should apply, and the question of what that means for particular punishments should be asked.

REV. 157, 161–67 (2014) (discussing differences in the administration of high versus low sanctions).

306. Epps, *supra* note 102, at 1084.

307. Garrett, *supra* note 9, at 156.

308. BESSLER, *supra* note 115, at 33.

309. Miller, *supra* note 11, at 956.