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RECONCEPTUALIZING THE EIGHTH AMENDMENT:
SLAVES, PRISONERS, AND “CRUEL AND UNUSUAL”
PUNISHMENT*

ALEXANDER A. REINERT**

The meaning of the Eighth Amendment’s Cruel and Unusual Punishment Clause has long been hotly contested. For scholars and jurists who look to original meaning or intent, there is little direct contemporaneous evidence on which to rest any conclusion. For those who adopt a dynamic interpretive framework, the Supreme Court’s “evolving standards of decency” paradigm has surface appeal, but deep conflicts have arisen in application. This Article offers a contextual account of the Eighth Amendment’s meaning that addresses both of these interpretive frames by situating the Amendment in eighteenth- and nineteenth-century legal standards governing relationships of subordination.

In particular, I argue that the phrase “cruel and unusual punishment[.]” was intertwined with pre- and post-Revolutionary notions of the permissible limits on the treatment of slaves. The same standard that the Framers adopted for the treatment of prisoners in 1787 was contemporaneously emerging as the standard for holding slaveholders and others criminally and civilly liable for harsh treatment of slaves. Indeed, by the middle of the nineteenth century, constitutional law, positive law, and common law converged to regulate the treatment of prisoners and slaves under the same “cruel and unusual” rubric. Thus, when the Supreme Court of Virginia referred to prisoners in 1871 as “slaves of the State[.]” the description had more than rhetorical force.

Going beyond the superficial similarity in legal standards, examining how the “cruel and unusual” standard was explicated in the context of slavery offers important insights to current

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debates within the Eighth Amendment. First, the contention by some originalists that the Punishments Clause does not encompass a proportionality principle is in tension with how courts interpreted the same language in the context of slavery. Indeed, relationships of subordination had long been formally governed by a principle of proportional and moderate "correction," even though slavery in practice was characterized by extreme abuse. Second, to the extent that dynamic constitutional interpretation supports limiting criminal punishment according to "evolving standards of decency," the comparative law frame used here raises questions as to how far our standards have evolved. This, in turn, should cause commentators and jurists to reconsider whether the twenty-first-century lines we have drawn to regulate the constitutional bounds of punishment are adequate to advance the principle of basic human dignity that is thought to be at the heart of the Eighth Amendment.

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INTRODUCTION

Every year, prisoners' rights cases constitute a substantial percentage of new filings brought in federal court.¹ Most of these

1. Even after passage of the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), which was intended to stem the tide of prisoners' rights litigation, caseloads remain high. In 2013, for instance, approximately 25,000 prisoners filed cases in

cases will implicate the Eighth Amendment to the United States Constitution, which in its Punishments Clause prohibits the imposition of “cruel and unusual punishment[.]”² The Eighth Amendment has been interpreted to regulate both the formal sentences that may be imposed for particular offenses as well as the conditions under which prisoners must serve those sentences.³ Thus, whether a prisoner is challenging the length of a particular sentence,⁴ the appropriateness of execution for particular crimes or categories of offenders,⁵ an officer’s use of force,⁶ a prison’s failure to provide medical care,⁷ the failure to protect prisoners from assault,⁸ or

federal court relating to prison conditions or civil rights, about ten percent of the total caseload in the federal courts. ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.C-2, at 3 (Dec. 31, 2013), <http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/december-2013.aspx> [<http://perma.cc/84B7-7TX3>]. These figures have remained relatively unchanged over the past five years. *E.g.*, ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.C-2, at 2 (Dec. 31, 2008), <http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/December2008.aspx> [<http://perma.cc/3WST-23G4>] (reporting approximately 25,000 prisoner civil rights filings out of 265,000 total federal court filings in 2008).

2. U.S. CONST. amend. VIII. This is not to say that the Eighth Amendment is the only relevant constitutional provision in prisoners’ rights litigation. The First, Fourth, Fifth, and Fourteenth Amendments each have limited application to prisoners, but the Eighth Amendment has been applied to directly govern a broad range of prison conditions. *See infra* notes 4–9 and accompanying text.

3. The Supreme Court first struck down a sentence for violating the Eighth Amendment in 1910. *Weems v. United States*, 217 U.S. 349, 378 (1910). In 1962, the Court found that the Eighth Amendment was incorporated against the states via the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962). And in 1976, the Court ushered in modern prison condition jurisprudence by holding that the Eighth Amendment protected prisoners from harm caused by the “deliberate indifference” of prison officials. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

4. *E.g.*, *Solem v. Helm*, 463 U.S. 277, 283 (1983).

5. *E.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (finding capital punishment unconstitutional where the defendant was convicted of a crime that did not involve death); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (holding that it was unconstitutional to execute a defendant who committed a crime as a juvenile); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibited the execution of a mentally retarded prisoner).

6. *E.g.*, *Hudson v. McMillian*, 503 U.S. 1, 4 (1992).

7. *E.g.*, *Estelle*, 429 U.S. at 104.

8. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825, 848–49 (1994) (finding that the Eighth Amendment can apply where prison officials fail to protect a prisoner from other prisoners); *see also* *Arnold v. Cty. of Nassau*, 252 F.3d 599, 602 (2d Cir. 2001) (applying *Farmer* in the context of corrections officers’ deliberate indifference to a substantial risk of inmate violence); *Snider v. Dylag*, 188 F.3d 51, 55 (2d Cir. 1999) (indicating that an assault invited by a staff member’s statements to other inmates is actionable); *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997) (stating that an assault made possible by an officer’s opening of a cell is actionable).

harmful conditions of confinement in general,⁹ the Eighth Amendment will guide resolution of the controversy.

Despite, or perhaps because of, its wide application, the meaning and mission of the Eighth Amendment is highly contested. A vocal minority of the Supreme Court maintains that modern application of the Punishments Clause has gone off the rails in two notable ways—first, by permitting challenges to sentences on the basis of their proportionality,¹⁰ and second, by authorizing courts to make subjective assessments as to when conditions of confinement or specific punishments contravene “evolving standards of decency.”¹¹ The critics’ objections are both methodological (founded in an originalist account of the Eighth Amendment’s meaning) and

9. *E.g.*, *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (discussing the Eighth Amendment’s limitations on permissible conditions of confinement); *see also* *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (permitting a lawsuit based on exposure to second-hand tobacco smoke); *LaBounty v. Coughlin*, 137 F.3d 68, 72 (2d Cir. 1998) (finding that a claim could be made for exposure to asbestos).

10. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting) (arguing that the Eighth Amendment regulates only the method, and not the amount, of punishment); *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (Scalia, J.) (arguing, based on original meaning, that there is no “proportionality guarantee” provided by the Eighth Amendment); *Solem v. Helm*, 463 U.S. 277, 313 (1983) (Burger, C.J., dissenting) (“The prevailing view up to now has been that the Eighth Amendment reaches only the *mode* of punishment and not the length of a sentence of imprisonment.”); *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (Rehnquist, J.) (“Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.”).

11. The objection has been lodged both as to the reliance on the Eighth Amendment to regulate conditions of confinement, *see, e.g.*, *Hudson*, 503 U.S. at 28 (Thomas, J., dissenting) (“The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation.”), as well as to the Court’s reliance on subjective assessments to determine when a particular punishment is in conflict with “evolving standards of decency,” *see, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 459 (2008) (statement of Scalia, J., and Roberts, C.J., respecting denial of rehearing); *see also* *Miller v. Alabama*, 132 S. Ct. 2455, 2490 (2012) (Alito, J., dissenting) (“Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.”); *Graham*, 560 U.S. at 121 (Thomas, J., dissenting) (“I simply cannot accept that these subjective judgments of proportionality are ones the Eighth Amendment authorizes us to make.”); *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (“The Court thus proclaims itself sole arbiter of our Nation’s moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures.”); *Farmer*, 511 U.S. at 859 (Thomas, J., dissenting) (“Conditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence.”); *Rhodes*, 452 U.S. at 346 (summarizing the Court’s prior holdings to disapprove of reliance on “subjective views of judges”).

institutional (expressing concern about the legitimacy of judicial rather than legislative or executive assessments of the appropriateness of particular punishments).¹² Proponents of the Court's current approach, by contrast, generally adopt a dynamic interpretive framework to decide constitutional questions and are more comfortable using judicial oversight to displace penal policy and practice.¹³

The controversy over the Eighth Amendment's meaning has naturally focused courts and commentators alike on the intentions of the clause's drafters, at least as a starting, if not an ending, point of the analysis.¹⁴ There is widespread agreement that there is very little direct evidence of what the First Congress intended to convey by inserting the provision into the Bill of Rights.¹⁵ The Amendment was

12. See John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1742–43 (2008) (summarizing the debate).

13. See Douglas A. Berman, *Graham and Miller and the Eighth Amendment's Uncertain Future*, 27 CRIM. JUST. 19, 24 (2013) ("Unsurprisingly, the Supreme Court has robustly and repeatedly embraced what might be called 'living Constitution rhetoric' in all its major Eighth Amendment rulings for more than a century."); Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 62–63, 63 n.36 (2009) (arguing that the Court's embrace of a dynamic interpretation of the Eighth Amendment began with *Weems v. United States*); cf. *Rummel*, 445 U.S. at 307 (Powell, J., dissenting) (arguing that a sentence was disproportionate based on the "living Constitution"); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 891 n.39 (2009) (arguing for a broader understanding of "cruelty" based on "living constitutionalism").

14. Compare *Graham*, 560 U.S. at 58–59 (finding a proportionality principle in the Eighth Amendment), and *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (using "the evolving standards of decency that mark the progress of a maturing society" to measure the reach of the Punishments Clause), with *Graham*, 560 U.S. at 99 (Thomas, J., dissenting) (arguing that "cruel and unusual" regulates only the method, and not the amount, of punishment), and *Solem*, 463 U.S. at 313 (Burger, C.J., dissenting) ("The prevailing view up to now has been that the Eighth Amendment reaches only the *mode* of punishment and not the length of a sentence of imprisonment."). See also Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 844–60 (1969) (arguing that the drafters of the English Bill of Rights intended to prohibit both excessive and barbarous punishments).

15. John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297, 299–300 (2013) (noting sparse legislative history and contemporaneous debate); Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J. L. & PUB. POL'Y 35, 35–36 (2008) (describing deliberations as "rather perfunctory"); Tessa M. Gorman, Comment, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CALIF. L. REV. 441, 461 (1997) ("In sum, the meaning of the Declaration of Rights' cruel and unusual punishment clause is not entirely clear . . ."); Granucci, *supra* note 14, at 840–41 (stating that the Eighth Amendment was considered "constitutional 'boilerplate'").

taken from the Virginia Declaration of Rights, which itself adopted wholesale a similar provision from the English Bill of Rights.¹⁶ But there was little contemporaneous debate or commentary when the Amendment was introduced and ratified.

This does not mean that scholars have completely foregone investigating the possible meanings that drafters could have had in mind when the Eighth Amendment was adopted. Legal historians have suggested that founding era concerns about state-sanctioned cruelty emanated from several sources: prior experience with the British monarchy; Enlightenment critiques of torture and other punishments employed by England and, to some degree, its colonies; and intellectual commentary that was influential during the founding era.¹⁷ Blackstone, who used the term “cruel and unusual” to illustrate what constituted “express malice” for the purpose of murder, exerted considerable influence on the founding generation,¹⁸ and Cesare Beccaria’s treatise on crime and punishment was popular on both sides of the Atlantic.¹⁹

These historical accounts have offered useful insights into the potential meaning the founders ascribed to the Eighth Amendment.²⁰ But they have neglected a rich source of information—the jurisprudence of slavery, which, on its face, was guided by the same

John Stinneford, however, finds more clarity by examining debates regarding other provisions of the Constitution and Bill of Rights, ultimately concluding that “the only plausible meaning” of the word “unusual” was that it was intended to limit innovation in punishment. Stinneford, *supra* note 12, at 1809–10.

16. Bessler, *supra* note 15, at 312–13; Granucci, *supra* note 14, at 848.

17. See Bessler, *supra* note 15, at 315–17 (describing the use of concepts in case law, Blackstone, contemporaneous documents, and the writings of “influential thinkers”); Samuel H. Pillsbury, *Talking About Cruelty: The Eighth Amendment and Juvenile Offenders After Miller v. Alabama*, 46 LOY. L.A. L. REV. 885, 896–99 (2013) (looking to writings of John Adams, Thomas Jefferson, Cesare Beccaria, and Montesquieu); Stinneford, *supra* note 12, at 1745–46 (arguing that common understanding of the word “unusual” equated the term with “government practices that are contrary to ‘long usage’ or ‘immemorial usage.’”); see also Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 806–13 (1975) (discussing the influence of Cesare Beccaria and other Enlightenment thinkers).

18. Bessler, *supra* note 15, at 318.

19. *Id.* at 305 (discussing the influence of Cesare Beccaria’s bestselling 1760s treatise, *On Crimes and Punishments*); see also Pillsbury, *supra* note 17, at 897–98; Schwartz & Wishingrad, *supra* note 17, at 808–13.

20. Bessler, *supra* note 15, at 305; Pillsbury, *supra* note 17, at 813–15; see also PHILA. SOC’Y FOR ALLEVIATING THE MISERIES OF PUB. PRISONS, CONSTITUTION OF THE PHILADELPHIA SOCIETY FOR ALLEVIATING THE MISERIES OF PUBLIC PRISONS 3–4 (1806), <https://archive.org/details/101292180.nlm.nih.gov> [<http://perma.cc/XB6U-BK9E>] (arguing for reform of both the “degrees and modes of punishment”).

prohibition on “cruel and unusual” treatment as the Eighth Amendment.²¹ This Article provides the first comprehensive exploration of slavery jurisprudence as it relates to the law of punishment.²² In particular, this Article draws comparisons between modern interpretation of the Eighth Amendment and eighteenth- and nineteenth-century interpretations of the common law and statutory prohibition of “cruel and unusual punishment” of slaves.

In so doing, this Article offers a two-tiered critique of current Eighth Amendment jurisprudence, one that should resonate with both adherents and critics of current Eighth Amendment doctrine. First, consistent with the conclusions that already have been drawn from legal history, the jurisprudence of slavery demonstrates that the words “cruel” and “unusual” did not simply purport to regulate the *mode* of punishment, but also called for an inquiry into the *excessiveness* of punishment.²³ To some extent, the pre-twentieth-century law of slavery offers a richer and more detailed exploration of the meaning of these terms than the contemporaneous law of punishment, and it points to an interpretation that is in sharp tension with those who adhere to the view that the Eighth Amendment only prohibits certain categories of punishment.²⁴ One should be careful not to overstate the point: as this Article discusses below, the law of slavery left much to be desired in terms of application.²⁵ It is presumably unsurprising that courts mouthed the words of “decency,”²⁶ “humanity[,]”²⁷ and “excessive punishment”²⁸ even as they protected abusive slaveholding behavior and the institution of slavery itself.²⁹ But as a matter of formal law, the jurisprudence of slavery contemplates the possibility that an excessive punishment

21. See *infra* Part II.

22. John Bessler’s work is an exception, at least to the extent that he discusses in some detail the law of slavery in the context of an argument about the permissibility of capital punishment. See Bessler, *supra* note 15, at 333–37. But Bessler’s description of the law of slavery is not meant to advance an argument about the law of punishment, but rather to provide a narrative about how the permissibility of capital punishment has gradually been restricted over time.

23. See *infra* Section II.B.

24. See *infra* notes 49–51 and accompanying text.

25. See *infra* notes 167–73 and accompanying text.

26. See, e.g., *Turnipseed v. State*, 6 Ala. 664, 665 (1844) (holding that if a slave is punished in a manner that is offensive to “decency[,]” the offender can be charged with inflicting cruel and unusual punishment).

27. See *infra* note 128 and accompanying text.

28. See *infra* notes 131–34 and accompanying text.

29. A similar observation could be made about the few nineteenth-century cases that address the rights of prisoners.

could be both cruel and unusual even if it was administered through “usual” means, such as a whip.³⁰

Second, and equally as critical for those who would align Eighth Amendment principles with “evolving standards of decency,” there are many ways in which the law of punishment of the last fifty years has not advanced far beyond the law of slavery of the eighteenth and nineteenth centuries. This is most obvious in the context of the use of force against both prisoners and slaves. When one examines the standards under which civil or criminal liability could arise from abusive force used against a slave—courts and statutes generally prohibited force that was used willfully and for the purpose of revenge or harm and beyond the scope of “moderate correction”—it is eerily similar to the “malicious and sadistic” standard regulating the use of force against prisoners.³¹ Again, one must be careful not to over-claim here—many states only contemplated punishing slaveholders who killed or maimed through the use of immoderate force,³² while prison officials are liable whether they kill or merely injure a prisoner.³³ And slaves had no right to recover damages or institute actions—to the extent that their injuries were recognized by courts as worthy of a civil remedy, it was to compensate a slaveholder for his loss.³⁴ But nonowners of slaves were theoretically accountable both civilly and criminally when they injured slaves through excessive “correction,”³⁵ and the inability of slaves to institute civil actions did not leave them formally unprotected by criminal law.

The failings of the law of punishment will not shock close observers. But with the law of slavery in the background, perhaps even experts in the law and practice of punishment will see a stark picture. There is a given narrative that runs throughout prison scholarship of the transition from the late-nineteenth and early-twentieth centuries’ “hands-off” doctrine to more judicial oversight in the 1960s and ‘70s, with retrenchment in the last thirty years.³⁶ This narrative is attractive because it is consistent with trends in other

30. See *infra* Section II.A.

31. See *infra* Part III.

32. See, e.g., *infra* notes 86–89 and accompanying text.

33. Indeed, to be civilly liable, a prison official need not cause any harm other than increasing the risk of future harm to a prisoner. See, e.g., *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

34. See *infra* notes 112–20 and accompanying text.

35. See *infra* notes 119–24 and accompanying text.

36. See generally JOHN W. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* 351–52 (9th ed. 2010) (describing the hands-off doctrine and the conditions of confinement litigation that followed).

institutional reform litigation, while also suggesting some incremental measure of progress. As this Article argues, however, the nineteenth-century description of prisoners as “slave[s] of the State” may be more than mere rhetorical flourish even now.³⁷ To the extent that the modern Supreme Court aligns its Eighth Amendment jurisprudence with respect for human dignity,³⁸ the Court should appreciate how shallow that conception is in operation. Indeed, there is ample evidence that, despite the promise of judicial regulation of prisoners’ treatment, courts often fall short of guaranteeing minimum standards of decency in prisons and jails even after years of judicial intervention.³⁹

Part I of this Article outlines our current understanding of the Eighth Amendment and its history. Although the Supreme Court has applied the Amendment to regulate both the content of criminal sentences and the treatment of prisoners held in confinement, there is a contentious debate about whether the Court has been true to the Amendment’s original meaning. Legal historians have intervened in the debate with useful insights, but have failed to discuss the slavery jurisprudence examined here, even though the cases offer a detailed and contemporaneous examination of the very words used in the Amendment.

Part II canvasses seventeenth-, eighteenth-, and nineteenth-century law, which provided the basic principles by which the treatment of slaves was theoretically regulated. Positive law generally

37. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 795–96 (1871) (“A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him.”); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 31 (2012). Notably, because convict leasing was used as a tool in the post-Reconstruction South to perpetuate the economic and political subjugation of African-Americans, prisoners in the late-eighteenth and early-nineteenth centuries experienced material conditions and treatment nearly indistinguishable from slavery. See DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME* 56–57 (2008).

38. See *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

39. See *id.* at 1926–28 (detailing decades of litigation involving medical and mental health treatment); see also Letter from Preet Bharara, U.S. Attorney for the S. Dist. of N.Y., to The Honorable Bill de Blasio, Mayor of N.Y.C., Joseph Ponte, Comm’r of the N.Y.C. Dep’t of Corr., and Zachary Carter, Corp. Counsel of N.Y.C. (Aug. 4, 2014), <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf> [<http://perma.cc/99A4-N863>] (detailing the results of an investigation into the treatment of juveniles held in detention at Rikers Island).

required that any “punishment” of slaves be graduated and proportional, while common law purported to require that slaves be treated according to some minimum standard of decency. As with the law of punishment, the application of the law of slavery did not live up to these principles—the practice of slavery involved everyday treatment that was cruel and barbarous. But for the purposes of this Article, which seeks to mine a new source of understanding as to the contemporaneous meaning given to the words “cruel and unusual,” slavery jurisprudence offers a rich vein.

Part III discusses the ramifications of the law of slavery for the law of punishment. For originalists, slavery jurisprudence offers a reason, in addition to some that have already been offered by legal historians, to be comfortable with the Supreme Court’s proportionality jurisprudence. For those who find within the Eighth Amendment a commitment to discerning and applying “evolving standards of decency[,]”⁴⁰ slavery jurisprudence should raise questions about the application of that standard to current problems in prison-conditions litigation. In this sense, the law of slavery may be the fun-house mirror for the law of punishment—in some ways, the reflection will be familiar, and in other ways, disturbing.

I. THE INCOMPLETE HISTORY OF THE EIGHTH AMENDMENT

The Eighth Amendment prohibits the infliction of “cruel and unusual punishments.”⁴¹ Perhaps more than any other single provision of the Bill of Rights, it has come to occupy multiple roles in regulating criminal justice, which this Article will briefly sketch before turning to the origins of the Punishments Clause.⁴² When a

40. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

41. For a more detailed discussion of different aspects of Eighth Amendment jurisprudence, see generally Reinert, *supra* note 13, at 61–68.

42. Indeed, some scholars have criticized Eighth Amendment jurisprudence for being so capacious. See, e.g., John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 78 (2010) (arguing that proportionality jurisprudence should not permit challenges to the length of a sentence); Claus, *supra* note 15, at 45; Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 107 (1996) (describing the Court’s proportionality jurisprudence as “confused”); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 528 (2008) (criticizing the Court for failing to “provide practical guidance or a coherent theoretical framework for analyzing proportionality challenges”); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 684 (2005) (describing Eighth Amendment jurisprudence as “ineffectual and incoherent”); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 478 (2005); Stinneford, *supra* note 12, at 1740–41.

criminal defendant receives a sentence upon conviction, the Eighth Amendment imposes two related constraints: (1) the punishment, including the length of any incarceration, must meet a loose proportionality test in order to pass constitutional muster;⁴³ and (2) the punishment must accord with “evolving standards of decency.”⁴⁴ And after the sentence is handed down, the Eighth Amendment, again through “evolving standards of decency,” regulates the conditions to which prisoners are subjected, including the medical and mental health care that a prisoner receives; the force that may be used by officers to impose order; the supervision that is required to ensure safety within prisons; and the material conditions that form the daily lived experience in prisons such as living space, food, and sanitation.⁴⁵

43. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring) (articulating a “narrow” proportionality principle).

44. The “evolving standards of decency” doctrine was introduced in *Trop*, 356 U.S. at 101 (plurality opinion). Since the beginning of the twentieth century, the Supreme Court has found prison sentences to be unconstitutional—under either proportionality or “evolving standards” analysis—in only a handful of noncapital cases involving adults, see *Solem v. Helm*, 463 U.S. 277, 284 (1983); *Trop*, 356 U.S. at 101 (plurality opinion); *Weems v. United States*, 217 U.S. 349, 382 (1910), and generally has held that sentences of terms of years will almost never be found to be unconstitutional, see *Ewing v. California*, 538 U.S. 11, 30–31 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 76–77 (2003); *Harmelin*, 501 U.S. at 996; *Hutto v. Davis*, 454 U.S. 370, 374–75 (1982) (per curiam). To the extent that the Court has been at all receptive to arguments regarding the constitutionality of both capital and noncapital sentences, the defendant has had specific characteristics that rendered a particular punishment inappropriate. See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (holding that the Eighth Amendment prohibits the imposition of mandatory life-without-parole sentences on juveniles); *Graham v. Florida*, 560 U.S. 48, 75–76 (2010) (noting that the Eighth Amendment prohibits the imposition of life-without-parole sentences on juveniles who do not commit capital crimes); *Roper v. Simmons*, 543 U.S. 551, 571–73 (2005) (holding that a death penalty sentence for juveniles violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding it unconstitutional to execute a defendant who is mentally retarded); cf. *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (finding the death penalty disproportionate for the conviction of a crime that did not involve death).

45. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (holding that handcuffing a prisoner to a hitching post without water or bathroom access for seven hours, well after the need to reclaim order had dissipated, violated the Eighth Amendment); *Farmer v. Brennan*, 511 U.S. 825, 849 (1994) (holding that the Eighth Amendment could be violated if an official failed to protect a prisoner from violence caused by other prisoners); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that deliberate indifference to second-hand tobacco smoke subjected prisoners to unsafe conditions in violation of the Eighth Amendment); *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (holding that when prison officials “maliciously and sadistically” use force, the Eighth Amendment is violated); *Wilson v. Seiter*, 501 U.S. 294, 304–05 (1991) (requiring access to minimum standards of warmth and exercise); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (requiring conditions of confinement that meet minimum standards); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (concluding that “deliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment); *Snider v. Dylag*, 188 F.3d 51, 55 (2d Cir. 1999) (holding that an assault invited by a staff member’s statements to other inmates is actionable under the

Thus, it is fair to say that the Eighth Amendment operates as a constraint on state action, albeit a loose one, from the day that a criminal sentence is imposed until the prisoner is released from custody.

The Court has not arrived at this point in its jurisprudence without controversy. Almost from the start, dissenting Justices have expressed discomfort and disagreement with the Court's interpretation of the Punishments Clause, especially the proportionality principle that a majority of the Court has embraced. In *Trop v. Dulles*,⁴⁶ for instance, four dissenters cautioned the Court against making policy judgments about appropriate punishments that would intrude upon the political branches.⁴⁷ Again in *Solem v. Helm*,⁴⁸ four dissenters objected that there was no support for a general Eighth Amendment proportionality principle and argued instead that the Eighth Amendment only prohibited certain modes of punishment.⁴⁹ A vocal minority has kept up the drumbeat through the years.⁵⁰ Over time, some Justices have also objected to the Court's reliance on the Eighth Amendment to regulate conditions of confinement.⁵¹

Eighth Amendment); *LaBounty v. Coughlin*, 137 F.3d 68, 72–73 (2d Cir. 1998) (finding actionable an Eighth Amendment claim where a prisoner claimed prison officials' deliberate indifference to asbestos exposure); *Fischl v. Armitage*, 128 F.3d 50, 57 (2d Cir. 1997) (noting that an assault made possible by an officer's opening of a cell is actionable).

46. 356 U.S. 86 (1958).

47. *See id.* at 119–20 (Frankfurter, J., dissenting).

48. 463 U.S. 277 (1983).

49. *See id.* at 312–13 (Burger, C.J., dissenting).

50. *E.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2483 (2012) (Thomas, J., dissenting) (objecting to the proportionality principle); *id.* at 2487 (Alito, J., dissenting) (criticizing the proportionality principle and evolving standards doctrine for “abandon[ing] the original meaning of the Eighth Amendment”); *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting) (criticizing the Eighth Amendment doctrine on original meaning grounds); *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (criticizing the proportionality principle and evolving standards doctrine on originalist grounds); *Ewing v. California*, 538 U.S. 11, 31–32 (2003) (Scalia, J., concurring in the judgment) (objecting to the proportionality principle as fundamentally a policy, not a legal, judgment); *id.* at 32 (Thomas, J., concurring in the judgment) (same); *Harmelin v. Michigan*, 501 U.S. 957, 992 (1991) (Scalia, J.) (recognizing, but criticizing, interpretations of *Weems* that support a proportionality principle).

51. *Hope v. Pelzer*, 536 U.S. 730, 758 n.12 (2002) (Thomas, J., dissenting); *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring in judgment) (“Conditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence.”); *Helling v. McKinney*, 509 U.S. 25, 37–38 (1993) (Thomas, J., dissenting); *Hudson v. McMillian*, 503 U.S. 1, 19 (1992) (Thomas, J., dissenting).

The vast majority of this critique has focused on the original meaning of the Eighth Amendment.⁵² Thus, for both scholars and jurists, excavating that meaning is of vital importance, even for those who do not place singular reliance on originalist modes of interpretation. As this Article discusses in detail below, the Amendment's original meaning is obscured, given the limited information available regarding the founders' intent in adopting the Punishments Clause.

There is very little direct information regarding the meaning given to the Eighth Amendment by those who voted to include it in the Bill of Rights. On August 17, 1789, the House of Representatives took up consideration of the Amendment, which had been introduced by James Madison.⁵³ Representative William Smith, of the Charleston District of South Carolina, immediately objected to the "cruel and unusual" language on vagueness grounds.⁵⁴ Samuel Livermore of New Hampshire agreed, reportedly arguing as follows:

The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in [the] future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.⁵⁵

According to contemporaneous accounts, no further discussion was had, the clause was approved by a "considerable majority[.]" and

52. See *Miller*, 132 S. Ct. at 2487 (Alito, J., dissenting); *Graham*, 560 U.S. at 99 (Thomas, J., dissenting); *Roper*, 543 U.S. at 608 (Scalia, J., dissenting).

53. 1 ANNALS OF CONG. 782 (1789) (Joseph Gales ed., 1834).

54. See *id.* Smith generally objected to the inclusion of a bill of rights in the Constitution and had already sought to delay debate over the amendments. See James W. Ely, Jr., "The Good Old Cause": *The Ratification of the Constitution and Bill of Rights in South Carolina*, in *THE SOUTH'S ROLE IN THE CREATION OF THE BILL OF RIGHTS* 101, 120 (Robert J. Haws ed., 1991).

55. 1 ANNALS OF CONG. 782–83.

debate turned to the Fourth Amendment.⁵⁶ In the Senate, the consideration of the Eighth Amendment was even less extensive. Introduced to the Senate on August 25, 1789, the Senate approved the Amendment without discussion on September 7, 1789.⁵⁷ If one were to plot along a spectrum the interest expressed by the First Congress in the various elements of the Bill of Rights, it is safe to say that the Eighth Amendment would lurk in the margins, barely seen. It certainly did not arouse the interest sparked by the First or Fourth Amendments.⁵⁸

Moreover, prior to its introduction in the First Congress, there is little evidence of public debate about the Punishments Clause. The only record of any discussion of the Clause outside of the halls of Congress comes from 1788, when James Iredell argued against the necessity of a Punishments Clause on several grounds.⁵⁹ First, he disputed the logic of adopting a provision of the English Bill of Rights, which was meant to limit the power of the Crown, when the Eighth Amendment would purport to limit the power of both the executive and the legislature.⁶⁰ Second, foreshadowing Livermore's concerns, Iredell argued that the phrase was "too vague to have been of any consequence" and that even if the clause limited the government's power more specifically, it would be of little use or effect.⁶¹ Finally, he questioned the need for such a limitation on the

56. *Id.* at 783.

57. 1 ANNALS OF CONG. 73 (1789) (Joseph Gales ed., 1790).

58. See, e.g., David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 486-94 (1983) (discussing the debate surrounding the Freedom of the Press Clause of the First Amendment); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1712-21 (1996) (discussing William Cuddihy's treatise on the Fourth Amendment's history).

59. James Iredell, *Marcus, Answers to Mr. Mason's Objections to the New Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 333, 359-60 (Paul Leicester Ford ed., 1888).

60. *Id.* ("It may be observed, in the first place, that a declaration against 'cruel and unusual punishments' formed part of an article in the Bill of Rights at the revolution in England in 1688. The prerogative of the Crown having been grossly abused in some preceding reigns, it was thought proper to notice every grievance they had endured, and those declarations went to an abuse of power in the Crown only, but were never intended to limit the authority of Parliament. Many of these articles of the Bill of Rights in England, without a due attention to the difference of the cases, were eagerly adopted when our constitutions were formed, the minds of men then being so warmed with their exertions in the cause of liberty as to lean too much perhaps towards a jealousy of power to repose a proper confidence in their own government. From these articles in the State constitutions many things were attempted to be transplanted into our new Constitution, which would either have been nugatory or improper. This is one of them.")

61. *Id.* at 360. ("If to guard against punishments being too severe, the Convention had enumerated a vast variety of cruel punishments, and prohibited the use of any of them, let

power to punish, given that those who made and executed the laws would “themselves be subject to them,” creating an incentive “not to make them unnecessarily severe[.]”⁶² Other than Iredell’s comments, however, there is no record of any public dispute during the time of the framing about the need for a limitation on the government’s power to punish.⁶³

One explanation for the apparent innocuousness of the Eighth Amendment may be found in the extent to which influential founding-era documents already contemplated similar limitations. First and most obvious were those state constitutions that used the same language as the Eighth Amendment by prohibiting “cruel and unusual punishments.” James Madison’s home state of Virginia had adopted something close to this formulation in section 9 of its 1776

the number have been ever so great, an inexhaustible fund must have been unmentioned, and if our government had been disposed to be cruel their invention would only have been put to a little more trouble. If to avoid this difficulty, they had determined, not negatively what punishments should not be exercised, but positively what punishments should, this must have led them into a labyrinth of detail which in the original constitution of a government would have appeared perfectly ridiculous, and not left a room for such changes, according to circumstances, as must be in the power of every Legislature that is rationally formed. Thus when we enter into particulars, we must be convinced that the proposition of such a restriction would have led to nothing useful, or to something dangerous, and therefore that its omission is not chargeable as a fault in the new Constitution.”).

62. *Id.*

63. During ratification, there was some debate about whether there should be a Punishments Clause in the Constitution itself, but this appears to reflect a broader debate about the wisdom of having a Bill of Rights separate from the Constitution. Abraham Holmes, debating in Massachusetts regarding ratification of the Constitution, seemed concerned that, at least at that point, there was no provision that prevented Congress from “inventing the most cruel and unheard-of punishments, and annexing them to crime.” *Debates in the Convention of the Commonwealth of Massachusetts*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 1, 111 (Jonathan Elliot ed., 1888) (“[T]here is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.”). Similar concerns were raised in 1788 by Patrick Henry and George Nicholas in Virginia, directly comparing the presence in Virginia’s Declaration of Rights of a “Punishment Clause” with the absence of such a clause in the draft of the Constitution then presented to the states for ratification. *Debates in the Convention of the Commonwealth of Virginia*, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 1, 447–48, 451–52 (Jonathan Elliot ed., 1888). In response to Henry and Nicholas’s concerns, George Mason observed that the Constitution prohibited torture by prohibiting compelled self-incrimination. *Id.* This was not a sufficient response from Nicholas’s perspective because a bill of rights might not be enforced as strictly as a constitution. *Id.*

Declaration of Rights,⁶⁴ and it surely influenced his thoughts as he drafted the Bill of Rights. The language from the Virginia Declaration of Rights, in turn, derived from the English Bill of Rights, which provided “[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁶⁵

In addition, several states other than Virginia had adopted language in their constitutions that resembled that found in the English Bill of Rights. North Carolina,⁶⁶ Massachusetts,⁶⁷ Maryland,⁶⁸ and Delaware⁶⁹ each prohibited “cruel *or* unusual punishment.”⁷⁰ Maryland’s Declaration of Charter and Rights also contained additional language that regulated the substance of punishment,

64. See VA. DECLARATION OF RIGHTS § 9 (1776) (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

65. *Id.*; see An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne 1689, 1 W. & M., sess. 2, § 9 (Eng.); *Solem v. Helm*, 463 U.S. 277, 286 n.10 (1983). See generally Granucci, *supra* note 14 (describing the histories of the prohibitions against cruel and unusual punishments in the English Bill of Rights and the Eighth Amendment). As a comparison, one other document with foreign provenance was likely influential among the founding generation: the *French Declaration of the Rights of Man*, which required that punishments be “strictly and obviously necessary.” DECLARATION OF THE RIGHTS OF MAN § 8 (1789). As William Blackstone noted, what must be called “excessive” under the English Bill of Rights “must be left to the courts, on considering the circumstances of the case, to determine.” 4 WILLIAM BLACKSTONE, COMMENTARIES *296–300. It is noteworthy that the English and Virginian documents did not use the mandatory “shall” but instead the hortatory “ought,” a fact often overlooked by scholars. See David Thomas Konig, *Natural Rights, Bills of Rights, and the People’s Rights in Virginia Constitutional Discourse, 1787–1791*, in THE SOUTH’S ROLE IN THE CREATION OF THE BILL OF RIGHTS 33, 36–39 (Robert J. Haws ed., 1991).

66. N.C. CONST. art. I, § 10 (1776); see also *Ratification of the Constitution by the State of North Carolina* (Nov. 21, 1789), reprinted in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 266, 276–90 (1894) (adopting the language of the Eighth Amendment). This difference is not insignificant, as many courts have noted. See, e.g., *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (discussing differences between the text of the Michigan Constitution and the Eighth Amendment); see also *In re Lynch*, 503 P.2d 921, 927 (Cal. 1972) (analyzing California’s punishments clause, which is phrased in the disjunctive); *People v. Kellogg*, 14 Cal. Rptr. 3d 507, 532 (Cal. Ct. App. 2004) (“[T]he scope of article I, section 17 of the California Constitution is not limited by the scope of the Eighth Amendment of the United States Constitution and may prohibit cruel *or* unusual punishments that may not be cruel *and* unusual punishment under the Eighth Amendment.”).

67. MASS. CONST. pt. I, art. XXVI (1780).

68. MD. DECLARATION OF RIGHTS art. 14 (1776) (prohibiting “cruel and unusual pains and penalties” and counseling avoidance of “sanguinary laws”); *id.* art. 22 (prohibiting “cruel or unusual punishments”).

69. DEL. DECLARATION OF RIGHTS § 16 (1776).

70. John Bessler has suggested that it is unclear that the distinction between the disjunctive “or” and the conjunctive “and” carried significant consequence. See Bessler, *supra* note 15, at 313.

prohibiting laws that “inflict cruel and unusual pains and penalties.”⁷¹ And the 1787 Northwest Ordinance extended to inhabitants of the Territory several rights, including the right to be free of cruel and unusual punishments and the requirement that fines be “moderate.”⁷²

But much like the lack of evidence of any deliberation regarding the adoption of the Eighth Amendment,⁷³ the origins of state constitutional provisions with similar language is opaque at best. Thus, legal historians attempting to triangulate the original meaning of the Eighth Amendment have turned to the moral and legal commentary that was most influential among the founding generation. John Stinneford, for instance, has painstakingly traced intellectual discourse to seek to understand contemporaneous meanings of the words “cruel” and “unusual.”⁷⁴ Samuel Pillsbury and John Bessler have similarly found evidence of original meaning in the founders’ prior experience with the British monarchy, Enlightenment critiques of torture, and other intellectual commentary.⁷⁵ And most historians have noted the deep influence of both William Blackstone and Cesare Beccaria, whose ideas appear to have influenced the founders’ concerns about cruelty and the excessiveness of punishments.⁷⁶

71. MD. DECLARATION OF RIGHTS art. 14 (1776) (prohibiting “unusual pains and penalties” and counseling avoidance of “sanguinary laws”). A prior draft had prohibited “unusual pains and penalties, unknown at common law.” See Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 656 (1998).

72. AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO OF 1787, reprinted in HOWARD W. PRESTON, DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1863, at 241, 247 (3d ed., New York, G. P. Putnam’s Sons 1893).

73. See *supra* note 59 and accompanying text.

74. See Stinneford, *supra* note 12, at 1745–46 (arguing that the common understanding of the word “unusual” equated the term with “government practices that are contrary to ‘long usage’ or ‘immemorial usage’”). See generally John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011) (using historical material to demonstrate that the original meaning of the Eighth Amendment is consistent with modern proportionality review).

75. See Bessler, *supra* note 15, at 315–17; Pillsbury, *supra* note 17, at 896–98. Montesquieu, as one example, spoke against the imposition of “cruel” and disproportionate punishment. See BARON DE MONTESQUIEU, 6 THE SPIRIT OF THE LAWS chs. 12, 16 (Thomas Nugent trans., 1750) (broadly discussing the need for punishments to be proportionate and not cruel).

76. Bessler, *supra* note 15, at 305 (discussing the influence of Cesare Beccaria); *id.* at 318 (discussing Blackstone’s influence); Pillsbury, *supra* note 17, at 897; Schwartz & Wishingrad, *supra* note 17, at 806–13 (discussing the influence of Cesare Beccaria and other Enlightenment thinkers); Stinneford, *supra* note 74, at 927–28, 956–58. As Blackstone noted, a “prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely

These historical accounts provide useful insights into the Eighth Amendment's potential meaning to the founders. For instance, historians have concluded that the founders were extremely familiar with a principle of proportionality in punishment as one possible anti-cruelty principle.⁷⁷ But while this work has made great strides in identifying some of the principles that no doubt influenced the adoption of the Eighth Amendment, it has neglected a rich source of information: eighteenth- and nineteenth-century positive law and legal doctrine prohibiting "cruel and unusual punishment" in the context of slavery. It is this doctrine to which the Article now turns.

II. THE CONTOURS OF THE PERMISSIBLE PUNISHMENT OF SLAVES

At first glance, it may seem strange, even inappropriate, to turn to the law of slavery to understand the Eighth Amendment. After all, slavery was an institution that traded on the dehumanization and subjugation of persons who committed no crimes and caused no social harm; prison is intended as punishment for past misconduct. This Article will address these and other objections in due time but for now will merely observe that, to the extent we care about what the words "cruel and unusual punishment[]" meant at the time of the founding and beyond, slavery jurisprudence is useful precisely because the standard adopted for the treatment of slavery was identical in most jurisdictions to the Eighth Amendment's text. And as will be discussed below, courts regularly offered interpretations of these words when purporting to regulate the treatment of slaves. Conversely, nineteenth-century judges had little opportunity to provide constitutional interpretations of the Eighth Amendment, primarily because of the then-limited reach of federal criminal and constitutional law.⁷⁸

A. *Statutory Regulation of the Treatment of Slaves*

Attempts to regulate the abuses of slavery began in the seventeenth century, when some colonies in which slavery was lawful adopted positive law that purported to protect slaves from extreme

requisite for the purpose of confinement only." 4 WILLIAM BLACKSTONE, COMMENTARIES *293-300. Blackstone, in turn, traced the origin of the principle of excessiveness, at least as it related to fines, back to Magna Carta. *Id.* at *379-80.

77. See *supra* note 20 and accompanying text.

78. See Reinert, *supra* note 13, at 57. In addition, the challenges brought in federal court were deemed insubstantial. *Id.* n.16. State courts adjudicating similar clauses of their own constitutions were busier, with some finding criminal sentences so excessive as to be invalid. *Id.* at 58-61 & nn.20-26 (discussing cases).

instances of mistreatment. As this Article discusses in further detail below, the colonies took varying approaches to this problem; but for those that chose to attempt regulation, the focus was often on reducing “cruelty.” And in some colonies, this term carried with it an implication that slaveholders and others should be “moderate” or “proportionate” in the pain they inflicted on slaves for perceived transgressions. Thus, the positive law that emerged between the seventeenth and nineteenth centuries is consistent with the account given by legal historians—that the contemporaneous meaning given to the words used in the Eighth Amendment encompassed a proportionality principle.⁷⁹

Virginia was the oldest British-American colony and the first to introduce and legalize slavery.⁸⁰ Therefore, not surprisingly, it played a central role in developing the law of slavery.⁸¹ In the 1600s, Virginia had enacted statutes purporting to restrict slaveholders from imposing cruel punishment on slaves, while excusing slave killings caused accidentally while “correcting” them.⁸² By 1705, Virginia expanded the scope of regulation to include penalties for those who abused servants or slaves without a slaveholder’s permission.⁸³ And by 1748, slaveholders were prohibited by statute from giving “immoderate correction,” or else face the risk of criminal punishment.⁸⁴ In 1769 legislation, Virginians rejected dismemberment

79. See Bessler, *supra* note 15, at 305; Pillsbury, *supra* note 17, at 897–99; Stinneford, *supra* note 74, at 938–60.

80. Philip J. Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705–1865*, at 16 (1988).

81. *Id.*

82. See An Act About the Casuall Killing of Slaves Act I (Va. 1669), *reprinted in 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, at 270 (William W. Hening ed., 1819–1823); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 163 (1999) (citing a 1669 Act that provided that if slaves resisted anyone correcting them and “by the extremity of coercion” were killed, the death would not be considered felonious); see also Act of 1799, ch. 9, §§ 1–2 (Tenn.), *reprinted in COMPILATION OF THE STATUTES OF TENNESSEE OF A GENERAL AND PERMANENT NATURE FROM THE COMMENCEMENT OF THE GOVERNMENT TO THE PRESENT TIME 676–77* (R. L. Caruthers and A. O. P. Nicholson eds., 1836) (criminalizing the willful killing of a slave with malice aforethought, except where the slave dies “under moderate correction”).

83. See An Act Concerning Servants and Slaves §§ 1, 7, 15 (Va. 1705), *reprinted in 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, at 447–51 (William W. Hening ed., 1819–1823). In 1723, however, Virginia turned its back on common law principles and excused from criminal liability anyone who killed a slave “by reason of any stroke or blow given, during his or her correction.” MORRIS, *supra* note 82, at 164.

84. See An Act Concerning Servants and Slaves § 5 (Va. 1748), *reprinted in 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE*

as a punishment for escaped slaves who refused to return and those who raided plantations for sustenance, explaining that the punishment was “often disproportioned to the offence, and contrary to the principles of humanity.”⁸⁵ Thus, by the time the Eighth Amendment was adopted, in large part based on the advocacy of Virginians George Mason and James Madison, the law of slavery in Virginia equated cruel treatment of slaves with disproportionate punishment.

Like Virginia, many other colonies that regulated the treatment of slaves by statute during the pre-Revolutionary period were focused on limiting cruelty. But their conception of the content of the word “cruel” varied significantly. South Carolina, for instance, had joined Virginia as one of the first states to enact positive law relating to the treatment of slaves. In 1690, the Palmetto State provided that no criminal liability would attach to any owner who killed or maimed a slave as punishment “for running away or other offence,” but criminalized the killing of a slave “out of wilfulness, wantonness, or bloody-mindedness[.]”⁸⁶ By 1722, the South Carolina legislature used different language—criminalizing the killing of slaves willfully or “out of cruelty”—to the same effect.⁸⁷ And in 1740, South Carolina purported to limit the amount of time that slaves could be put to “hard labour” and imposed a monetary penalty for “*cruelly*” scalding or burning a slave, cutting out his tongue, putting out his eye, or depriving him of any limb.⁸⁸ The same law, purporting to “restrain and prevent barbarity being exercised towards slaves,” criminalized

FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 547 (William W. Hening ed., 1819–1823).

85. SCHWARZ, *supra* note 80, at 21–22. In the same stroke, Virginia approved of the practice of castrating slaves convicted of attempted rape of white women. *Id.* at 22.

86. An Act for the Better Ordering of Slaves, 7 Stat. 346 (S.C. 1690), *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 346 (David McCord ed., 1840) [hereinafter SOUTH CAROLINA STATUTES]. A 1712 act “for the better ordering and governing of . . . slaves” contained similar provisions with different penalties. 7 Stat. 363, § 30 (S.C. 1712), *in* SOUTH CAROLINA STATUTES, *supra*, at 352, 363.

87. An Act for the Better Ordering and Governing of Negroes and Other Slaves, 7 Stat. 381 (S.C. 1722), *in* SOUTH CAROLINA STATUTES, *supra* note 86, at 381; *see also* An Act for the Better Ordering of Negroes and Other Slaves, 7 Stat. 393, § 28 (S.C. 1735), *reprinted in* SOUTH CAROLINA STATUTES, *supra* note 86, at 393 (using the words “*cruelly* or willfully kill”) (emphasis added). As an 1848 decision summarized it, “as the slaves became more civilized by their intercourse with the whites, not only were the penalties greatly increased, but the offence of killing them was described by words more extensive in their signification, so as to include other killing than what would be denominated murder.” *State v. Fleming*, 33 S.C.L. (2 Strob.) 464, 468 (S.C. Ct. App. 1848).

88. An Act for the Better Ordering and Governing of Negroes and Other Slaves in This Province, No. 670, § 37 (S.C. 1740), *reprinted in* SOUTH CAROLINA STATUTES, *supra* note 86, at 411 (emphasis added).

willful murder of slaves, killing a slave through “undue correction,” and “*cruel punishment*.”⁸⁹

Other jurisdictions in which slavery was lawful also enacted legislation in the eighteenth century related to the treatment of slaves, some of which reflects principles of proportionality. In 1715, Maryland prohibited slaveholders from “unreasonably [burdening slaves] beyond their strength with labor, . . . excessively beat[ing] and abus[ing] them,” and theoretically provided the remedy of release from slavery upon a slaveholder’s third offense.⁹⁰ Mississippi and Alabama had statutes from the colonial era that prohibited masters from inflicting “*cruel or unusual*” punishments on slaves.⁹¹ Between 1765 and 1770, Georgia established a more detailed statutory framework for addressing the treatment of slaves by slaveholders and others. Seeking to restrain slaveholders from exercising “unnecessary rigour or wanton cruelty” over slaves, Georgia prohibited anyone from willfully murdering a slave, and from “inflict[ing] any other *cruel punishments*, other than by whipping or beating . . . or by putting irons on, or confining or imprisoning such slave.”⁹² The members of the Georgia legislature considered themselves advanced in this respect, observing that “cruelty is not only highly unbecoming those who profess themselves Christians, but is odious in the eyes of all men who have any sense of virtue or humanity.”⁹³ Needless to say, the Georgia legislature’s sense of cruelty was not well developed, although it did categorize the following as “cruel” punishments: cutting out a slave’s tongue, putting out an eye, castration, scalding, burning, or

89. *Id.*

90. WORTHINGTON G. SNETHEN, *THE BLACK CODE OF THE DISTRICT OF COLUMBIA, IN FORCE SEPTEMBER 1ST, 1848*, at 9 (1848).

91. Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 *AM. J. LEGAL HIST.* 93, 131 (1985) (emphasis added).

92. An Act for Ordering and Governing Slaves Within this Province and for Establishing a Jurisdiction for the Trial of Offences Committed by Such Slaves, and Other Persons Therein Mentioned; and to Prevent the Inveigling and Carrying Away Slaves from Their Masters, Owners, or Employers pmbl., § 42 (Ga. 1770), *reprinted in* 2 *THE EARLIEST PRINTED LAWS OF THE PROVINCE OF GEORGIA, 1755–1770*, at 275, 291 (1978) [hereinafter *LAWS OF GEORGIA*] (emphasis added); *see also* An Act for the Better Ordering and Governing Negroes and Other Slaves in This Province, and to Prevent the Inveigling or Carrying Away Slaves from their Masters or Employers pmbl. (Ga. 1765), *in* *LAWS OF GEORGIA, supra*, at 14.

93. An Act for Ordering and Governing Slaves Within this Province and for Establishing a Jurisdiction for the Trial of Offences Committed by Such Slaves, and Other Persons Therein Mentioned; and to Prevent the Inveigling and Carrying Away Slaves from Their Masters, Owners, or Employers § 42 (Ga. 1770), *reprinted in* *LAWS OF GEORGIA, supra* note 92, at 291.

amputation of a limb or member.⁹⁴ Moreover, Georgia gave white persons the power to “moderately correct” a slave who was out of the house or plantation where the slave lived and who refused to submit to an “examination” by the white person.⁹⁵

Some nonslaveholding colonies also purported to regulate the treatment of slaves by slaveholders and others. Thus, a 1718 New Hampshire law imposed capital punishment for the willful killing of a slave.⁹⁶ New York similarly regulated the treatment of slaves at the turn of the eighteenth century,⁹⁷ and by 1798, New Jersey permitted indictment for the “cruel” treatment of slaves.⁹⁸

By the late-eighteenth century, state legislatures began to extend greater legal protection to slaves, at least on the surface. Some state constitutions included provisions providing for the punishment of those who “maliciously” maimed or killed slaves.⁹⁹ Between 1788 and 1816, Virginia, North Carolina, Tennessee, and Georgia each extended their criminal law so as to encompass or increase the punishment of whites who killed slaves.¹⁰⁰ By the middle of the nineteenth century, numerous legislative provisions protected against “cruel” or “unusual” punishments (or both) including laws in South Carolina,¹⁰¹ Georgia,¹⁰² Alabama,¹⁰³ and the Territories of

94. *Id.*

95. An Act for Ordering and Governing Slaves Within this Province and for Establishing a Jurisdiction for the Trial of Offences Committed by Such Slaves, and Other Persons Therein Mentioned; and to Prevent the Inveigling and Carrying Away Slaves from Their Masters, Owners, or Employers § 5 (Ga. 1770), *reprinted in* LAWS OF GEORGIA, *supra* note 92, at 277.

96. An Act for Restraining Inhuman Severities, ch. 25 (N.H. 1718), *reprinted in* 2 LAWS OF NEW HAMPSHIRE 292 (Albert Stillman Batchellor ed., 1913).

97. *See* An Act for Regulateing Slaves, ch. 123 (N.Y. 1702), *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 519–21 (James B. Lyon ed., 1894)

98. An Act Respecting Slaves, Patterson’s Laws 307, Rev. L. 369, § 15 (N.J. 1798), *reprinted in* LAWS OF THE STATE OF NEW JERSEY 369, 372 (Joseph Justice ed., 1821).

99. MORRIS, *supra* note 82, at 172 (noting that four states included provisions to this effect in their constitutions).

100. MORRIS, *supra* note 82, at 172–74; *see also* SCHWARZ, *supra* note 80, at 24–25 n.35 (discussing the slave code in Virginia); An Act Making the Beating of Any Slave or Slaves the Property of Another an Indictable Offence, ch. 56 (Tenn. 1813), *reprinted in* 2 LAWS OF THE STATE OF TENNESSEE 131 (Edward Scott ed., 1821) (criminalizing the beating of another’s slave when done wantonly and without sufficient cause). In 1798, North Carolina criminalized the murder of a slave except when the cause was “moderate correction.” An Act to Prevent the Wilful and Malicious Killing of Slaves, ch. 31 (N.C. 1798), *reprinted in* THE STATE RECORDS OF NORTH CAROLINA 975 (Walter Clark ed., 1904). North Carolina had adopted a law in 1723 that punished the willful murder of a slave. *See* MORRIS, *supra* note 82, at 164.

101. *See* Act to Amend Sec. 37 of the Act of 1740 (S.C. 1858), *in* JOHN C. HURD, 2 THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 100 (1858) (summarizing an

Mississippi,¹⁰⁴ Texas,¹⁰⁵ Louisiana,¹⁰⁶ Utah,¹⁰⁷ and New Mexico.¹⁰⁸ Thus, when Thomas R. Cobb published his 1858 proslavery tract, he could claim with some credibility that, at least on the surface, positive law in the states served to protect slaves from “cruel[,]” “inhuman[,]” “excessive[,]” and “unusual” punishments by slaveholders and others.¹⁰⁹ And the common understanding of these terms was that

1858 South Carolina law providing that “if any person, being the owner of any slave, or having the care, management, or control of any slave, shall inflict on such slave any cruel or unusual punishment, such person, on conviction thereof under indictment, shall be fined and imprisoned at the discretion of the Court”—but nothing shall prevent an owner or overseer “from inflicting on such slave such punishment as may be necessary for the good government of the same”). In 1823, South Carolina regulated slave patrols by providing for a monetary penalty, to be paid to a slaveholder, if any white person “wantonly” beat or abused a slave without authority. John B. O’Neill, *Negro Law of South Carolina*, reprinted in 2 STATUTES ON SLAVERY: THE PAMPHLET LITERATURE 117, 160 (Paul Finkelman ed., 1988).

102. See The Penal Code of the State of Georgia, Div. 12, §§ 34–37 (Ga. 1816) (providing for punishment for cruelty); MORRIS, *supra* note 82, at 184 (noting that an 1816 law prohibited owners from “unnecessary and excessive whipping”); An Act to Alter and Amend the Twelfth Section of the Thirteenth Division of the Penal Code of This State (Ga. 1851), reprinted in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA 268 (Samuel J. Bay ed., 1852) (prohibiting cruel treatment of slaves and inserting “beating, cutting, or wounding, or by cruelly and unnecessarily biting or tearing with dogs”).

103. See Ala. Laws tit. 5, ch. 4, § 2043 (1852), reprinted in THE CODE OF ALABAMA 390 (John J. Ormond, Arthur P. Bagby & George Goldthwaite eds., 1852) (“The master must treat his slave with humanity and must not inflict upon him any cruel punishment . . .”).

104. An Act Respecting Slaves, ch. 27, §§ 15–16 (Miss. 1805), reprinted in THE STATUTES OF THE MISSISSIPPI TERRITORY 385 (Samuel Terrell ed., 1807) (“[W]hereas it has been the humane policy of all civilized nations, where slavery has been permitted, to protect this useful, but degraded class of men, from cruelty and oppression . . . no cruel or unusual punishment shall be inflicted on any slave within this territory.”).

105. See An Act Concerning Slaves, 4 T.L. 171, § 3 (Texas 1840), reprinted in 2 THE LAWS OF TEXAS 1822–1897, at 172 (H.P.N. Gammel ed., 1898) (imposing fines for any person who cruelly treats or abuses a slave).

106. See The Civil Code, bk. I, tit. VI, ch. 3, art. 173 (La. 1825), reprinted in CIVIL CODE OF THE STATE OF LOUISIANA 28 (Thomas Gibbes Morgan ed., 1854) (“The slave is entirely subject to the will of his master, who may correct and chastise him, though not with unusual rigor, nor so as to maim or mutilate him, or to expose him to the danger of loss of life, or to cause his death.”); Black Code, 1856 La. Revised Statutes §§ 72, reprinted in 2 HURD, *supra* note 101, at 165; 1806 La. Law, ch. 11, § 56, reprinted in 2 HURD, *supra* note 101, at 158 (providing a penalty for the cruel punishment of slaves).

107. Act in Relation to Service, Laws of 1855, ch. 17, § 6 (Utah), reprinted in 2 HURD, *supra* note 101, at 214.

108. An Act to Provide for the Protection of Property in Slaves in this Territory, ch. 26, § 18 (N.M. 1859), reprinted in LAWS OF THE TERRITORY OF NEW MEXICO 76 (A. de Marle ed., 1859) (providing for the punishment of an owner for cruel treatment).

109. See THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 98–99 (1858) (“The general principle would be, that the master’s right to enforce obedience and subordination on the part of the slave should, as far as possible, remain intact. Whatever goes beyond this, and from mere wantonness or

they regulated both the mode and degree of punishments inflicted on slaves.

B. *Judicial Regulation of the Punishment of Slaves*

By the mid-nineteenth century, with positive law in place to theoretically limit abuse of slaves according to the “cruel and unusual” standard, courts had ample opportunity to review allegations of excessive punishment of slaves in both the criminal and civil contexts. Slaveholders, overseers, and others were occasionally prosecuted for injuring, maiming, and killing slaves. More commonly, slaveholders brought suit against others who had harmed or killed a slave in which the slaveholder claimed a property interest. Indeed, courts were called upon to determine whether treatment of a slave constituted “cruel” or “unusual” punishment far more often than they had to interpret punishment clauses of the federal or state constitutions.¹¹⁰ In the course of their interpretation, courts emphasized two overriding principles: first, that slaves were not to be subjected to “immoderate” or “excessive” punishments; and second, that where an accused or civil defendant was motivated by malice, revenge, or cruelty, rather than a desire to “correct” a slave, he had transgressed the bonds of “decency” or “humanity.”¹¹¹

1. Cases Concerning Civil and Criminal Liability of Nonowners

Many of the cases from the Revolutionary period and early 1800s involved allegations of abusive treatment by strangers or nonowners. By the middle of the nineteenth century, most state courts had recognized that slaveholders could bring a civil action against others who inflicted excessive punishment on slaves.¹¹² Some Virginia courts

revenge inflicts pain and suffering, especially unusual and inhuman punishments, is cruelty, and should be punished as such.”); *see also id.* at 85, 97, 98, 108 (describing various legal sanctions for the abuse of slaves). In his attempt to craft a proslavery legal theory, Cobb also called attention to the ancient history of slavery, noting that at least in Greece and Rome slaves were protected from cruel treatment. *Id.* at lxx, lxxxvi.

110. For a discussion of how often courts addressed the Punishments Clause in the context of criminal prosecutions, see Reinert, *supra* note 13, at 56–61.

111. *See infra* Sections II.B.1–II.B.2.

112. *Johnson v. Lovett*, 31 Ga. 187, 190–91 (1860); *see also Nelson v. Bondurant*, 26 Ala. 341, 352 (1855) (allowing a civil case against a hirer who killed a slave with “barbarous or cruel” treatment); *Hilliard v. Dortch*, 10 N.C. (3 Hawks) 246, 247 (1824) (recognizing the right of an owner to bring an action where another used “immoderate” force on a slave); *Walker v. Brown*, 30 Tenn. (11 Hum.) 179, 181–82 (1850). This right of recovery extended to circumstances where a bailee or an overseer went beyond “moderate and usual correction” that resulted in injury to a slave. *Jones v. Glass*, 35 N.C. (13 Ired.) 305, 307–08 (1852) (affirming taking action against a bailee); *Copeland v. Parker*, 25 N.C. (3 Ired.) 513, 514–15 (1843) (affirming a right to recover against an overseer who used a

also found criminal liability for those who maliciously injured a slave.¹¹³ As a Virginia court remarked,

there appears no reason, arising from the relative situation of master and slave, why a free person should not be punished as a felon for maiming a slave. Whatever power our laws may give to a master over his slave, it is as important for the interest of the former, as for the safety of the latter, that a *stranger* should not be permitted to exercise an unrestrained and lawless authority over him.¹¹⁴

The standards for assessing liability against nonowners varied somewhat from state to state. In Kentucky, a slaveholder could pursue an action against a defendant who subjected his slave to “inhuman[.]” treatment leading to death.¹¹⁵ Slaveholders in Alabama, Georgia, and North Carolina could also pursue civil actions against those who injured their slaves through the application of “indecent[.]” “cruel[.]” “excessive[.]” or “barbarous” punishment beyond the bounds of “decency and humanity.”¹¹⁶ Similarly in Tennessee, one who hired out slaves from a slaveholder could not “exceed the bounds of moderate correction” or dispense “cruel” or “inhuman” treatment without risking liability.¹¹⁷

Most states also distinguished between the power of slaveholders and others to “chastise” a slave; slaveholders were only prohibited

deadly instrument against a slave who was not resisting but “only retreating against his orders”); *Scotts v. Hume*, 16 Ky. (1 Litt. Sel. Cas.) 378, 378 (1821); *Hoomes v. Kuhn*, 8 Va. (4 Call) 274, 274 (1792).

113. *Commonwealth v. Howard*, 38 Va. (11 Leigh) 631, 632 (Va. Gen. 1841) (upholding an indictment for “violently and inhumanly assaulting and beating” the slave of another); *Commonwealth v. Carver*, 26 Va. (5 Rand.) 660, 661–64 (Va. Gen. 1827) (holding that a “free person” who maliciously and unlawfully shoots a slave shall be guilty of a felony and sentenced to prison); *Commonwealth v. Cohen*, 4 Va. (2 Va. Cas.) 158, 158–59 (Va. Gen. 1819) (reviewing and affirming judgment against a defendant for murder in the second degree of a slave); *Commonwealth v. Chapple*, 3 Va. (1 Va. Cas.) 184, 184–86 (Va. Gen. 1811) (holding that an 1803 law protected slaves from assault under penal laws, even though part of the punishment inflicted for the crime was payment of a fine to the injured party, and slaves could not legally hold property). Even in the pre-Revolutionary period, Virginia authorities prosecuted and sometimes executed overseers who killed slaves under their authority. MORRIS, *supra* note 82, at 167.

114. *Carver*, 26 Va. (5 Rand.) at 665.

115. *Scotts*, 16 Ky. (1 Litt. Sel. Cas.) at 378; *see also Carney v. Walden*, 55 Ky. (16 B. Mon.) 388, 395–97 (Ky. 1855) (finding that a cause of action existed for an owner who sought to recover damages from a contractor for the death of a slave “by inhuman treatment”); *Craig’s Adm’r v. Lee*, 53 Ky. (14 B. Mon.) 96, 98 (Ky. 1853).

116. *Nelson*, 26 Ala. at 352; *Johnson*, 31 Ga. at 191; *Hilliard*, 10 N.C. (3 Hawks) at 247; *see also Jones*, 35 N.C. (13 Ired.) at 307–08 (applying the principle to a bailee); *Copeland*, 25 N.C. (3 Ired.) at 514–15 (applying the principle to an overseer).

117. *James v. Carper*, 36 Tenn. (4 Sneed) 397, 400–02 (1857).

from inflicting “cruel and inhuman punishment” if it resulted in the death or maiming of their slaves.¹¹⁸ A bailee or someone who had hired out the slave, however, could be both civilly and criminally liable “if he or his overseer in the course of his service as such, . . . by cruel neglect, or by inhuman treatment, cause[d] the death of the slave, or impair[ed] his health, or otherwise injure[d] him.”¹¹⁹ Such liability was triggered where a nonowner neglected a sick slave, dispensed “inhuman treatment in the form of immoderate chastisement, or [inflicted] cruel treatment in failing to furnish necessary food, raiment and shelter.”¹²⁰

Examining cases involving slave patrols offers additional insight into the formal legal protections provided to slaves. Slave patrols originated in early slave states such as Virginia and North and South Carolina, and consisted of organized groups of white men who sought to limit the movement and behavior of slaves.¹²¹ Slave patrols were considered quasi-public organizations and were granted the power of the executive to enforce laws and the power of the judiciary to judge and punish.¹²² Because they were loosely regulated, they also carried the potential to devolve into mob violence, particularly when purporting to act on the public’s behalf.¹²³ State courts, recognizing this, entertained both criminal and civil actions against patrollers

118. *Craig’s Adm’r*, 53 Ky. (14 B. Mon.) at 98.

119. *Id.* at 99.

120. *Id.*

121. For a thorough examination of the history, purpose, and practice of slave patrols, see generally SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001).

122. DANIEL J. FLANIGAN, *THE CRIMINAL LAW OF SLAVERY AND FREEDOM, 1800–1868*, at 79–81 (1973) (discussing slave patrols as a system for regulating slave behavior); HADDEN, *supra* note 121, at 41–70 (describing various means by which slave patrols were regulated in the Carolinas and Virginia); *State v. Hailey*, 28 N.C. (6 Ired.) 11, 12–13 (1845) (“If punishment is to be inflicted, they must adjudge, decide, as to the question; five stripes may in some cases be sufficient, while others may demand the full penalty of the law.”).

123. See HADDEN, *supra* note 121, at 108 (giving an account of a South Carolina patrol that beat a slave to death for attending a dance that had been held without the slaveholder’s permission); *Tomlinson v. Darnall*, 39 Tenn. (2 Head) 538, 542 (1859) (“The institution and support of the night-watch and patrol, on some plan, are indispensable to good order, and the subordination of slaves, and the best interests of their owners. But the authority conferred for these important objects must not be abused by those upon whom it is conferred, as it sometimes is by reckless persons.”); *Kirkwood v. Miller*, 37 Tenn. (5 Sneed) 455, 460 (1858) (“Every description of mob-law, and reckless invasion of the rights of others, should be visited with the highest penalties. If this lawless spirit is tolerated, or allowed to display itself with impunity, no man would be safe, in his person or property, in any community. Almost any other evil would be preferable to this.”).

when they imposed “extreme punishment” in the course of their roving.¹²⁴

This case law parallels, in many ways, modern Eighth Amendment doctrine. First, it is clear that state courts, like many state legislatures, equated cruel and unusual treatment with “excessive” or “barbaric” “correction.” Second, state courts also looked to contemporaneous moral standards to understand the meaning of the prohibition on abusive treatment of slaves. For instance, Tennessee courts initially tended to distinguish between extracting labor from slaves, for which slaveholders could use essentially any means, and the killing of a slave, which could have criminal consequences.¹²⁵ By 1850, Tennessee courts rejected the view that a slaveholder had the power “to maim his slave for the purpose of his moral reform.”¹²⁶ Similarly, when the Tennessee Supreme Court considered a case brought by a slaveholder against a hirer whose overseer had killed a slave, the court distinguished between a lawful purpose of “correction” and the use of “instruments of torture to gratify his malice, intending to kill.”¹²⁷ The Tennessee court claimed to rely on “the moral sense and humanity of the present age[,]”¹²⁸ a parallel to the conception of the Eighth Amendment, which also trades on “evolving standards of decency.”¹²⁹

2. Criminal Liability of Slaveholders

Imposing criminal liability for the conduct of slaveholders with regard to their own slaves posed a challenge for many slave states. In Virginia, this is illustrated by the 1824 case *Commonwealth v.*

124. *State v. Atkinson*, 51 N.C. (6 Jones) 65, 68 (1858) (upholding the conviction of defendant members of a slave patrol for inflicting “extreme punishment” on a slave resulting in his death); *State v. Boozer*, 36 S.C.L. (5 Strob.) 21, 26 (S.C. App. 1850) (upholding the conviction of patrol members for whipping slaves without provocation); *Tennent v. Dendy*, 23 S.C.L. (Dud.) 83, 84–86 (S.C. App. 1837) (permitting civil action against a patroller for whipping a slave); *Hogg v. Keller*, 11 S.C.L. (2 Nott & McC.) 113, 113–14 (S.C. Constitutional Ct. App. 1819) (upholding a motion for a new trial for a defendant who unlawfully “whipp[ed]” a slave); *Tomlinson*, 39 Tenn. (2 Head) at 542 (discussing the actions of a patrol that “exceeded the bounds of moderation”).

125. *Fields v. State*, 9 Tenn. (1 Yer.) 156, 165 (Tenn. High Ct. Err. & App. 1829) (reviewing the conviction of a white man for manslaughter in the killing of a slave and stating that “[i]t is well said by one of the judges of North Carolina, that the master has the right to exact the labor of the slave—that far, the rights of the slave are suspended; but this gives the master no right over the life of the slave. . . . Law, reason, Christianity and common humanity, all point out one way”).

126. *Werley v. State*, 30 Tenn. (11 Hum.) 172, 175–76 (1850).

127. *Puryear v. Thompson*, 24 Tenn. (5 Hum.) 397, 398–400 (1844).

128. *Werley*, 30 Tenn. (11 Hum.) at 175.

129. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

Booth.¹³⁰ The defendant was indicted for beating a slave while the slave was hired out to him. The jury found the defendant guilty, subject to an answer to the following question:

Can the Defendant [Booth] be indicted and punished for the excessive, cruel and inhuman infliction of stripes on the slave *Bob*, while in his possession, and under his control as a hired slave, for the space of one month, no permanent injury having resulted to the said slave from such infliction?¹³¹

The General Court of Virginia declined to answer directly, reasoning that for the purposes of the criminal law Booth stood in the same shoes as a slaveholder, and, therefore, the indictment “ought to state distinctly, the connection of the parties, and to shew that it is the *excess* of the punishment which is complained of, and not, that the right to punish at all, is questioned.”¹³² An assault on one’s own slave “becomes unlawful by subsequent excess and inhumanity,” and the indictment did not specifically allege the facts sufficient to establish those elements.¹³³ In support, the court looked to the form indictments under English common law against masters abusing their apprentices, indicating that the law of slavery was situated in more general principles regarding relationships of subordination.¹³⁴

A few years later, in *Commonwealth v. Turner*,¹³⁵ the General Court of Virginia declined to find as a matter of common law that a slaveholder could be prosecuted “for the immoderate, cruel and excessive beating of his own slave.”¹³⁶ Reasoning that it lacked power to create common law crimes, the court looked to foreign jurisdictions where slavery had existed and to positive law.¹³⁷ Finding no support in either of these sources for holding slaveholders liable for the nonfatal excessive beating of slaves,¹³⁸ the court rejected the prosecution’s argument. To the extent that courts had recognized the liability of slaveholders for beating their slaves in public, the court found that the

130. 4 Va. (2 Va. Cas.) 394 (Va. Gen. 1824).

131. *Id.* at 394.

132. *Id.* at 395.

133. *Id.* The Court emphasized that it did not address the question of whether criminal liability would lie in the absence of any permanent injury. *Id.*

134. *Id.* (citing 3 JOSEPH CHITTY, TREATISE OF THE LEGAL PREROGATIVES OF THE CROWN 829 (1878)).

135. 26 Va. (5 Rand.) 678 (Va. Gen. 1827).

136. *Id.* at 686–87 (Brockenbrough, J., dissenting).

137. *Id.* at 680–83 (majority opinion).

138. *Id.* at 682–84 (reviewing the history of villenage in England and slavery among Jews, Romans, and Greeks to conclude that, at most, slaves were protected against fatal attacks by their owners).

reasons were rooted in the desire to protect “the harmony of society” and not the humanity of the slave.¹³⁹ The court compared the situation to imposing criminal liability for the beating of a horse; according to the court, “it would not be pretended, that it was in respect to the rights of the horse, or the feelings of humanity, that this interposition would take place.”¹⁴⁰ And to the extent that statutes in post-1788 Virginia also protected slaves from maiming, those statutes could not extend to excessive whipping.¹⁴¹ The court expressed distress (sincere or not) at its holding, concluding by remarking that “[i]t is greatly to be deplored that an offence so odious and revolting as this, should exist to the reproach of humanity[,]” but found that resolving the matter was best left to the legislature or “the tribunal of public opinion.”¹⁴² The line between liability for death and “mere injury” suggested by *Turner* persisted in Virginia even into the 1850s.¹⁴³

Judge Brockenbrough dissented, and in his opinion offered a different view of the history and regulation of slavery. He noted that there was some tradition, found in Justinian’s Institutes, that compelled slaveholders to be dispossessed of their property if they were excessively severe, but this was founded on the principle “that no one should be allowed to misuse even his own property.”¹⁴⁴ Brockenbrough also referenced other relationships of subordination, such as parent-child, tutor-pupil, and master-servant, in which “superiors” could only use “moderate” correction.¹⁴⁵ Because the slave was more than a thing but less than a person, Brockenbrough argued “his person was protected from all unnecessary, cruel, and inhuman punishments.”¹⁴⁶ And by a 1788 act that repealed prior legislation immunizing slaveholders from criminal liability for all mistreatment other than that which caused death, Brockenbrough

139. *Id.* at 680.

140. *Id.*

141. *Id.* at 680–81.

142. *Id.* at 686.

143. *Souther v. Commonwealth*, 48 Va. (7 Gratt.) 673, 678–79 (Va. Gen. 1851) (upholding a murder conviction where the defendant’s slave Sam was killed by “cruel and excessive whipping and torture”).

144. *Turner*, 26 Va. (5 Rand.) at 688 (Brockenbrough, J., dissenting). Indeed, Gaius, a Roman jurist, included a section on slavery in his textbook of Roman law in which he notes that, pursuant to the Constitution of the Emperor Antoninus, “neither Roman citizens nor any other persons subject to the rule of the Roman people are allowed to treat their slaves with excessive and causeless harshness.” *THE INSTITUTES OF GAIUS: PART I, TEXT WITH CRITICAL NOTES AND TRANSLATION* 17 (Francis de Zulueta ed., 1946).

145. *Turner*, 26 Va. (5 Rand.) at 688 (Brockenbrough, J., dissenting).

146. *Id.* at 689.

maintained that the law since that time worked to protect slaves "from all inhuman torture," even when inflicted by their owners.¹⁴⁷

Virginia was not alone in suggesting a distinction between the power of slaveholders and nonowners to inflict abuse on slaves. Kentucky law made a similar distinction, recognizing civil and criminal liability against nonowners but imposing criminal liability against a slaveholder only "if he intentionally murders or maims his slave by a single blow, or by slow degrees, and by protracted punishment."¹⁴⁸ Georgia similarly imposed criminal liability on slaveholders who intentionally killed their slaves, or killed them by imposing discipline that is "cruel and excessive."¹⁴⁹ And North Carolina punished slaveholders who killed through the application of "barbarities" with no "intention to correct or to chastise."¹⁵⁰ Thus, where an owner's actions "flowed from a settled and malignant pleasure in inflicting pain, or a settled and malignant insensibility to human suffering[.]" criminal liability for a slave's death would follow.¹⁵¹

South Carolina used a similar standard as Virginia, North Carolina, Kentucky, and Georgia, although its courts appeared more open to finding criminal liability. As early as 1823, South Carolina courts upheld the conviction of a slaveholder for the willful murder of his slave.¹⁵² Slaveholders were similarly prosecuted for killing by "undue correction."¹⁵³ South Carolina courts also found slaveholders liable for using a "cruel" punishment, as contemplated by the state's 1740 law discussed above.¹⁵⁴

Louisiana's case law offers a contrast with other states, because the territorial courts suggested that the same standards of treatment

147. *Id.*

148. *Craig's Adm'r v. Lee*, 53 Ky. (14 B. Mon.) 96, 98-99 (Ky. 1853).

149. *Martin v. State*, 25 Ga. 494, 511 (1858); *Jordan v. State*, 22 Ga. 545, 559 (1857) (prosecuting an owner for murder). The *Martin* court distinguished "unusual" punishments, which are "not necessarily, nor always the most cruel or severe." *Martin*, 25 Ga. at 511.

150. *State v. Robbins*, 48 N.C. (3 Jones) 249, 253 (1855) (affirming a conviction for murder where a slaveholder killed a slave out of "cruelty, torture and revenge"); *State v. Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) 500, 503-04 (1839) (upholding conviction).

151. *Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) at 504; *see also* *Copeland v. Parker*, 25 N.C. (3 Ired.) 513, 515 (1843) (affirming a right to recover where "shooting the slave betrayed passion in the overseer").

152. *State v. Taylor*, 13 S.C.L. (2 McCord) 483, 492-93 (S.C. Constitutional Ct. App. 1823) (affirming a prosecution under a 1740 act for the willful murder of slave).

153. *State v. Montgomery*, 25 S.C.L. (Chev.) 120, 120-21 (S.C. App. Law 1840) (relating to the joint indictment of a husband and wife for killing a slave "by undue correction" under a 1740 act).

154. *State v. Wilson*, 25 S.C.L. (Chev.) 163, 165 (S.C. App. Law 1840).

applied to both slaveholders and nonowners who abused slaves. Louisiana courts barred “excessive and cruel” punishment, or “unusual and excessive” chastisement by overseers.¹⁵⁵ Slaveholders also were prosecuted in Louisiana for “cruel” and “inhuman” treatment of their slaves.¹⁵⁶ Mississippi, like Louisiana, protected slaves from “cruel or unusual” punishment, whether inflicted by a slaveholder or a stranger.¹⁵⁷ Alabama prohibited the killing of any slave by “cruel . . . or inhuman” punishment,¹⁵⁸ and in nonfatal cases, it prohibited the infliction of “cruel or unusual punishment.”¹⁵⁹ In the District of Columbia, as early as 1806, beating a slave was an indictable offense,¹⁶⁰ but it is not evident that juries were inclined to convict slaveholders of “cruel[]” or “inhuman[]” treatment.¹⁶¹

While the states discussed above differed somewhat in their approach to finding criminality in the conduct of slaveholders, they tended to coalesce around similar descriptors. A case from Alabama offers perhaps the most nuanced discussion of the key terms “cruel” and “unusual.” In *Turnipseed v. State*,¹⁶² a case involving a prosecution for “cruel or unusual punishment,” the Alabama court

155. *Miller v. Stewart*, 12 La. Ann. 170, 171 (1857) (upholding a claim against an overseer); *Kennedy v. Mason*, 10 La. Ann. 519, 521 (1855); *Hendricks v. Phillips*, 3 La. Ann. 618, 618 (1848) (considering a claim against an overseer for treating slaves with “cruelty and inhumanity”); *Bailey v. Stevens*, 9 Rob. 158, 158 (La. 1844) (discussing an action for “brutal treatment” of slaves by an overseer). *But see Martineau v. Hooper*, 8 Mart. La. 699, 700 (1820) (finding that an overseer was not civilly liable when he shot and killed a slave who “refused to submit” to a whipping and instead tried to escape).

156. *State v. White*, 13 La. Ann. 573, 573 (1858) (prosecuting defendants for “inhuman and cruel” treatment); *State v. Morris*, 4 La. Ann. 177, 177 (1849) (prosecuting an owner for the “cruel treatment” of a slave). In one noteworthy Louisiana case, a private citizen brought suit to compel the sale of a slave from an owner who had “cruelly beat and maltreated” the slave. *Markham v. Close*, 2 La. 581, 582 (1831). Although a jury found for the plaintiff, the Louisiana Supreme Court reversed, holding that the law that prohibited “cruel punishment” required that a criminal case be successfully brought before a slaveholder could be compelled to sell the slave. *Id.* at 587.

157. *Oliver v. State*, 39 Miss. 526, 539–40 (Miss. High Ct. Err. & App. 1860) (holding that a slaveholder cannot impose “inhuman or brutal treatment” on a slave); *Scott v. State*, 31 Miss. 473, 479 (Miss. High Ct. Err. & App. 1856) (upholding the conviction of an overseer for “cruel or unusual” treatment).

158. *State v. Flanigin*, 5 Ala. 477, 477, 480 (1843) (affirming conviction).

159. *Turnipseed v. State*, 6 Ala. 664, 665 (1844); *see also Gillian v. Senter*, 9 Ala. 395, 397 (1846) (holding that an overseer may not impose “immoderate punishment” that is “cruel, or indicative of wanton and brutal feelings”).

160. *United States v. Lloyd*, 4 D.C. (4 Cranch) 470, 470 (C.C.D.C. 1834); *United States v. Butler*, 1 D.C. (1 Cranch) 373, 373 (C.C.D.C. 1806).

161. *United States v. Brockett*, 2 D.C. (2 Cranch) 441, 441 (C.C.D.C. 1823) (finding the defendant not guilty but reflecting on the jury’s recommendation “that the Court should express their strong disapprobation of similar conduct”).

162. 6 Ala. 664 (1844).

explained that the State was not required to prove both cruel *and* unusual punishment, making the statute “sufficiently broad to embrace a high offence against good morals.”¹⁶³ Using words that foreshadowed Supreme Court holdings regarding the Eighth Amendment, the court went on:

Cruel, as indicating the infliction of pain of either mind or body, is a word of most extensive application; yet every cruel punishment is not, perhaps, unusual; nor, perhaps, can it be assumed that every uncommon infliction is cruel. But be this as it may, there may be punishment that is both cruel and unusual; thus, if a slave should be punished, even without bodily torture, in a manner offensive to modesty, decency and the recognized proprieties of social life, the offender would be chargeable in the broad terms employed in the indictment.¹⁶⁴

And in a later case, the Alabama Supreme Court used a proportionality concept to explain the boundaries of “cruel and unreasonable” punishment.¹⁶⁵ Again in language that presages debates in modern Supreme Court jurisprudence, the court stated that “[p]unishment for a past offense, which is inflicted with a view to reformation, should be graduated by the nature of the offense; and somewhat by the fact, whether the offense has been of frequent or rare commission.”¹⁶⁶

It is important not to overstate the rhetoric of the cases discussed in this Section. These courts viewed the state of slavery as a tranquil one, and their concepts of what was “decent” or “humane” was skewed accordingly. Overall, the abject conditions experienced by slaves on a daily basis were extremely harsh and bore little indication of any regulation.¹⁶⁷ As Thomas Morris has noted, it can hardly be said that the laws discussed herein were of real practical significance in protecting slaves from cruelty.¹⁶⁸ Indeed, the laws themselves may have been a product of a Southern elite’s cynical attempt to respond to antislavery critics by demonstrating that slavery could be “humanize[d]” without altering the underlying brutality of the

163. *Id.* at 665.

164. *Id.* at 665–66.

165. *Tillman v. Chadwick*, 37 Ala. 317, 318 (1861) (“The law cannot enter into a strict scrutiny of the precise force employed, with the view of ascertaining that the chastisement had or had not been unreasonable. Still there is a boundary, and the force must not be grossly disproportionate to the offense.”).

166. *Id.* at 319.

167. BLACKMON, *supra* note 37, at 45, 50.

168. MORRIS, *supra* note 82, at 185–88 (summarizing appellate cases).

institution.¹⁶⁹ Despite the statutory prohibitions present in many states, prosecutions were rarely successful or initiated, at least so far as one can tell from the available appellate case law.¹⁷⁰ There was marginally more success in prosecuting overseers for violations of the prohibition on “cruel and unusual punishments.”¹⁷¹ As Andrew Fede has suggested, this might have suggested a class bias in favor of slaveholders, but in general, the courts’ ability to denounce violent slaveholder behavior while avoiding the imposition of criminal liability “saved the courts . . . from facing the harsh realities of slavery.”¹⁷² In addition, the actions against overseers were more consistent with the view that slaves were the property of slaveholders, and the power of nonowners was necessarily limited so as to protect that power.¹⁷³

One should also be cautious about conceptualizing these principles as equivalent to an affirmative right of the kind provided by the Eighth Amendment. As already discussed, slaves had no right to initiate actions to remedy excessive punishment, and slaves had a very limited right to forcibly resist the application of force against them. In Louisiana, they were denied the right to self-defense and could only be excused from an assault on whites when they acted in defense of a “master, or of the person having charge of him, or in whose [care] he may then be.”¹⁷⁴ Similar provisions existed in Georgia.¹⁷⁵ To the extent that a right to resist based on a threat to the slave’s person was found, it was based on “cruel” or “excessive” treatment by an owner

169. See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 186 (2006) (discussing the impact of antislavery criticism on Southern professionals).

170. CHRISTOPHER WALDREP, *ROOTS OF DISORDER: RACE AND CRIMINAL JUSTICE IN THE AMERICAN SOUTH, 1817–80*, at 13–18 (1998) (discussing cases from 1831, 1835, and 1846 in Warren County, Mississippi); Fede, *supra* note 91, at 143.

171. See, e.g., *Scott v. State*, 31 Miss. 473, 479 (Miss. High Ct. Err. & App. 1856) (upholding the conviction of an overseer for “cruel or unusual” treatment).

172. Fede, *supra* note 91, at 144.

173. *Id.* at 147 (“The overseer’s need to maintain slave discipline conflicted with the master’s interest in preventing unnecessary damage to slave property. Consequently, slave owners did sue overseers to recover monetary compensation for damage to slaves.”).

174. LA. CONSTITUTIONAL AND ANTI-FANATICAL SOC’Y, *DIGEST OF THE LAWS RELATIVE TO SLAVES AND FREE PEOPLE OF COLOUR IN THE STATE OF LOUISIANA* (1835), reprinted in *STATUTES ON SLAVERY: THE PAMPHLET LITERATURE*, *supra* note 101, at 55.

175. An Act for Ordering and Governing Slaves Within this Province and for Establishing a Jurisdiction for the Trial of Offences Committed by Such Slaves, and Other Persons Therein Mentioned; and to Prevent the Inveigling and Carrying Away Slaves from Their Masters, Owners, or Employers § 23 (Ga. 1770), reprinted in *LAWS OF GEORGIA*, *supra* note 92, at 284; see also *id.* §§ 21, 29, *supra* note 92, at 20, 23.

or other white person, paralleling the cases and statutes that regulated punishment of slaves.¹⁷⁶

Nonetheless, the cases discussed in this Section are compelling evidence that, shortly after the ratification of the Eighth Amendment, and well before ratification of the Fourteenth Amendment (a critical moment), the words “cruel and unusual punishment[.]” had a generally accepted public meaning in the context of slavery. These words implied a limitation on excessive abuse and sometimes called for a consideration of “decency and the recognized proprieties of social life.”¹⁷⁷ As discussed in the next Part, both of these aspects of slavery jurisprudence, even if they were rarely enforced in actuality, have significant implications for modern Eighth Amendment jurisprudence.

III. LESSONS FOR MODERN PRISONERS’ RIGHTS JURISPRUDENCE

The law of slavery revolved around the meaning of the same terms that govern the Eighth Amendment: “cruel” and “unusual” treatment. This Part will show that there is more than a surface similarity in these two areas of jurisprudence. Because the institution of slavery itself implied a delegation of state power to private slaveholders, the principles that governed the punishment of slaves were closely linked to the Eighth Amendment limitations on state punishment. Once that is acknowledged, the law of slavery provides at least two critical insights into the law of punishment. First, the law of slavery suggests that the Eighth Amendment’s language was meant to permit a proportionality inquiry into criminal punishments, thus providing an additional source of interpretation that bears on that extant debate. Second, the law of slavery exposes the impoverished state of Eighth Amendment jurisprudence, in particular excessive force jurisprudence.

A. *Slavery as a Delegation of State Power*

The rhetorical links between slavery and prison are longstanding. Slaves correctly perceived slaveholders and others as arms of the

176. *Jacob v. State*, 22 Tenn. (3 Hum.) 493, 519–20 (1842); *see also Moses v. State*, 30 Tenn. (11 Hum.) 232, 241–42 (1850) (rejecting a self-defense claim based on prior whipping, because the owner had not whipped the slave “cruelly”); *Nelson v. State*, 29 Tenn. (10 Hum.) 518, 535 (1850) (holding that a slave had the right to resist where a nonowner assaulted the slave “in a manner cruel and excessive”). The court in *Nelson* took care to note that the deceased was neither the slave’s master nor an overseer. *Id.* at 527–28.

177. *Turnipseed v. State*, 6 Ala. 664, 665–66 (1844).

state. As one former slave put it, “[t]he white man was the slave’s jail.”¹⁷⁸ By the same token, prison and punishment were often associated with a form of slavery. When counsel for a defendant in 1820s New York argued that a punishment violated the Eighth Amendment, he maintained that it imposed a penalty (disqualification from service in the legislature) “of the same undistinguished severity, upon all offences, without distinction as to their nature[,]” making the defendant a “slave in a nation of freemen.”¹⁷⁹ None other than Blackstone compared a judge’s exercise of sentencing power on a whim to slavery, in which citizens “would live in society, without knowing exactly the conditions and obligations which it lays them under.”¹⁸⁰

The comparison had more than just rhetorical force in the eighteenth and nineteenth centuries, however. Slaveholders were “the first rule-makers, the corrections officers, and even sometimes the executioners.”¹⁸¹ Prisoners and slaves both were condemned to “hard labour[,]”¹⁸² subjected to “moderate” correction,¹⁸³ and physically restrained with shackles and chains.¹⁸⁴ More importantly for the purposes of this Article, slaveholders exercised all of the powers over slaves that were otherwise reserved to the state. States analogized the power of slaveholders and overseers to inflict “reasonable punishment” to the power of the state to regulate.¹⁸⁵ Slaveholders,

178. SCHWARZ, *supra* note 80, at 8.

179. *Barker v. People*, 3 Cow. 686, 893 (N.Y. 1824), *aff’g* 20 Johns. 457 (N.Y. Sup. Ct. 1823) (affirming without addressing the Eighth Amendment issue because of its nonapplicability to the states).

180. 4 WILLIAM BLACKSTONE, COMMENTARIES *369-74.

181. SCHWARZ, *supra* note 80, at 8.

182. Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 503, 505 (Julian P. Boyd et al. eds., 1950) (noting that imprisonment with hard labor “would be no punishment or change of condition to slaves (me miserum!)”); An Act for the Better Ordering and Governing of Negroes and Other Slaves in This Province, No. 670, § 37 (S.C. 1740), *reprinted in* SOUTH CAROLINA STATUTES, *supra* note 86, at 411 (limiting the amount of time a slave could be put to “hard labor”); An Act for the Punishment of Vagabonds, and Other Idle and Disorderly Persons, and for Erecting Prisons, or Places of Security, in the Several Parishes of this Province; and for Preventing Trespasses on Lands of the Crown, or Lands Reserved for the Indians, and for the More Effectual Suppressing and Punishing Persons Bartering with the Indians in the Woods § 2 (Ga. 1764), *reprinted in* LAWS OF GEORGIA, *supra* note 92, at 200 (creating a workhouse requiring “hard labour” of “vagabonds”).

183. *See, e.g., Jordan v. State*, 22 Ga. 545, 554-55 (1857).

184. SCHWARZ, *supra* note 80, at 8.

185. *Gillian v. Senter*, 9 Ala. 395, 397 (1846) (“The overseer of slaves, under a contract with the master, to supervise and direct their operations must be considered to some extent as standing *in loco magisteri*; and of necessity invested with the authority to inflict reasonable punishment for the breach of police regulations.”). In Tennessee, although slave owners might have been permitted to punish a slave for the slave’s criminal behavior

like wardens throughout time, "could withdraw 'privileges'" such as family visitation.¹⁸⁶ The slaveholder's powers over slaves were justified in quasi-sovereign terms, on the theory that the public welfare was better served by punishment "admeasured by a domestic tribunal."¹⁸⁷

Slaveholders also had affirmative obligations akin to those of jailors or wardens. Even in the pre-Revolutionary era, it was well established in the slave states that slaveholders had affirmative duties to provide food, clothing, and shelter to their slaves.¹⁸⁸ These standards were found in statutes and also as a matter of common law.¹⁸⁹ Some states included provisions for the "care" of slaves in times of old age, sickness, or disability.¹⁹⁰ These provisions continued into the nineteenth century.¹⁹¹

without involving the state, a hirer could not. *James v. Carper*, 36 Tenn. (4 Sneed) 397, 403 (1857) ("The interests of the owner, sound policy, and humanity alike forbid that the hirer of a slave should be clothed with any such power; and if the hirer is possessed of no such authority, of course he can communicate none to a third person.").

186. SCHWARZ, *supra* note 80, at 10.

187. *Gillian*, 9 Ala. at 397.

188. SNETHEN, *supra* note 90, at 187 (quoting from Laws of Maryland, ch. 44, § 21 (1715), requiring masters or overseers of "servants" to provide "sufficient meat, drink, lodging, and clothing"); An Act for the Better Ordering and Governing Negroes and Other Slaves in This Province, and to Prevent the Inveigling or Carrying Away Slaves from their Masters or Employers § 31 (Ga. 1765), *reprinted in LAWS OF GEORGIA*, *supra* note 92, at 23 (requiring those who run workhouses where fugitive slaves are kept to provide sufficient food, drink, clothing, and covering for all slaves in custody, chargeable to master of slave); An Act for the Better Ordering and Governing of Negroes and Other Slaves in This Province, No. 670, § 38 (S.C. 1740), *reprinted in SOUTH CAROLINA STATUTES*, *supra* note 86, at 411; An Act for the Better Ordering of Slaves, No. 57, § 2 (S.C. 1690), *in SOUTH CAROLINA STATUTES*, *supra* note 86, at 343 (requiring that all slaves "have convenient clothes, once every year").

189. An Act Respecting Free Negroes, Mulattoes, Servants and Slaves § 10 (Ill. 1819), *reprinted in THE PUBLIC AND GENERAL STATUTE LAWS OF THE STATE OF ILLINOIS* 503 (Stephen F. Gale ed., 1839) (requiring owners to provide "wholesome and sufficient food, clothing, and lodging, and at the end of their service," to give them a new suit of clothes). Although North Carolina never adopted positive law protecting slaves from cruel punishment, in 1796 it enacted a statute that "denied compensation to the owners of slaves executed for crimes if the slaves had not been adequately fed, clothed, and treated with the 'humanity consistent with his or her situation.'" MORRIS, *supra* note 82, at 184.

190. LA. CONSTITUTIONAL AND ANTI-FANATICAL SOC'Y, DIGEST OF THE LAWS RELATIVE TO SLAVES AND FREE PEOPLE OF COLOUR IN THE STATE OF LOUISIANA (1835), *reprinted in STATUTES ON SLAVERY: THE PAMPHLET LITERATURE*, *supra* note 101, at 49 (reprinting the Black Code of 1806, which required that "[s]laves disabled through old age, sickness, or any other cause . . . shall be fed and maintained by their owners," with a fine for failure to do so).

191. Ala. Laws tit. 5, ch. 4, § 2043 (1852), *reprinted in THE CODE OF ALABAMA* 390 (John J. Ormond, Arthur P. Bagby & George Goldthwaite eds., 1852) ("The master must treat his slave with humanity and . . . must provide him with a sufficiency of healthy food and necessary clothing; cause him to be properly attended during sickness, and provide for

Indeed, one Virginia case from the early-nineteenth century reflects the intersection of the treatment of prisoners and slaves. In *Dabney v. Taliaferro*,¹⁹² the plaintiff had an escaped slave committed to King William County Jail in January 1821.¹⁹³ After the slave became “diseased, frost-bitten from cold, crippled and maimed,” the plaintiff brought suit, claiming that the sheriff owed a duty to furnish necessary food, clothing, and shelter and that he had negligently failed in his duty, rendering the slave of “no value to the plaintiff.”¹⁹⁴ The jury entered a verdict for the plaintiff, and the defendant appealed, arguing that he had no duty to provide protection from the cold to the escaped slave.¹⁹⁵ The Supreme Court of Virginia disagreed and held that as a matter of common law, there was an obligation to provide food, clothing, and warmth to the prisoner-slave.¹⁹⁶ It was irrelevant to the court that the prisoner was a slave, speaking to the extent to which the standards of treatment for prisoners and slaves were viewed in a similar light. Other jurisdictions came to similar conclusions.¹⁹⁷

Both individually and collectively, slaveholders and overseers functioned as the executive and the judiciary in enforcing law and dispensing punishments.¹⁹⁸ Indeed, proslavery forces bragged of this system, arguing that in rural areas it saved these disputes from going

his necessary wants in old age.”); An Act for the Protection of Slaves, Fla. Laws, ch. 256, § 1 (1849), *reprinted in* THE ACTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF FLORIDA 69 (Joseph Clisby ed., 1849) (requiring owners to “feed, clothe, and provide” for slaves).

192. 25 Va. (4 Rand.) 256 (1826).

193. *Id.* at 256.

194. *Id.* at 256–57.

195. *Id.* at 261.

196. *Id.* (“Can we suppose a state of the weather at that season, which would justify the jailor in neglecting to make any sort of provision for the cold, neither a blanket to cover, nor a fire to warm the prisoner? If the particular day on which he was committed was so warm, as to have rendered such provision unnecessary for the moment, could the continuance of such weather be counted on, with so much certainty, as to justify the total omission of attention to the subject? I speak not now under the Act of Assembly, but on the principles of the common law; and I am clearly of opinion, that these principles do not warrant or excuse such omission and neglect. The genius of our law is not so cruel and unfeeling.”).

197. *E.g.*, *Lewis v. City of New Orleans*, 12 La. Ann. 190, 191 (1857) (rejecting a claim against the city for the death of a prisoner held in a New Orleans parish jail, but recognizing that a claim might exist for the negligence of individual jailors); *McCarthy v. Lewis*, 5 La. Ann. 115, 116 (1850) (acknowledging the possibility of imposing liability on a jailor for the death of a slave in a parish prison, if disease was caused by confinement in prison, but entering a judgment for the defendant on the facts).

198. FLANIGAN, *supra* note 122, at 74 (“For [minor offenses,] the planters might simply get together and agree on a punishment, usually a specified number of lashes administered by the master of the offending slave.”).

to court.¹⁹⁹ State and municipal authorities also stepped into the shoes of slaveholders when necessary to prop up the institution of slavery. In urban areas, slaveholders relied on municipal authorities to punish slaves through local ordinances as well as to “correct” slaves through domestic discipline.²⁰⁰ In colonial Maryland, when a slaveholder believed that a slave “deserve[d] greater correction,” he was permitted to take the slave before a justice of the peace who could “order such correction as he shall think fit, not exceeding thirty-nine lashes for any one offence.”²⁰¹ In this way the private punishment meted out by slaveholders was merged with the state.

Moreover, the end of slavery and the beginning of Reconstruction prompted the rise of the penitentiary system, in which the conditions of slavery were recreated within prison walls.²⁰² By 1904, remarking on prison conditions during and after Reconstruction, a prison official would see the direct parallels between slavery and incarceration.²⁰³ Transitioning African-Americans from slave labor to convict labor was a principal imperative during Reconstruction, accomplished through convicting as many black men as possible, with little regard for guilt or innocence.²⁰⁴ In 1919, even the Governor of Alabama would compare prison labor conditions to “a relic of barbarism[,] . . . a form of human slavery.”²⁰⁵ Prison and slavery were thus linked rhetorically, historically, and jurisprudentially.

199. *Id.* at 75.

200. *Id.* at 76–77 (“Every city allowed the master to send slaves to the workhouse or jail to have them corrected.”).

201. See SNETHEN, *supra* note 90, at 187 (quoting from Laws of Maryland, ch. 44, § 21 (1715)). Along similar lines, a 1763 Georgia law permitted wardens of workhouses that held slaves to punish them by “moderate” whipping. An Act for Regulating a Work-house for the Custody and Punishment of Negroes § 3, 1763 Ga. Laws 7, reprinted in LAWS OF GEORGIA, *supra* note 92, at 163.

202. See generally BLACKMON, *supra* note 37, at 57 (describing how convict leasing practices during Reconstruction were almost identical to slavery practices in the 1850s); DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997) (exploring the high level of incarceration rates of blacks during Reconstruction in Mississippi).

203. Gorman, *supra* note 15, at 449.

204. *Id.*; see also BLACKMON, *supra* note 37, at 53–54.

205. Gorman, *supra* note 15, at 451 (citing Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 646, 651 (1982)).

B. Lessons from the Slave Cases for Modern Prisoners' Rights Doctrine

Given the formal intersection of slavery and state power, it is fair to think of the law of slave “punishment”²⁰⁶ as the law of state punishment for southern blacks. It is thus instructive to revisit the meaning given “cruel and unusual punishments” in the context of slavery. In that context, courts often looked to principles of proportionality as well as standards of decency—condemning “excessive” or “immoderate” punishments as well as “barbarous” ones.²⁰⁷ In addition, punishment that “flowed from a settled and malignant pleasure in inflicting pain, or a settled and malignant insensibility to human suffering” could result in criminal liability even for slaveholders.²⁰⁸

These two aspects of the jurisprudence of slave punishment map well, if not perfectly, onto areas of prison jurisprudence. First, there continues to be a live debate within and without the Supreme Court about the extent to which principles of proportionality may be derived from the Eighth Amendment’s Punishments Clause.²⁰⁹ Much of that debate centers around what the drafters of the Eighth Amendment might have intended by their use of the phrase “cruel and unusual.”²¹⁰ To the extent that scholarship has been brought to bear on this question, it has focused on the history and meaning of the documents that gave rise to the Punishments Clause, namely the English Bill of Rights and the Virginia Declaration of Rights.²¹¹

The slavery jurisprudence examined here, however, presents another, perhaps more illuminating source of information. The slavery cases provide evidence that the terms used in the Punishments Clause had a well-understood and accepted public meaning grounded in proportionality principles, among other things.²¹² That is, it was well understood throughout the eighteenth and nineteenth centuries that the terms “cruel” and “unusual” often implied a prohibition on excessive punishment.²¹³ The jurisprudence of slavery, then, is

206. Slaves, of course, had committed no crime, and therefore what slaveholders called “punishment” is more accurately described as abuse and mistreatment.

207. *See supra* Section II.B.1.

208. *State v. Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) 500, 504–05 (1839); *see also* *Copeland v. Parker*, 25 N.C. (3 Ired.) 382, 383 (1843) (affirming the right to recover where shooting a slave “betrayed passion”).

209. *See supra* notes 10–13 and accompanying text.

210. *See supra* note 52 and accompanying text.

211. *See supra* notes 14–19 and accompanying text.

212. *See supra* Part II.

213. *See supra* Section II.B.1.

consistent with the conclusions that legal historians have drawn from legal and moral commentary about the contemporaneous meaning of the Eighth Amendment during the time of the founding.²¹⁴ The law of slavery offers additional reasons to believe that the original meaning of the Eighth Amendment aligns with the proportionality jurisprudence that a majority of the Supreme Court has come to embrace.

There are caveats, of course, but they are not compelling. First, much of the slavery jurisprudence emerged *after* ratification of the Eighth Amendment. The legal community of the 1820s and 1830s may have been governed by significantly different interpretive principles as compared with the 1780s and 1790s, but there is no evidence to support this proposition. But even if this were the case, in some states, the equation of cruelty, at least, with excessiveness predated the Revolution.²¹⁵ Second, the slavery jurisprudence revolved around statutory enactments and the common law, not constitutional interpretation.²¹⁶ Of course, the relevant legislation and common law arose in some instances around the same time that the Eighth Amendment and parallel state constitutional provisions were adopted. More importantly, there is no evidence that the difference between constitutional and nonconstitutional sources was significant in the interpretation of these particular provisions, especially given the extent to which slaveholders were assumed to exercise quasi-public power.

In addition to being relevant to the ongoing debate about proportionality and constitutional limits on punishment, the slavery cases also expose the inadequacy of current Eighth Amendment jurisprudence that is informed by “evolving standards of decency.” In the law of slavery, standards of protection were also theoretically governed by “decency and the recognized proprieties of social life,”²¹⁷ and “the moral sense and humanity of the present age.”²¹⁸ This

214. See generally Bessler, *supra* note 15, at 315–27 (describing the use of concepts in case law, contemporaneous documents, and the writings of Blackstone and other “influential thinkers”); Pillsbury, *supra* note 17, at 896–98 (looking to writings of John Adams, Thomas Jefferson, Cesare Beccaria, and Montesquieu); Stinneford, *supra* note 12, at 1820–21 (“Once one recognizes that ‘unusual’ actually means ‘contrary to long usage,’ however, one realizes that the Cruel and Unusual Punishments Clause almost certainly *was* intended to cover grossly disproportionate punishments.”); see also Schwartz & Wishingrad, *supra* note 17, at 806–13 (discussing the influence of Cesare Beccaria and other Enlightenment thinkers).

215. See *supra* Section II.A.

216. See *supra* Part II.

217. *Turnipseed v. State*, 6 Ala. 664, 665–66 (1844).

218. *Werley v. State*, 30 Tenn. (11 Hum.) 172, 175 (1850).

translated to the condemnation of treatment that was “indicative of wanton and brutal feelings[.]”²¹⁹ “inhuman or brutal treatment,”²²⁰ killing that was motivated by revenge or passion,²²¹ or treatment that “flowed from a settled and malignant pleasure in inflicting pain, or a settled and malignant insensibility to human suffering.”²²² Prisoners, in turn, are only protected from force used “maliciously and sadistically to cause harm.”²²³ Just as in the case of “immoderate correction” of slaves, prisoners must show that the force used was “wanton” and “unnecessary” in light of the need for the force.²²⁴ Echoing the jurisprudence of slavery, prisoners are protected only from punishment that reflects “unnecessary and wanton infliction of pain.”²²⁵ Prisoners, in other words, may yet be “slaves of the State.”²²⁶

Thus, for those jurists and commentators who embrace an interpretation of the Eighth Amendment grounded in “evolving standards of decency,” it is fair to ask how far our jurisprudence has evolved from the time of slavery until now. It would surely be surprising to our current Supreme Court to be confronted with the observation that the Court’s Eighth Amendment jurisprudence appears to offer prisoners little more protection from abuse than was formally offered to nineteenth-century slaves. Even originalists would presumably be troubled by this observation.²²⁷

219. *Gillian v. Senter*, 9 Ala. 395, 397 (1846).

220. *Oliver v. State*, 39 Miss. 526, 539 (Miss. High Ct. Err. & App. 1860).

221. *State v. Robbins*, 48 N.C. (3 Jones) 253, 256 (1855) (affirming conviction for murder where a slaveholder killed a slave out of “cruelty, torture and revenge”); *Copeland v. Parker*, 25 N.C. (3 Ired.) 382, 383 (1843) (affirming a right to recover where shooting a slave “betrayed passion” in the overseer).

222. *State v. Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) 500, 504 (1839); *see also Puryear v. Thompson*, 24 Tenn. (5 Hum.) 397, 399–400 (1844) (distinguishing between a purpose of legitimate “correction” and the use of “instruments of torture to gratify [one’s] malice, intending to kill”).

223. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

224. *Id.*

225. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

226. *See Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). Andrea Armstrong has reported that newspaper accounts confirm that Ruffin was an African-American prisoner. Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 877–78 (2012).

227. *See McDonald v. City of Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and concurring in the judgment) (stating that “slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of

These considerations call out for a transformation of our Eighth Amendment jurisprudence. First, we should now lay to rest originalist arguments that the Eighth Amendment cannot be squared with a proportionality principle. The best evidence of eighteenth-century understanding of the meaning of “cruel and unusual punishments” is that it connotes a proportionality requirement. One may quarrel with the metes and bounds of this principle—certainly slavery jurisprudence provides nothing to admire in terms of its application to particular facts. But the law of slavery is consistent with other historical evidence, all of it pointing towards an original public understanding of the words “cruel and unusual” that is inconsistent with the jurisprudence of avowedly originalist Justices.

Second, and perhaps more importantly, for the majority of Justices who believe the Eighth Amendment should be consistent with “evolving standards of decency,” the law of slavery should raise questions as to how much our prison jurisprudence has evolved and whether it truly incorporates evolving standards of decency. For example, the Eighth Amendment has been interpreted to protect prisoners against force used “maliciously and sadistically to cause harm,”²²⁸ because of the need to provide “wide-ranging deference” to prison administrators charged with maintaining order and discipline.²²⁹ The Court has adopted this high standard of proof in large part to acknowledge that corrections officers often have to make split-second decisions regarding whether the use of force is needed to keep order.²³⁰

As a formal matter, this means that prisoners are protected from use of force inflicted for sadistic and malicious purposes, just as slaves once were in theory. In practice, courts are free to dismiss prisoners’ claims of being doused with urine and feces by correction officers,²³¹ punched in the genitals and shoved into cement by prison staff,²³² slapped several times for no reason,²³³ sprayed in the face with pepper

thinking that produced race slavery, race privilege and race hatred.”); *Harmelin v. Michigan*, 501 U.S. 957, 986 n.11 (1991) (Scalia, J.) (describing slavery as something “intensely undesirable”).

228. *Hudson*, 503 U.S. at 6–7.

229. *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986)).

230. *Id.* at 5–6 (contrasting the standard for excessive force with the standard for denial of medical care).

231. *Tafari v. McCarthy*, 714 F. Supp. 2d 317, 341 (N.D.N.Y. 2010) (“This conduct, while certainly repulsive, is not sufficiently severe to be considered ‘repugnant to the conscience of mankind.’”).

232. *Murray v. Goord*, 668 F. Supp. 2d 344, 357, 362 (N.D.N.Y. 2009).

233. *Perry v. Stephens*, 659 F. Supp. 2d 577, 580, 582–83 (S.D.N.Y. 2009).

spray or tear gas long after any disturbance has arisen,²³⁴ or forced to stand naked for eight to ten hours in a two-and-a-half-foot square cage.²³⁵ In other words, to ensure that prisoners are treated with basic standards of decency, it may be necessary to allow prisoners to move forward with legal claims without having to show that defendant officials were motivated by sadism or malice.

CONCLUSION

This Article has argued that viewing our Eighth Amendment jurisprudence through the lens of the law of slavery offers two important insights. First, it shows that the current debate about whether the words “cruel and unusual punishments” were originally intended to encompass a review of sanctions for their excessiveness has overlooked a useful source of information. The positive and common law relating to the treatment of slaves suggest that the same words found in the Eighth Amendment were understood without controversy to regulate both the mode and amount of a given punishment.

Second, the law of slavery suggests that standards of “decency,” to the extent they relate to the treatment of prisoners, cannot be said to have evolved significantly over time. Indeed, prisoners appear to receive legal protection from abusive use of force similar to that which slaves received in the nineteenth century. I am, however, wary of claiming too much—slaves were subjected to a system of injustice and brutality incomparable on every level to the modern-day treatment of prisoners. What this Article has sought to argue is that the dual legal frameworks for understanding and regulating the mistreatment of prisoners and slaves bear disturbing parallels. Even if the similarities are only skin deep, they justify further interrogation of the norms that have arisen in Eighth Amendment jurisprudence.

To close observers of the prison system, this conclusion may not come as a surprise. After all, there is substantial evidence that our Eighth Amendment jurisprudence has done little to protect prisoners from everyday abuse and mistreatment. In California, for instance, after decades of litigation, significant failures remain in the provision of mental-health treatment and medical care.²³⁶ And in New York

234. *Mosely v. Bergh*, No. 2:08-CV-17, 2008 WL 5216028, at *2 (W.D. Mich. Dec. 11, 2008); *Duncan v. Gordon*, No. 8:06-CV-396MBS, 2007 WL 1031939, at *6 (D.S.C. Mar. 29, 2007), *aff'd*, 260 F. App'x 543 (4th Cir. 2007).

235. See *Jarriett v. Wilson*, No. 03-4196, 2005 WL 3839415, at *7-8 (6th Cir. July 7, 2005).

236. See *Brown v. Plata*, 131 S. Ct. 1910, 1926-28 (2011).

City, despite a vibrant and active prisoners' rights bar, Rikers Island confronted accusations by the United States government of systematically abusing juvenile prisoners in violation of the Constitution.²³⁷

What we might learn from the juxtaposition of the law of slavery with the law and reality of prisons today is that it is time for a new Eighth Amendment, one that offers more protection from abuse than eighteenth- and nineteenth-century doctrine linked to the "peculiar institution"²³⁸ that has always been a stain on this country's history.

237. Letter from Preet Bharara, U.S. Attorney for the S. Dist. of N.Y., to The Honorable Bill de Blasio, Mayor of N.Y.C., Joseph Ponte, Comm'r of the N.Y.C. Dep't of Corr., and Zachary Carter, Corp. Counsel of N.Y.C., *supra* note 39 (detailing the results of an investigation into the treatment of juveniles held in detention at Rikers Island). New York City and the United States Department of Justice ultimately agreed to a settlement that addressed many issues, including concerns regarding the treatment of juveniles. See Letter from Preet Bharara, U.S. Attorney for the S. Dist. of N.Y., to The Honorable James C. Francis, IV, U.S. Dist. Judge for the S. Dist. of N.Y. (June 22, 2015), <http://www.justice.gov/usao-sdny/file/479956/download> [<http://perma.cc/4EA2-AETC>] (summarizing the settlement agreement).

238. *Scott v. Emerson*, 15 Mo. 576, 577 (1852).