No. 18-6135

IN THE

Supreme Court of the United States

JAMES K. KAHLER,

Petitioner,

v.

KANSAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF *AMICUS CURIAE* OF PROFESSOR JOHN F. STINNEFORD IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

Amicus curiae John F. Stinneford is a law professor at the University of Florida Levin College of Law who has written extensively on the history and original meaning of the Eighth Amendment.[1] His published works include: *The Original Meaning of 'Cruel'*, 105 Geo. L.J. 441 (2017); *Punishment Without Culpability*, 102 J. Crim. L. & Criminology 653 (2012); *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899 (2011); and *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008).[2] Professor Stinneford submits this brief to offer historical context for the Court regarding the original public meaning of the Cruel and Unusual Punishments Clause of the Eighth Amendment.

SUMMARY OF ARGUMENT

This case presents the question whether Kansas's decision to abolish the insanity defense—and thus impose criminal liability without regard to individual culpability—exceeds the bounds of permissible innovation in criminal punishment under our constitutional system. This brief reviews the history and original meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or his counsel made a monetary contribution to its preparation or submission. The parties have both given blanket consent to the filing of *amicus* briefs.

[2] Parts of this brief have been drawn and adapted from the above-referenced articles.

The Cruel and Unusual Punishments Clause was originally understood to prohibit cruel innovation in punishment. More specifically, the word "cruel" was originally understood to mean "unjustly harsh" and the word "unusual" was understood to mean "contrary to long usage." Taken as a whole, the Clause was originally understood to prohibit punishments that are unjustly harsh in light of longstanding prior practice, either because they involve a barbaric or unduly severe method of punishment or because they are significantly disproportionate to the offender's culpability as measured against longstanding prior practice.

The insanity defense is a bedrock principle of Anglo-American law that has for centuries played a significant role in ensuring that criminal punishment is not imposed in the absence of individual culpability. Kansas and a small handful of other states have departed from that traditional and widely accepted baseline—and have thus elected to extend criminal liability to those who have traditionally been considered non-culpable. If tested against the original meaning of the Cruel and Unusual Punishments Clause, the Kansas law at issue here—which departs from longstanding prior practice and abandons the traditional linkage between culpability and liability—likely would exceed the Eighth Amendment's constitutional limits. *Cf., e.g.*, *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70 (Ky. 1820) (concluding that to punish a person for exercising the common law right of self-defense was unconstitutionally "cruel" under state constitutional law, even though a criminal statute purported to authorize such punishment).

ARGUMENT

I. Under its original public meaning, the Eighth Amendment prohibits punishments that are unjustly harsh in light of longstanding practice.

The Eighth Amendment is deeply rooted in history. Its text—"[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"[3]—was drawn, with small alterations, from the Virginia Declaration of Rights of 1776[4] and the English Bill of Rights of 1689.[5] Historical evidence suggests that the drafters and ratifiers of all three provisions considered themselves to be restating a longstanding common law prohibition that was common to both England and the United States.

The Cruel and Unusual Punishments Clause had, and was publicly understood to have, a preexisting legal meaning when it became part of the Eighth Amendment in 1791. The prohibition of cruel and unusual punishments was part of the lexicon of rights that was familiar to well-informed members of the public.

In the context of the Eighth Amendment, the word "unusual" was a term of art derived from the common law. Although most lawyers today think of the common law as judge-made law, it was traditionally described as the law of "custom" and "long us-

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

[4] Va. Decl. of Rts. § 9 (1776).

[5] An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne (1689), in 6 *The Statutes of the Realm* 142, 143 (1819).

age."[6] A central idea was that a practice or custom could attain the status of law if it were used throughout the jurisdiction for a very long time. These two characteristics—universality and long usage—justified legal enforcement of the practice. The theoretical basis for common law judging was not that judges had the power to make law, but that they had the power to identify and enforce universal, longstanding customs.

In English and American legal thought, the terms "custom" and "long usage" were tied closely together as a matter of both logic and grammar. Whereas today we normally say that we "follow" a custom, it was more common in the 17th and 18th centuries to say that we "use" a custom. Thus, for example, Edward Coke wrote: "And note that no custome is to bee allowed, but such custome as hath bin used by title of prescription, that is to say, from time out of minde." 1 Edward Coke, *Institutes of the Lawes of England* (1608), *reprinted in* 2 *The Selected Writings and Speeches of Sir Edward Coke* § 170, at 701 (Steve Sheppard ed., 2003) [hereinafter "Coke, *Institutes*"]. Coke argued that the common law consisted of customary practices that enjoyed "long" or "immemorial usage," and that were therefore inherently just and reasonable. "The Law of England," Coke wrote, "by many successions of ages … hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the

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[6] *See* John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 468-71 (2017) [hereinafter "Stinneford, *Cruel*"]; John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008) [hereinafter "Stinneford, *Unusual*"].

old rule may be justly verified of it, *Neminem oportet esse sapientiorem legibus*: no man, out of his own private reason, ought to be wiser than the law, which is the perfection of reason." 1 Edward Coke, *Systematic Arrangement of Lord Coke's First Institute of the Laws of England* 1 (J.H. Thomas ed., 2d American ed. 1836).

In America, James Wilson—one of the primary drafters of the U.S. Constitution—wrote (quoting Justinian): "[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law." 1 James Wilson, *Lectures on Law: Of the Common Law*, in 2 *Collected Works of James Wilson* 749, 759 (Mark David Hall & Kermit L. Hall eds., 2007) (quotation omitted).[7] Likewise, Webster's dictionary referred to "[u]nwritten or common law" as "a rule of action which derives its authority from long usage, or established custom." Noah Webster, *An American Dictionary of the English Language* 488 (3d ed. 1830).

The notion of long usage as a basis for law is important because it gave rise to the idea of rights enforceable against the sovereign. Influential jurists asserted that the common law was normatively superior to laws ordered by king or Parliament because it does not become law until long usage shows that it is just, reasonable, and enjoyed the stable, multigenerational consent of the people. Laws enacted by

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[7] *See also* 1 James Wilson, *Lectures on Law: Of Municipal Law*, in 2 *Collected Works of James Wilson*, *supra*, at 570 ("'Long use and custom' is assigned as the criterion of law, 'taken by the people at their free liberty, and by their own consent.' And this criterion is surely sufficient to satisfy the principle: for consent is certainly proved by long, though it be not immemorial usage.").

the sovereign, by contrast, become law before they have been used and may well turn out to be unjust or unworkable in practice.

A growing chorus in England, and especially in America, argued that the sovereign lacked legitimate authority to enact or enforce laws that violated rights established through long usage—particularly rights relating to life, liberty, or property. Residents of the American colonies came to understand "[t]he English 'constitution'" as "conferring on subjects of the Crown rights that could not be arbitrarily infringed upon by any governing body"—with "[t]he content of those rights, and the scope of protection for those who held them, … thought to be embodied in time-honored customs and established doctrines of the common law." 1 G. Edward White, *Law in American History* 115 (2012). *See also* John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (2005) (discussing the forensic uses of history associated with the "ancient constitution" in the seventeenth and eighteenth centuries).

In 17th century England[8] and 18th century America, governmental violations of rights established through settled and longstanding practice were described as "unusual." In 1769, for example, the Virginia House of Burgesses described Parliament's attempt to revive a long-defunct statute that would permit the trial of American protesters in England—in derogation of cherished rights to venue and vicinage—as "new, unusual, … unconstitutional and illegal." Journals of the House of Burgesses, 1766-1769, at 215 (John Pendleton Kennedy ed., 1906). In the Declaration of Independence, the Continental Congress complained of the recent English practice

[8] *See* discussion *infra* at II.B.

of calling colonial legislatures at "places unusual." The Declaration of Independence para. 6 (1776).

Similarly, in the ratification debates, Antifederalists expressed the concern that without a Bill of Rights, the Constitution would not bind Congress to respect common law rights, particularly those relating to criminal trial and punishment. The lack of common law constraints on the proposed new federal government led Patrick Henry to describe the government itself as a series of "new and unusual experiments." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 170-72 (photo. reprint 2d ed. 1974). George Mason, who had been a principal drafter of the Virginia Declaration of Rights a decade earlier, warned that the lack of common law constraints in the new Constitution would empower Congress to "constitute new crimes, inflict *unusual and severe punishments*, and extend their powers as far as they shall think proper[.]" George Mason, *Objections to this Constitution of Government* (1787) (emphasis added).

In sum, historical evidence suggests that the Founding generation understood the Cruel and Unusual Punishments Clause to prohibit cruel innovations in punishment. Punishment practices that enjoyed long usage were considered to be presumptively just and reasonable, and to enjoy the stable, multigenerational consent of the people. New punishment practices that were significantly harsher than the baseline established by longstanding prior practice were considered cruel and unusual.

II. Under its original public meaning, the Eighth Amendment prohibits punishments that are significantly disproportionate to the offender's culpability in light of longstanding practice.

A. The requirement of proportionality in punishment is deeply rooted in Anglo-American law.

The principle that punishment should be commensurate with fault or culpability is ancient and deeply rooted in Western history.[9] This principle is also deeply rooted in English and American law; indeed, "the prohibition of excessive punishments and the concern for equating crime and punishment were ancient concerns in English law and custom." Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 92 (1981) [hereinafter "Schwoerer, *Declaration*"].

The principle of proportionality was prominently associated with Magna Carta, the "foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). "Magna Carta guaranteed that '[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof,'" *Timbs v. Indiana*, 139 S. Ct. 682, 687-88 (2019) (quoting Magna Carta, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225))—thus requiring, among other things, that amerce-

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[9] *See, e.g.*, Exodus 21:25; Leviticus 24:19-20 ("An eye for an eye; a tooth for a tooth."); 4 Thomas Aquinas, *Summa contra Gentiles* 304 (1929 ed.) (1264) ("[T]he punishment should correspond with the fault, so that the will may receive a punishment in contrast with that for love of which it sinned."); V Aristotle, *Nicomachean Ethics* ch. 3 (Roger Crisp trans., Cambridge Univ. Press 2004) ("What is just in this sense, then, is what is proportionate. And what is unjust is what violates the proportion.").

ments[10] "be proportioned to the wrong." *Id*. (quotation omitted).

English legal thinkers considered Magna Carta to be, as Edward Coke put it, "but a confirmation or restitution of the Common Law." 1 Coke, *Institutes* § 108, at 697. Thus, they did not consider Magna Carta the source of the proportionality requirement, but merely a reaffirmation of it. By the early 17th century, the English common law courts had distilled from Magna Carta the general principle that other types of economic sanctions, such as fines, should also be reasonable and proportional, with one prominent case from 1615 reasoning that "[e]xcess in any thing is reprehended by common law." *Godfrey's Case*, 77 Eng. Rep. 1199, 1202 (1615), *as translated in* 2 John Bouvier, *A Law Dictionary* 179 (15th ed. 1890). That same year, the courts also recognized and applied the principle of proportionality to cases involving imprisonment—although this form of punishment was rare prior to the 18th century. In *Hodges v. Humkin*, 80 Eng. Rep. 1015 (1615), Hodges was incarcerated for insulting a local mayor with vulgar words and gestures. He petitioned for a writ of habeas corpus. The Court of King's Bench ordered his release, holding that under Magna Carta and the Statute of Marlbridge, "imprisonment ought always to be according to the quality of the offence." *Id*. at 1016.

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[10] Amercements—"the most common criminal sanction in 13th century England," *Solem v. Helm*, 463 U.S. 277, 284 n.8 (1983) (citing 2 F. Pollock & F. Maitland, *The History of English Law* 513-15 (2d ed. 1909))—"were payments to the Crown … required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown." *Timbs*, 139 S. Ct. at 688 n.2.

In this way, Magna Carta's prohibition of excessive amercements came to embody a broader fundamental principle in English law—that the governmental power to punish should be limited by customary retributive notions of proportionality. It was against this common law backdrop that the ban on "cruell and unusuall Punishments" in the English Bill of Rights of 1689 was enacted.

B. The "Cruell and Unusuall Punishments" Clause in the English Bill of Rights was originally understood to prohibit excessive or disproportionate punishments.

During the 17th century, England entered a period of intense constitutional struggle. Efforts to constrain the Sovereign to follow the rule of law were directed first against the absolutist Stuart kings, then against the absolutist Parliament that succeeded them after the English Civil War, and finally against the Stuart kings who returned to power after the Restoration. In 1688-89, these conflicts culminated in the Glorious Revolution. Members of the English aristocracy invited William and Mary to invade England and depose James II on the ground that the king had violated the rights of English subjects in a variety of ways—including through the imposition of "excessive Bayle," "excessive fynes," and "illegal and cruell punishments." Decl. of Rts., *reprinted in* Schwoerer, *Declaration* at 295, 296.

Parliament recognized William and Mary as king and queen on the condition that they accept a declaration of rights designed to limit the arbitrary exercise of the monarch's power. This declaration was followed by the Bill of Rights of 1689, which codified and entrenched the constitutional settlement that followed the overthrow of James II. It specified certain actions that the sovereign should not take—

including that "excessive Baile ought not to be required, nor excessive Fines imposed; nor cruell and unusuall Punishments inflicted." *See* An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne (1689), in 6 *The Statutes of the Realm* 142, 143 (1819). This appears to have been the first use of the phrase "cruell and unusuall Punishments."

We have compelling evidence of the contemporary meaning of the phrase "cruell and unusuall Punishments" in England because the same Parliament that drafted the Bill of Rights was called upon to debate the meaning of this prohibition shortly after it was adopted. The reason for this debate was a disgraced former Anglican clergyman named Titus Oates. A few years earlier, Oates had been convicted of perjury for falsely claiming that there was a plot—the so-called "Popish plot"—to kill the King.[11] Oates had named some 15 members of this alleged conspiracy and had testified against them at their trials. His story was eventually exposed as false.

At Oates's sentencing, the notorious Chief Justice George Jeffreys of the Court of King's Bench expressed regret that the death penalty was not available for this crime and declared that "it is left to the discretion of the court to inflict such punishment as they think fit" so long as it "extend not to life or member." *Trial of Titus Oates*, 10 How. St. Tr. 1079, 1314-15 (K.B. 1685). Oates was sentenced to be whipped continuously as he crossed the city of London "from Aldgate to Newgate," and then two days later "from Newgate to Tyburn." *Id*. at 1316-17. He

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[11] *See* John H. Langbein, *The Origins of Adversary Criminal Trial* 69-73 (2003) (discussing Oates's perjury trial and the "Popish Plot").

was also sentenced to life imprisonment, pillorying four times a year for life, a fine of 2,000 marks, and defrockment. *Id*. Shortly after the English Bill of Rights was enacted, however, Oates petitioned Parliament to review his sentence—arguing that it violated, among other things, the prohibition of "cruell and unusuall Punishments."

Representatives from the House of Commons asserted that the House had Oates's case specifically in mind when it drafted the Bill of Rights. *See* 10 H.C. Jour. 247 (1689) ("[T]he Commons had a particular Regard to these Judgments, amongst others, when that Declaration [*i.e.*, the English Cruell and Unusuall Punishments Clause] was first made; and must insist upon it, That they are erroneous, cruel, illegal, and of ill Example to future Ages."); *see also id*. ("It was of ill Example, and unusual, That an Englishman should be exposed upon a Pillory, so many times a Year, during his Life.").

Similarly, in the House of Lords, "there was not one Lord but thought the Judgments erroneous, and was fully satisfied, That such an extravagant Judgment ought not to have been given, or a Punishment so exorbitant inflicted upon an English subject." 10 H.C. Jour. 249 (1689). Nonetheless, the Lords affirmed the judgment, because they considered Oates to be "so ill a Man." *Id*. A minority protested and argued that Oates's punishments were "contrary to law and ancient practice," 14 H.L. Jour. 228 (1689), "barbarous, inhuman and unchristian," and given with "no precedent" to support such punishments, *id*. Accordingly, the subsequent debate over Oates's case presents a good illustration of the original meaning of the English Cruell and Unusuall Punishments Clause.

Notably, every element of Oates's punishment (except defrocking) was accepted under the common law at the time; none appears to have been considered at the time as an inherently barbarous *method* of punishment.[12] Thus, if the punishments inflicted on Oates were unacceptably cruel at the time, that must have been because they were disproportionate to the crime of perjury. This conclusion is further supported by the fact that the punishments were described in the parliamentary debates as "extravagant" and "exorbitant," 10 H.C. Jour. 249 (1689). Considered together, the evidence strongly suggests that these expressions were focused on excessiveness of punishment, not just on particular modes of punishment; the purpose—as members of the House of Commons put it at one point during the back-and-forth with the Lords over how to proceed on Oates's petition in August 1689—was to ensure that "*such excessive Punishments* shall not be inflicted for the future." 10 H.C. Jour. 264 (1689) (emphasis added).

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[12] Today, most of the methods of punishment associated with *Titus Oates's Case*—having "fallen completely out of usage for a long period of time," *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (quotation and alteration omitted)—might well also be considered categorically "cruel and unusual" within the original meaning of the text of the Cruel and Unusual Punishment Clause. *See generally* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 Wm. & Mary L. Rev. 531 (2014). The Cruel and Unusual Punishments Clause's text, as originally understood, is appropriately regarded as enacting a *principle of legal development*—not merely a fixed set of particular applications that a given reader might have anticipated in 1791. *Cf.* Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 B.Y.U. L. Rev. 1393, 1462 (2012) (suggesting that "it is not the original expected applications of a legal text that bind us, but it is instead the words that are enacted into law").

Moreover, in prohibiting "cruell and unusuall Punishments," Parliament drew upon the idea that long usage tends to reveal what is just and that lack of long usage tends to reveal what is unjust. The court's deviation from longstanding precedent in *Titus Oates's Case* was important because it showed that the punishment was unreasonable. The punishment was excessive or disproportionate because it was significantly harsher than the punishments that had previously been given for the crime of perjury.

In the years following the Glorious Revolution, the common law's proportionality limitations on punishments are attested in the writings of prominent English jurists. Consider, for instance, the discussion of common law principles that appeared in Sollom Emlyn's preface to the 1730 edition of *State Trials*. As Emlyn recounted:

> As to smaller Crimes and Misdemeanors, they are differenc'd with such a variety of extenuating or aggravating Circumstances, that the Law has not, nor indeed could affix to each a certain and determinate Penalty; this is left to the Discretion and Prudence of the Judge, who may punish it either with Fine or Imprisonment, Pillory or Whipping, as he shall think the nature of the Crime deserves: but tho' he be intrusted with so great Power, yet he is not at liberty to do as he lists, and inflict what arbitrary Punishments he pleases; due regard is to be had to the Quality and Degree, to the Estate and Circumstances of the Offender, and to the greatness or smallness of the Offence ….

Sollom Emlyn, *Preface*, in *A Complete Collection of State-Trials* xi (3d ed., 1742) (reprinting Preface to

2d ed., 1730) (footnote omitted). Emlyn further observed:

> It is indeed no easy matter to settle the precise Limits, how far a Court of Justice may go; every Case must depend upon its own particular Circumstances. But *some* Fines and *some* Punishments are so monstrously extravagant, that no body can doubt their being so; such were the Fines of Sir *Samuel Barnardiston* and Mr. *Hampden*, such were the repeated Pilloryings and barbarous Whippings of *Oates*, *Dangerfield*, and *Johnson*.
>
> These Punishments may no doubt be properly inflicted, where they are in a moderate degree and proportioned to the Offence ….

Id. at xii (footnotes omitted).

The historical evidence thus demonstrates that the English Cruell and Unusuall Punishments Clause was understood to entrench traditional common law norms regarding proportionality and to prohibit new punishments that were excessive in light of prior practice. But because the English version of the Clause was directed only at judges, not Parliament, its significance in England was limited. As the doctrine of parliamentary supremacy developed over the course of the 18th century, Parliament repeatedly innovated in a manner contrary to fundamental common law principles. These innovations included imposition of the "bloody code," which punished more than two hundred crimes, major and minor, with death. *See* Randall McGowen, *Making the 'Bloody Code'? Forgery Legislation in Eighteenth-Century England*, in *Law, Crime and English Society, 1660-1830* 117 (Norma Landau ed., 2002). Though

Parliament's actions in this area were both "cruel" and "unusual"—contrary to long usage—the doctrine of parliamentary supremacy precluded any challenge against them on this ground.

In America, things were different. The American Revolution represented a fundamental *rejection* of the doctrine of parliamentary supremacy. *See, e.g.*, Akhil Reed Amar, *America's Constitution: A Biography* 105-06 (2005). Accordingly, the provisions of the Bill of Rights—including the Eighth Amendment's prohibition of Cruel and Unusual Punishments—bound Congress as well as the courts. Because the Eighth Amendment was "adopted as an admonition to *all* departments" of government[13]—to Congress as well as the courts[14]—there is no reason to suppose that the Founding generation wished Congress to have the same power to impose arbitrary and disproportionate punishments as was then enjoyed by Parliament. Indeed, a critical purpose of the Bill of Rights was to ensure that Congress did *not* assume such arbitrary power unto itself.

C. Early American sources considered whether punishment was disproportionate to culpability in judging whether the punishment was "cruel and unusual."

The Cruel and Unusual Punishments Clause had, and was publicly understood to have, a preexisting legal meaning when it became part of the Eighth

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[13] 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1896, at 750-51 (1833) (emphasis added).

[14] And, following the adoption of the Fourteenth Amendment, to all branches of the state governments as well.

Amendment in 1791.[15] The prohibition of cruel and unusual punishments was part of the lexicon of rights that was familiar to well-informed members of the public.

In America, "English law—as authority, as legitimizing precedent, as embodied principle, and as the framework of historical understanding—stood side by side with Enlightenment rationalism in the minds of the Revolutionary generation." Bernard Bailyn, *The Ideological Origins of the American Revolution* 31 (1967). The leading English expositors of the law were held in high esteem: For example, Coke's "*Institutes* were read in the American Colonies by virtually every student of law[.]" *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (plurality) (quotation omitted).

Virginia's landmark Declaration of Rights, issued in June 1776, echoed the English Bill of Rights—providing "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Va. Decl. of Rts. § 9. This was one of several provisions that had been "borrowed from England," Edmund Randolph, *Essay on the Revolutionary History of Virginia* (c. 1809-

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[15] This account is consistent with the view that "the founding generation generally did not consider many of the rights identified in the Bill of Rights as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text." *Timbs*, 139 S. Ct. at 692-93 (Thomas, J., concurring in the judgment) (quotation and alteration omitted). In light of the fact that "one of the consistent themes of the era was that Americans had all the rights of English subjects," this Court has concluded that "[w]hen the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality." *Solem*, 277 U.S. at 285-86.

1813), reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 246, 248 (1971), in a document that in large measure was "a restatement of English principles—the principles of Magna Charta, the Petition of Rights, the Commonwealth Parliament, and the Revolution of 1688." Allan Nevins, *The American States During and After the Revolution, 1775-1789* 146 (1924).

Other states followed Virginia's lead. "[B]y 1791, the number of state constitutions with clauses regarding cruel and unusual punishment had risen … to eight, corresponding to 57 percent of the states and 73 percent of the population[.]" Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1518-19 (2012). The cruel-punishments provisions in state constitutions and bills of rights varied somewhat—sometimes prohibiting punishments that were "cruel and unusual," sometimes prohibiting punishments that were "cruel or unusual," and sometimes prohibiting "cruel" punishments.[16] But these provisions reflected a general consensus on two points: First, the government should not impose cruel punishments. Second, the common law was essentially reasonable, so that governmental efforts to "ratchet up" punishment beyond what was permitted by the common law were presumptively contrary to reason. Given this dual consensus, the words "cruel" and "unusual" acted as synonyms when employed in the context of punishment. The word "cruel" stated the abstract moral principle, and the word "unusual" provided a concrete reference point for determining

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[16] Stinneford, *Cruel*, at 465-66; Stinneford, *Unusual*, at 1798-99.

whether that principle had been violated. Accordingly, it makes sense that some states barred "cruel punishments," some barred "cruel and unusual punishments," and some barred "cruel or unusual punishments." Each formulation was simply a different way of saying the same thing.

Americans understood the phrase "cruel and unusual" to embody the concept of excessiveness or disproportionality.[17] In America, as in England, the phrase "cruel and unusual" was used within the legal system as a synonym for "excessive" or "disproportionate." This occurred in two major areas of law outside of criminal punishment.

First, in the late 18th and 19th centuries, several states referenced "cruel and unusual" killings in their homicide laws. In virtually every case involving such a killing, the phrase "cruel and unusual" was used as a synonym for "excessive."[18] Some states treated "cruel and unusual" homicide as a form of murder. In these states, a beating was considered "cruel and unusual" if it was so excessive that it demonstrated intent to kill or its equivalent.[19] Other states treated "cruel and unusual" homicide as a form of manslaughter. In these states, a beating was considered "cruel and unusual" if it was disproportionate to any threat or provocation that came from the victim.[20] "In nearly one hundred reported cases

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[17] The common use in America of "cruel and unusual" as a synonym for "excessive" supports reading the three clauses of the Eighth Amendment as stating complementary prohibitions of excessive governmental deprivations of life, liberty or property.

[18] Stinneford, *Rethinking*, at 938-42.

[19] *Id.* at 939.

[20] *Id.* at 939-40.

decided in the eighteenth and nineteenth centuries, not one involved a claim that 'cruel and unusual' homicide occurred only when the offender employed a barbaric mode or method. Rather, in all cases, the phrase 'cruel and unusual' was used as a synonym for 'excessive.'" Stinneford, *Rethinking*, at 940.

Second, several federal and state laws prohibited those in positions of authority over others—including ship's officers, parents, and teachers—from inflicting "cruel and unusual punishments." Parents were said to be permitted to use moderate force to discipline their children and teachers were permitted to use moderate force to discipline students. But when excessive force was used, this discipline was described as a "cruel and unusual punishment." Notably, in none of these cases was it suggested that the phrase only applied to inherently barbaric modes of punishment.[21]

The relationship of punishment to an offender's *culpability* was central to the question of whether the punishment was cruel and unusual by virtue of its

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[21] *See* Stinneford, *Rethinking*, at 939-42 (surveying cases); *see also* Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. Rev. 817 (2016) (discussing additional cases in the slavery context). Notably, in only one case decided prior to 1866 did a court explicitly state that a state analogue to the Cruel and Unusual Punishments Clause forbids only barbaric methods of punishment. *See Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 447-50 (Va. Gen. Ct. 1824). That dictum in *Aldridge*, however, ought to be of limited persuasive force as it contradicts actual holdings of Virginia courts made both before and after that case was decided. *See* Stinneford, *Rethinking*, at 951.

disproportionality.[22] Indeed, on the few occasions in the late 18th and early 19th centuries when legislatures passed laws that authorized punishment *without* culpability, courts declared such laws unconstitutional. In determining whether a challenged punishment was unconstitutionally excessive, early courts compared the punishment to what had previously been permitted at common law.

For example, in an 1820 case—*Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70 (Ky. 1820)—the Kentucky Court of Appeals held that it would be unconstitutional under a state analogue to the Cruel and Unusual Punishments Clause to punish a person for exercising the common law right of self-defense, even though the criminal statute at issue purported to permit such punishment. The Court held that it would be "cruel indeed" to impose a whipping on a defendant whose actions were justified under the common law doctrine of self-defense, for such a defendant did not deserve punishment at all. *Id*. at 74.

Similarly, in *Commonwealth v. Wyatt*, 27 Va. (6 Rand.) 694 (1828), the General Court of Virginia stated that a judge could violate the cruel and unu-

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[22] In practice, this approach is similar to what modern criminal-law theorists have referred to as "limiting retributivism," or the use of retributivism as a "side constraint" on punishment. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 737-45 (2005); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590-92 (2005). According to this idea, criminal sentences may be imposed to serve multiple purposes (incapacitation, deterrence, etc.), but the retributive concept of disproportionality relative to culpability nevertheless represents an upper bound on legitimate punishment.

sual punishments clause by ordering the defendant to undergo excessive floggings, although a statute giving the judge discretion to impose flogging on operators of an illegal gambling business was not facially unconstitutional.

And in *Jones v. Commonwealth*, 5 Va. (1 Call) 555 (1799), the Supreme Court of Appeals of Virginia held that abrogation of the common law rule prohibiting imposition of a joint fine in a criminal case would be cruel and unusual because it could require some defendants to bear the punishment for others. In *Jones*, the defendants were convicted of assaulting a magistrate. As punishment, they were given a joint fine and were ordered to be imprisoned until the fine was paid. The court invalidated this punishment on the ground that it violated the common law prohibition of joint fines in criminal cases. The problem with a joint fine, as one of the two judges in the majority explained, was that it could require the defendant to "endure a longer confinement or to pay a greater sum than his own proportion of the fine" if one of his codefendants died, escaped, or became insolvent. *Id*. at 558 (Carrington, J.). Because the sentence subjected the defendant to a punishment "beyond the real measure of his own offence," the Court held that it violated both the constitutional command that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," *id.* at 557, as well as a statutory command that any "fine or amercement ought to be according to the degree of the fault and the estate of the defendant." *Id*. A second judge in the majority explained that "principles of natural justice … forbid

that one man should be punished for the fault of another[.]" *Id*. at 556 (Roane, J.).[23]

The approaches outlined above were consistent with settled understandings and longstanding traditions regarding the centrality of individual culpability to criminal punishment. Indeed, as late as 1877 this Court implied that it would be beyond the authority of government to punish even knowing violations of a criminal statute, where the violations were committed in good faith and with no "evil intent": "All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one." *Felton v. United States*, 96 U.S. 699, 703 (1877).

In reaching these conclusions, courts were guided by traditional views regarding criminal culpability that had been universally held for more than five hundred years. For example, the medieval jurist Henry de Bracton, whose influential work *On the Laws and Customs of England* was the most comprehensive treatment of English law before Blackstone, wrote that "a crime is not committed unless the intention to injure exists[.] It is will and purpose which mark maleficia …." 2 Henry de Bracton, *On the Laws and Customs of England* 384 (Samuel E. Thorne trans. & ed., Harvard Univ. Press 1968) (c. 1300). William Blackstone likewise maintained that

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[23] Judge Roane continued: "This is so unjust and contrary to the spirit of the constitution, that even if it were established by adjudged cases to be the law, nay even if an act of Assembly should pass authorizing it, in express terms, I should most probably be of opinion that the one should be exploded and the other declared unconstitutional and not law." 5 Va. (1 Call) at 557.

it was unjust to impose punishment without culpability. He wrote that "punishments are … only inflicted for the abuse of … free-will," 4 William Blackstone, *Commentaries* *27, and that "an unwarrantable act without a vitious will is no crime at all." *Id*. at *21.

III. The abolition of the insanity defense is an abrupt and severe departure from settled punishment practices.

As this Court has repeatedly recognized, the core justification of criminal punishment is moral culpability. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 250 n.4 (1952) ("Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." (quotation omitted)); *Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender").

For this reason, the law has long adhered to the idea that "[t]hose who are under a natural Disability of distinguishing between Good and Evil, as Infants under the Age of Discretion, Ideots and Lunaticks, are not punishable by any criminal Prosecution whatsoever." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 2 (1739). The rule exists because, as Hawkins wrote, "[t]he Guilt of offending against any Law whatsoever … can never justly be imputed to those who are either uncapable of understanding it, or of conforming themselves to it." *Id*. at 1. *Accord* 4 William Blackstone, *Commentaries* *25, *195 (1769) ("[L]unatics or infants … are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong.").

The insanity defense has ancient origins, and has been a bedrock common law principle since at least the 16th century. *See, e.g.*, Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227 (1966) [hereinafter "Platt & Diamond"]. It appears to have enjoyed very widespread acceptance throughout American history, from the founding, through the adoption of the Fourteenth Amendment, and up to the latter decades of the 20th century. *See id.*; *see also, e.g.*, Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and* Mens Rea*: Beyond* Clark v. Arizona, 97 J. Crim. L. & Criminology 1071, 1092, 1115-116 (2007) [hereinafter "Morse & Hoffman"]; *United States v. Drew*, 25 F. Cas. 913, 913 (C.C.D. Mass. 1828) (Story, J.) ("insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility"); *Commonwealth v. Rogers*, 48 Mass. 500, 503 (1844) (defendant should be acquitted if crime "was the result of the disease and not of a mind capable of choosing"—*i.e.*, if "it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will"). It continues to enjoy near-universal acceptance today. As Petitioners explain, "*every* American jurisdiction had an affirmative insanity defense until 1979." Pet. Br. 28 & Add.

The specific parameters of the insanity defenses used by federal and state courts have varied somewhat across different jurisdictions and have, to some extent, evolved over time. But crucially, the central thrust of the various approaches to the insanity defense appears to have been the question of whether mental disease or defect has robbed the defendant of

the capacity to know that his conduct is wrongful. *See, e.g.*, Platt & Diamond, *supra*.

Today, the insanity defenses of most jurisdictions incorporate either the *M'Naghten* test—which looks to whether a person does not know the nature and quality of his act or does not know right from wrong with respect to that act, *M'Naghten's Case*, 8 Eng. Rep. 718 (H. L. 1843)—or the Model Penal Code standard—which excuses from responsibility a person who "at the time of [criminal] conduct as a result of mental disease or defect … lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law," Model Penal Code § 4.01. *See also* Pet. Br. 26-28 & Add. (discussing other variations).

Regardless of the particular version of the test applied, however, "in nearly every State" the law continues to "incorporate[] th[e] principle" "that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong." *Delling v. Idaho*, 133 S. Ct. 504, 504 (2012) (Breyer, J., dissenting from denial of certiorari). Because the evaluation of moral culpability lies at the heart of the insanity defense, the defense serves an important role in linking punishment with culpability.

Permitting defendants to use evidence of insanity to negate *mens rea* is not a meaningful equivalent to the traditional insanity defense. Older common law formulations of *mens rea*, such as "malice," arguably incorporated (at least to some degree) the requirement that the prosecution prove that the defendant possess the intent to do wrong. But modern criminal statutes typically require prosecutors to prove only narrow factual questions concerning the defendant's state of mind, such as whether he know-

ingly performed a certain act. They are not required to prove whether he knew the act was wrongful. Thus, the Kansas "*mens rea*" approach is significantly less protective than the *M'Naghten* test. *See, e.g.*, Morse & Hoffman, *supra*, at 1095 (noting that the insanity defense "address[es] normative issues concerning responsibility that are broader than claims involving action or mens rea, which are more factual").

If tested against the original meaning of the Cruel and Unusual Punishments Clause, Kansas's abolition of the insanity defense appears to be the very sort of jarring departure from longstanding practice resulting in punishment in excess of culpability that would have been understood as violating the Eighth Amendment. In this regard, *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70 (Ky. 1820), is a particularly instructive early case. In *Ely*, as noted above, the Kentucky Court of Appeals stated that it would be unconstitutional under a state analogue to the Cruel and Unusual Punishments Clause to punish a person for exercising the common law right of self-defense—despite the fact that a criminal statute had purported to permit such punishment. The court suggested that it would be "cruel indeed" to impose the punishment of whipping on a defendant whose actions were justified under the common law doctrine of self-defense—because such a defendant did not deserve *any* punishment. *Id*. at 74.

Similarly, when a handful of states attempted to abolish the insanity defense by statute in the early part of the 20th century, the courts struck down such innovations as unconstitutional. *See, e.g.*, *Sinclair v. State*, 132 So. 581 (Miss. 1931) (per curiam); *State v. Strasburg*, 110 P. 1020 (Wash. 1910). A concurring opinion in *Sinclair* considered the implications of the

state's abolition of the insanity defense under a state analogue to the Cruel and Unusual Punishments Clause at length:

> It certainly would be cruel and unusual to punish a child of tender years, incapable of judging the consequences of its act, should it, through misjudgment or otherwise, administer poison to another child or to another person. It would be equally cruel and equally as unusual to impose life imprisonment or death upon any person who did not have intelligence enough to know that the act was wrong or to know the consequences that would likely result from the act.

Sinclair, 132 So. at 584 (Ethridge, J., concurring).

Kansas's decision to depart from longstanding prior practice by abolishing a traditional common law defense designed to prevent punishment of the morally innocent likely would violate the Cruel and Unusual Punishments Clause as that provision was originally understood. In this way, the Eighth Amendment, originally understood, would operate to ensure that a defendant was not punished "beyond the real measure of his own offence," *Jones*, 5 Va. (1 Call) at 558 (Carrington, J.), due to unjust and severe departures from longstanding and broadly-accepted punishment practices.

CONCLUSION

The insanity defense is a longstanding common law safeguard for distinguishing those who are truly culpable—and thus deserving of punishment—from those who are not. Abolishing the defense is a dramatic departure that significantly extends the reach of criminal liability—including to those who lack moral culpability, as traditionally conceived. It is

likely that the Cruel and Unusual Punishments Clause, if read in light of its history and original meaning, would proscribe Kansas's outright abolition of the insanity defense.

Respectfully submitted,

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