
VIRGINIA LAW REVIEW

IN BRIEF

VOLUME 97

AUGUST 31, 2011

PAGES 51–60

RESPONSE

ON PROPORTIONALITY AND FEDERALISM: A RESPONSE TO
PROFESSOR STINNEFORD

*Michael J. Zydney Mannheim**

JOHN Stinneford's latest article¹ sheds fresh light on the original public meaning of the Eighth Amendment. Stinneford provides a cogent rejoinder to Justice Scalia's position that the Cruel and Unusual Punishments Clause² contains no proportionality principle. But to show that the Clause contains *some* proportionality requirement gets us only part of the way to an understanding of what that proportionality principle demands. And Stinneford's work falters in its articulation of the proportionality requirement of the Cruel and Unusual Punishments Clause as understood in 1791. He claims, in essence, that the Clause was understood as generally constraining Congress from inflicting punishments that were significantly harsher than those imposed at common law for the same offense. While Stinneford's assertion that the Clause imposed common-law constraints on Congress's power to punish is well supported, he incorrectly assumes a consensus in 1791 about the nature of the common law. To the contrary, the conceptions of the common law in 1791 were far from homogenous. Specifically, around that time, a more modern, Realist notion of the common law began to emerge and was

* Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. J.D. 1994, Columbia Law School. E-mail: mannheimem1@nku.edu.

¹ John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 Va. L. Rev. 899 (2011).

² U.S. Const. amend. VIII ("[C]ruel and unusual punishments [shall not be] inflicted.").

championed by the Anti-Federalists, who conditioned ratification of the Constitution on the inclusion of a Bill of Rights and whose views are therefore critical to an understanding of the Cruel and Unusual Punishments Clause. Thus, while Stinneford is probably correct that the Clause was widely understood in 1791 as imposing common-law constraints on the federal government's power to punish, it is unlikely that there was any consensus as to what that meant. In particular, the Anti-Federalists—and their political heirs, the Republicans—took a more state-centered approach than Stinneford would allow.

I.

The importance of Stinneford's contribution should not be understated. He has provided, at long last, an originalist defense of the principle that the Cruel and Unusual Punishments Clause of the Eighth Amendment forbids disproportionate punishments. Such a defense has been strangely absent in the twenty years since Justice Scalia delivered his stinging originalist critique of current Eighth Amendment jurisprudence in his plurality opinion in *Harmelin v. Michigan*.³ According to Justice Scalia, the Clause was originally understood to forbid only the imposition of certain types of punishment and not to reach punishments thought to be disproportionate to the crime committed.⁴ To be sure, nonoriginalist attacks have been launched against this view, beginning with Justice White's dissent in *Harmelin* itself.⁵ Yet Stinneford appears to be the first to meet Justice Scalia on his own turf and counter the latter's originalist account of the Clause with his own highly persuasive originalist narrative.

Yet, as Stinneford himself recognizes, establishing proportionality as a principle embedded in the Cruel and Unusual Punishments Clause is only the first step: "When one says that a punishment must not be excessive, the natural next question is: 'Relative to what

³ 501 U.S. 957 (1991) (plurality opinion).

⁴ See *id.* at 966–74; see also *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) ("The Eighth Amendment is addressed to always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew."). Justice Thomas has also expressed his agreement with this view. See *Graham v. Florida*, 130 S. Ct. 2011, 2044–47 (2010) (Thomas, J., dissenting); *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in the judgment).

⁵ See *Harmelin*, 501 U.S. at 1012–18 (White, J., dissenting).

standard?”⁶ Stinneford uses the common law of punishments as his benchmark. He argues that “the Bill of Rights was adopted largely to ensure that the new federal government would be required to recognize the fundamental common-law rights of American citizens.”⁷ Accordingly, his central claim is that the Cruel and Unusual Punishments Clause was originally understood as generally forbidding the federal government from imposing punishments that are excessive in relation to punishments for the same conduct at common law.⁸ And he assumes that this constraint was, and is, uniform across the nation.⁹

II.

A.

Stinneford’s thesis is well supported, but only up to a point. He is on solid ground in discussing what the term “cruel and unusual” meant to the English in the late seventeenth century, and what that phrase (or the similar “cruel or unusual”) meant in the context of state constitutions and statutes. It is straightforward enough to imagine common-law constraints in a system comprising a unitary “common law.” Indeed, in a prior work that forms the analytical foundation for *Rethinking Proportionality*, Stinneford expressly claimed¹⁰ that the common law that those in the founding period had in mind was of the pre-Realist variety: monolithic, declaratory, and untethered to sovereignty.¹¹ But Stinneford pays inadequate at-

⁶ Stinneford, *supra* note 1, at 904.

⁷ *Id.* at 943–44.

⁸ See *id.* at 947–52. A necessary corollary, in an era when we no longer look to the common law to determine punishments, is that we must now look to longstanding practice. Stinneford asserts that “[i]f a punishment is significantly harsher than prior practice would permit for a given crime, the punishment is unusual.” *Id.* at 968.

⁹ See *id.* at 951–52.

¹⁰ See John Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 *Nw. U. L. Rev.* 1739, 1768–69 (2008) (“Common law judges did not see themselves as formulating public policy, but rather as identifying long-standing customary rules and applying them to particular cases.”). While Stinneford here is referring to seventeenth- and eighteenth-century judges, it is this vision of the common law that he claims those in the revolutionary and founding periods had in mind when they advocated common-law constraints on legislatures. See *id.* at 1793–1807.

¹¹As Justice Holmes famously caricatured this view:

tention to the fact that the framers and ratifiers of Constitution “split the atom of sovereignty” by creating a unique federal system.¹² More importantly, Stinneford fails adequately to consider the extent to which the framers and ratifiers themselves viewed their invention of dual sovereignty as inconsistent with a unitary view of common law.¹³

The founding-period view of the common law in the new American States was itself far from monolithic. It was around this period that “the instrumental (rather than the declaratory) nature of the common law increasingly began to take hold in legal thinking.”¹⁴ This led to a major jurisprudential dispute over whether the common law of England had been imported into America “lock, stock, and barrel,” or instead “selectively” and only when consistent with local needs.¹⁵ As Grant Gilmore tells us, “[s]uch questions never received neat and tidy answers.”¹⁶

As early as the 1780s, and through the first decade of the nineteenth century, there was a growing realization, at least among some, that the idea of a single monolithic common law governing the American States was entirely incoherent. For example, St. George Tucker, in his American version of Blackstone in 1803, surveyed the state of the common law in the colonies prior to the Revolution and

Books written about any branch of the common law treat it as a unit . . . It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law.

Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

¹² U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); see Kathryn Preyer, Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic, 4 *Law & Hist. Rev.* 223, 224 (1986) (“[G]eneral problems of sovereignty and the particular problem of the reception of English [common] law were further compounded by the structure of the new national government with its . . . novel relationship to the states of the union.”).

¹³ To be fair, Stinneford does concede in a footnote that the acceptance of the pre-Realist view of the common law “was not entirely true by the end of the eighteenth century.” Stinneford, *supra* note 10, at 1769 n.170. However, he fails adequately to account for the consequences of this concession to his central claim.

¹⁴ Henry P. Monaghan, Supremacy Clause Textualism, 110 *Colum. L. Rev.* 731, 774 (2010) (footnote omitted).

¹⁵ Grant Gilmore, *The Ages of American Law* 20 (1977).

¹⁶ *Id.*

dismissed as absurd the notion that any single common law bound them together:

[I]t would require the talents of an Alfred to harmonize and digest into one system such opposite, discordant, and conflicting municipal institutions, as composed the codes of the several colonies at the period of the revolution In vain then should we attempt, by any *general theory*, to establish an uniform authority and obligation in the common law of England, over the American colonies¹⁷

B.

The debate over the nature of the common law during the first twenty years of the Republic was most salient in the debate over the existence of a general federal common law of crime. Like the question of the existence of an American common law in general, contemporary opinion of the existence of a general federal criminal common law was “muddled.”¹⁸ And like many legal debates this country has seen, this one had stark political undertones and was marked, perhaps even driven, by ideological divisions. Importantly, it was the Anti-Federalists, those who pushed most fiercely for the Bill of Rights, and their political heirs, the Republicans, who railed against the existence of a general criminal common law. And it was the Republicans, ultimately, who prevailed.

The debate between the Federalists and Republicans over the existence of a general criminal common law was first laid bare in the federal courts in 1798, only seven years after the adoption of the Bill of Rights, in *United States v. Worrall*.¹⁹ Worrall was convicted in the Circuit Court for Pennsylvania, presided over by Justice Samuel Chase of the U.S. Supreme Court and Judge Richard Peters of the Dis-

¹⁷ 1 Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 405 app. E (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803); accord Morton J. Horwitz, *The Transformation of American Law, 1780–1860*, at 11 (1977).

¹⁸ Preyer, *supra* note 12, at 263.

¹⁹ 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766). The information about *Worrall* is taken from the report of the case in Francis Wharton, *State Trials of the United States During the Administrations of Washington and Adams 189–98* (Philadelphia, Cary & Hart 1849).

trict Court, of attempting to bribe a federal Commissioner of Revenue. He moved in arrest of judgment on the ground that the bribery of a Revenue Commissioner was nowhere criminalized in the federal criminal code. When the District Attorney, William Rawle, asserted that the indictment could be supported at common law, Chase cut him short and delivered an opinion rejecting the notion of a general criminal common law.

Chase first stated definitively his opinion that “the United States, as a Federal government, have no common law.”²⁰ Chase recognized that each of the former colonies had adopted the common law of England. However, each adopted only “so much of the common law as was applicable to their local situation and change of circumstances.”²¹ Chase provided a proto-Realist account of the common law as judge-made policy that varied with local conditions, an account that foreshadowed the Realist triumph in *Erie*²² precisely 140 years later:

[E]ach colony judged for itself what parts of the common law were applicable to its new condition; and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced . . . and that there is . . . a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another . . .²³

To hammer the point home, Chase pointed to the futility, the nonsensicality, of applying “the common law” to a federal criminal action:

[W]hat is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified, as it exists in some of the States; and of the various modifications which are

²⁰ *Worrall*, 28 F. Cas. at 779.

²¹ *Id.*

²² *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”).

²³ *Worrall*, 28 F. Cas. at 779.

we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?²⁴

Chase, concededly, may have been an outlier. Judge Peters, who sat with Chase on the *Worrall* case, expressly disagreed with him, declaring: “The power to punish misdemeanours is originally and strictly a common law power; of which I think the United States are constitutionally possessed.”²⁵ Justice Joseph Story would later write that Chase was unique among the first Justices of the Supreme Court in rejecting a general federal common law of crime.²⁶ But there is good reason for that. Chase articulated the Anti-Federalist, and later the Republican, position on the matter.²⁷ All thirteen of the men who sat on the Supreme Court until 1804, including Chase, were Federalists. However, Chase began his career as an Anti-Federalist, a “vehement opponent of the proposed Federal Constitution on the grounds that it too tightly constricted the sovereignty of the individual states.”²⁸ He switched parties only after the Constitution was ratified.²⁹ Chase expert Stephen Presser surmises that *Worrall* may have represented “the last vestiges of Chase as a popular states-rights advocate.”³⁰

Within a short time after Chase’s articulation of the classic Anti-Federalist position, the cause was taken up by the Republicans.³¹ They saw the assertion of a general federal jurisdiction over common-law crimes as a power grab by the federal government, a way

²⁴ Id.

²⁵ Id.

²⁶ See 1 William W. Story, *Life and Letters of Joseph Story* 299 (1851) (observing that “excepting Judge Chase, every Judge that ever sat on the Supreme Court Bench, from the adoption of the Constitution until 1804, (as I have been very authoritatively informed,) held a like opinion” that there was a general federal common law of crimes).

²⁷ See Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 *Nw. U. L. Rev.* 26, 68 (1978) (relating the “dispute . . . over the existence of a federal common law of crimes . . . to the broader Federalist/Republican split over the extent of powers that the Constitution granted to the central government”).

²⁸ Id. at 73.

²⁹ See id.; see also Daniel W. Howe, *Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 *Nw. U. L. Rev.* 1, 8, 10 (1989).

³⁰ Presser, *supra* note 27, at 73.

³¹ See Stephen B. Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer*, 4 *Law & Hist. Rev.* 325, 329 (1986) (“[T]he Jeffersonians . . . took their cue on federal common law of crimes jurisdiction . . . from . . . Samuel Chase . . .”).

to obtain authority via the judiciary over subjects that could not properly be reached by the limited legislative powers granted by the Constitution. Republican patriarch Thomas Jefferson privately pronounced the “new doctrine” that there was a general federal common law an “audacious, barefaced and sweeping pretension” that threatened the very existence of the state courts.³² James Madison echoed Chase’s sentiments when he wrote in his Report on the Virginia Resolutions:

In the state prior to the Revolution, it is certain that the common law, under different limitations, made a part of the colonial codes. But . . . it was the separate law of each colony within its respective limits, and was unknown to them as a law pervading and operating through the whole, as one society.

It could not possibly be otherwise. The common law was not the same in any of the two colonies; in some, the modifications were materially and extensively different.³³

The matter of whether there is a general federal common law of crimes eventually was resolved in the negative. In *United States v. Hudson*, the Supreme Court articulated the Republican conception of the common law, as Chase and Madison had done before, noting that the common law “var[ied] in every state in the Union.”³⁴ Accordingly, the Court rejected the notion of a general federal common law of crimes: “The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”³⁵ The result is not surprising: by the time *Hudson* was decided in 1812, there were only two Federalist judges left on the Court.³⁶ And long before *Hudson*, the matter

³² Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), in 9 Works of Thomas Jefferson 73, 76 (1905).

³³ Mr. Madison’s Report on the Virginia Resolutions, reprinted in *The Virginia and Kentucky Resolutions of 1798 and ‘99*, at 21, 31 (Jonathan Elliot ed., Washington, Jonathan Elliot 1832).

³⁴ See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812).

³⁵ *Id.* at 34.

³⁶ These were Chief Justice John Marshall and Justice Bushrod Washington. The official case report indicates that Washington was absent from the bench when *Hudson* was decided. See *id.* at 32. Marshall apparently joined the majority. See Preyer, *supra* note 12, at 247, 248 n.86.

had been settled in the court of public opinion.³⁷ The Federalist conceit in prosecuting federal common-law crimes probably played some part in Jefferson's election in 1800,³⁸ after which the Federalists would never again hold either the White House or either House of Congress.³⁹

III.

If Stinneford is correct that the Cruel and Unusual Punishments Clause was understood in 1791 as imposing common-law constraints on the federal government's power to punish, and I believe he is, then that is only the beginning, not the end, of the inquiry. The next step is to determine the nature of those common-law constraints as understood at that time. If the common law was thought of in its pre-Realist formulation—declaratory rather than instrumental, unitary rather than particularized, free floating rather than tied to sovereignty—then Stinneford is correct that the Clause was understood as imposing uniform constraints. But a different picture emerges when one recognizes that a robustly Realist vision of the common law was developing at around the same time the Bill of Rights was adopted. This vision conceptualized the common law much as we do today: as a set of mutable and imperfect policy choices made by judges, that vary from place to place based on particularized local needs. This is especially true of the common law of crime—overwhelmingly a local issue—which necessarily encompasses the common law of punishment.

It may well be that the Anti-Federalists, and later the Republicans, championed this vision of the common law to further their political goals, that is, to cabin the power of the central government, and preserve the autonomy and sovereignty of the States as much as the new Constitution would allow. But champion it they did, much as they insisted upon a Bill of Rights to accomplish the same ends. A decent respect to the origins of the Bill of Rights demands that we

³⁷ See *Hudson*, 11 U.S. (7 Cranch) at 32 (“Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion.”).

³⁸ See Presser, *supra* note 27, at 47.

³⁹ See Gary D. Rowe, Note, *The Sounds of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 *Yale L.J.* 919, 922 n.12 (1992) (“The Federalists held power from 1796 to 1800 and never regained it thereafter.”).

look to the Anti-Federalists in interpreting its meaning, for the Bill was the price they exacted in exchange for their reluctant acquiescence to union.⁴⁰ When one reads the Cruel and Unusual Punishments Clause in the light shed by the Anti-Federalist conception of the common law that had emerged by the 1790s, the common-law constraints that the Clause embodies appear more particularized and local, less uniform and general. The Anti-Federalists' Eighth Amendment may well have been understood in 1791, like the Anti-Federalist vision of common law, as varying from place to place.⁴¹

⁴⁰ Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 *Nw. U. L. Rev.* 39, 67 (1989) (asserting that "Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights" because "without their acquiescence ratification might never have been secured").

⁴¹I have previously articulated this view in Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 *U. Cin. L. Rev.* 819, 871-73 (2006), and I elaborate upon it in Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments* (June 30, 2011) (unpublished manuscript, available at <http://ssrn.com/abstract=1875868>).