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ARTICLE

IMPRISONING THE INNOCENT: THE “KNOWLEDGE OF LAW” FICTION

Phillip D. Kline[†]

I. THE PRESENT PROBLEM OF PUNISHING THE MORALLY INNOCENT

Disorientation alarmed him. Ocie Mills was accustomed to deciding his direction and defining his purpose. But today, Monday, May 15, 1989, Ocie and his son Cary were reporting to prison, adjudged felons by the country they loved.¹

Tension between individual liberty and the state, and the inherent metaphysical mysteries of that tension,² are at least as old as humankind’s earliest discovered written stories. In *The Epic of Gilgamesh*, written from circa. 2150-1400 BC and considered the most ancient example of literature,

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1. James J. Drumme, *This Land is My Land – Isn’t It?*, NEW AM. (June 19, 1989) [hereinafter *This Land*], <https://www.thenewamerican.com/usnews/constitution/item/18055-this-land-is-my-land-isnt-it>; Author’s Interview with Cary Mills, recorded with permission (September 27, 2017) [hereinafter *Author’s Interview*].

2. I propose one source of our current difficulty in assessing the proper scope and meaning of the Eighth Amendment and to punish justly is an unwillingness to acknowledge foundational truths and their implications while acknowledging that due to human fallibility the procedural protections provided in our Constitution and the equal protection clause fail to adequately forward those truths. This failure is partially due to our refusal to speak in the language of faith, or metaphysics, dismissing intuition, refusing to acknowledge the aspirational nature of the Constitution and a failure to recognize the presuppositions present in all language. See *infra* pp. 59-71.

the Sumerian gods created Enkidu and tasked him to curb the harsh rule of the demi-god Gilgamesh, the King of Uruk.³

History and literature are consistent with this topic, revealing the danger of state tyranny against man, not the individual's tyranny against the state.

And the same danger is present today. In our nation, founded on the promise of individual liberty, procedural protections of liberty are failing as the state assumes far greater jurisdictional authority over the lives of its citizens. The symptoms are limited, but the beginnings of disease often are. It is the loss of principle that is monumental and which will allow the symptoms to grow in number and strength.

Ocie's wife maneuvered their car silently onto the Escambia Bay Bridge, which was embraced by Pensacola, Florida's morning fog. Likewise, Ocie shrouded his thoughts as he glanced towards his son Cary, 31. Their eyes met. No words were spoken.

Keith Onsdorff, an attorney for the United States Environmental Protection Agency, had much to say about Ocie and Cary's prison sentence. He trumpeted to assembled media that the EPA was "truly gratified" for the prison term so that "a strong message" would be sent to other polluters of the nation's "navigable waterways."⁴

The Millses were found guilty of five counts of discharging pollutants into the waters of the United States without a permit, "in violation of Sections 301(a) and 309(c) [of] the Clean Water Act, Title 33, United States Code, Sections 1311(a) and 1319(c)."⁵

3. *The Epic of Gilgamesh* is considered as one of humankind's earliest written stories. Gilgamesh is now considered an historical figure who ruled Uruk in southern Mesopotamia circa 2100 B.C. In the Epic, the citizens of Uruk suffer under Gilgamesh's harsh rule, enslaving his subjects to forward his interests. See generally *Gilgamesh*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Gilgamesh> (last visited Feb. 2, 2018); *Epic of Gilgamesh*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Epic-of-Gilgamesh> (last visited Feb. 2, 2018). Most historians consider Gilgamesh as a semi-mythic historical figure who is "widely accepted" as the 5th King of Uruk. See Joshua J. Mark, *Gilgamesh*, ANCIENT HIST. ENCYCLOPEDIA, <https://www.ancient.eu/gilgamesh/> (last visited Feb. 2, 2018).

4. Author's Interview, *supra* note 1; see also This Land, *supra* note 1.

5. *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

Deterrence, or punishing to warn others, has long been recognized as a legitimate goal of punishment. Blackstone identified the specific deterrence of the offender and the general deterrence of the public as the primary purposes of punishment,⁶ proclaiming punishment is inflicted, not as a means of expiation or atonement, but “as a precaution against future offense of the same kind . . . or by deterring others by the dread of his example.”⁷

Yet Blackstone, as protective of “public safety” as a utilitarian can be, would recoil at the treatment of Ocie Mills.⁸ Much as Federal District Court Judge Roger Vinson did when criticizing the government’s claim that Ocie Mills committed a “knowing” violation of law. The government employed “a reversal of terms that is worthy of *Alice in Wonderland*” to accomplish their objective, Vinson explained.⁹

He then took aim at “the regulatory hydra which emerged from the Clean Water Act” that sent a man and his son to prison for “plac[ing] clean fill dirt on dry land” that they owned while claiming the father and son “discharge[ed] pollut[ants] the navigable *waters* of the United States.”¹⁰

The *dry land*, which the Corps of Engineers construed as a *wetland*, was located at the head of East Bay in Pensacola and consisted of two lots on which Cary hoped to build his dream home.¹¹ But, before building, father

6. 4 WILLIAM BLACKSTONE, COMMENTARIES *11 (republished in 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS (George Sharswood, ed. 1893), <http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-2> (last visited Feb. 2, 2018)). I join others in disagreeing with Blackstone on this point and argue that unlimited consequentialist penological purposes offend the dignity of individuals by using the individual as a means, rather than recognizing them as an end. See *infra* pp. 23-71; see also Mark 2:28.

7. 4 WILLIAM BLACKSTONE, COMMENTARIES *11. Retributive punishment serves the ends of justice and properly sets the stage for the re-establishment of right relationship, or righteousness, recognizing the wrong committed and thereby recognizing the victim and the offender’s intrinsic worth. Utilitarian aims, however, use individuals as a means and offends human dignity. See generally Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 337 (1966); Jeffrey C. Tuomala, *Christ’s Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221 (1993).

8. I argue that Blackstone would naturally apply retributive proportionality as a limit to consequentialist aims despite his “Toryism” in affirming the supreme power of Parliament. See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4-19 (1996).

9. *Mills*, 817 F. Supp. at 1547.

10. *Id.* at 1547 (quoting 33 U.S.C. § 1319(c)(1)).

11. Author’s interview, *supra* note 1.

and son decided to repair and stabilize an old drainage ditch and use clean sand as fill on the lots. For this, they would pay a dear price.

America, today, always wants someone else to pay. Fueled by media amplification of the politics of fear and false hope, the nation demands quick fixes to perplexing problems. The nation is even slowly converting feelings of well-being into positive rights to be protected by institutions and government.¹²

It is not surprising, then, in this environment of hyper self-interest, where media catapults local issues into national concerns and elected officials convert concerns to fears, that considerations of the accused and criminals are marginalized. Those exercising political power do not identify with the isolated, forgotten, and different. Ironically, the demand for simple solutions born in self-interest is spawning a loss of freedom and increasing the growing tendency of the state to diminish the individual.

Yet, such passions were not unknown or unforeseen at our nation's founding. In England, contemporaneous with the American Revolution and the adoption of the Eighth Amendment's prohibition against "cruel and unusual punishments,"¹³ Parliament had authorized the death penalty for more than 200 crimes.¹⁴ Blackstone lamented that Parliament, through indifference and answering "the passions or interests of a few," had "too hastily employ[ed] such means as are greatly disproportionate to their end" by imposing a death sentence on those who broke down "the mound of a fishpond, whereby any fish shall escape; or [who] cut down a cherry-tree in

12. College campuses are implementing "safe spaces" where students can be shielded from dissenting viewpoints, creating tension with First Amendment principles. See, e.g., "Safe Spaces' on college campuses run at odds with First Amendment, say law experts, FOX NEWS (November 14, 2015), <http://www.foxnews.com/us/2015/11/13/safe-spaces-on-college-campuses-unconstitutional-say-law-experts.html>. In Canada, the Canadian Law Society of Upper Canada, the official licensing agency for lawyers in Ontario, is compelling lawyers, at the threat of losing their license, to prepare "a statement of principles" consistent with guidelines promulgated by the society. Government compelled speech is one symptom of converting that previously considered a negative right or an issue of expressing respect into a positive right to be enforced by government. See Bruce Parody, *Canadian Law Society's new policy compels speech, crosses line that must not be crossed*, NAT'L POST (Oct. 3, 2017), <https://www.sott.net/article/363588-Canadian-Law-Societys-new-policy-compels-speech-crosses-line-that-must-not-be-crossed>.

13. U.S. CONST. amend. VIII.

14. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976).

an orchard . . . [as well as] those “seen for one month in the company of persons who call themselves, or are called, Egyptians.”¹⁵

Limiting such undisciplined passions was a primary aim of the drafters of the Eighth Amendment. “Your men who go to Congress are not restrained by a bill of rights,” warned Patrick Henry at the Virginia Ratifying Convention for the Constitution in 1788. Without a Bill of Rights and the Eighth Amendment, Henry pointed out, Congressmen “are not restrained from inflicting unusual and severe punishments What will be the consequence? They may inflict the most cruel and ignominious punishments.”¹⁶ “We are told [by those opposing a Bill of Rights that] we are afraid to trust ourselves; that our own representatives—Congress—will not exercise their powers oppressively; that we shall not enslave ourselves Who has enslaved France, Spain, Germany, Turkey, and other countries which groan under tyranny? They have been enslaved by the hands of their own people. If it will be so in America, it will be only as it has been every where else.”¹⁷

Henry prevailed, and Virginia refused to ratify the Constitution, unless a Bill of Rights, including a prohibition against cruel and unusual punishments, was attached.

Two-hundred and twelve years later, in Bayou la Batre, Alabama, 927 miles southwest of the site of Henry’s speech but within the modern boundaries of the nation he helped found, agents of the National Marine Fisheries Service raided the business of Abner Schoenwetter, obtaining evidence that sent Schoenwetter to federal prison for six years. Schoenwetter improperly packed his imported lobsters in plastic, rather than cardboard,¹⁸ violating the Lacy Act which requires U.S. citizens to comply with all foreign laws and regulations.¹⁹ Honduras, the source of Schoenwetter’s lobsters, through a regulation later ruled invalid by the Honduran high court, prohibited shipping lobsters in plastic.²⁰

15. 4 WILLIAM BLACKSTONE, COMMENTARIES *4.

16. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, IN 1787 at 411 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Debates*].

17. *Id.* at 412.

18. See *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

19. 16 U.S.C. §§ 3371 et. seq. (1900).

20. *McNab*, 331 F.3d at 12. Later, the Honduran Supreme Court ruled that packing regulation violated by Schoenwetter was invalid. This ruling, however, did not save Schoenwetter from this conviction or serving time in prison. See *Rough Justice*, THE ECONOMIST (July 22, 2010) http://www.economist.com/node/16640389?story_id=16640389.

In 2014, 724 miles southeast of Schoenwetter's arrest, ninety-year-old World War II veteran and pastor, Arnold Abbott was arrested and faced sixty days in jail for feeding the homeless in Fort Lauderdale, running afoul of a regulation requiring permits and the provision of a "porta-potty."²¹ Abbot figured providing the porta-potty was the city's job.

And citizens in every state are here warned that a criminal record, a fine, and six months in prison await those who "reproduce, or use" the character Woodsy the Owl or his slogan, "Give a Hoot, Don't Pollute," without permission of the United States government.²²

A. *The Erosion of Mens Rea through the Expanding Breadth and Number of "Public Welfare Crimes" and Weak Eighth Amendment Jurisprudence Combine to Place the Innocent in Jeopardy.*

1. Ignorance of that which is Unknowable can Land You in Prison.

"[W]e have assumed a tendency to federalize 'everything that walks, talks, and moves' . . . [and now] hoots," observed Justice Neil Gorsuch when speaking to the Federalist Society in 2013.²³

Federalization and criminalization are so prevalent that we are unable to count the number of federal crimes.²⁴ They're too numerous and are hidden in a byzantine regulatory structure. The federal penal code "spread[s] across . . . fifty-one titles and 27,000 pages" containing more than 4,000 federal crimes.²⁵ Additionally, estimates are that there are more than 300,000 federal regulatory crimes and perhaps as many, or more, state crimes.²⁶

21. See, e.g., Jordan Richardson, *Pastor Charged with Criminal Penalty for Feeding the Homeless*, THE DAILY SIGNAL (November 6, 2014), <http://dailysignal.com/2014/11/06/pastor-charged-criminal-penalty-feeding-homeless/>.

22. 18 U.S.C. § 711a (1994).

23. *Judge Neil Gorsuch on Overcriminalization*, RIGHT ON CRIME (Nov. 18, 2013), <http://rightoncrime.com/2013/11/judge-neil-gorsuch-on-overcriminalization/>. Gorsuch then served on the 10th Circuit Court of Appeals and assumed his position on the Supreme Court on April 8, 2017. *Neil Gorsuch*, OYEZ, https://www.oyez.org/justices/neil_gorsuch (last visited Feb. 2, 2018).

24. There are more than 4,000 crimes in the federal criminal code. The remaining crimes are detailed in federal regulatory reports. The Congressional Research Service has been unable to tally the number of such crimes. See, e.g., *Overcriminalization*, RIGHT ON CRIME, <http://rightoncrime.com/category/priority-issues/overcriminalization/> (last visited Feb. 2, 2018).

25. Edwin Meese, III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. AND CRIMINOLOGY 725, 739 (2012) [hereinafter *Reconsidering*].

26. *Id.* at 740. Federal courts lack common law jurisdiction and so all federal crimes must be statutory. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). So, counting

Today, more than one-third of America's workers face regulatory oversight through licensure, "almost seven times higher than it was just fifty years ago [and is] almost as common for workers in the United States as goldbricking."²⁷ This assessment does not include the impact of the regulation of worker conduct.

Yet, *ignorantia juris non excusat*²⁸ is still considered a legal maxim.

And lawyers and serious thinkers scoff.

Claiming knowledge of the content and scope of these laws is just as beyond our reach as Caligula's laws were beyond the vision of his subjects.²⁹ "[N]otoriously and ridiculously false,"³⁰ writes John Austin, regarding the claim. As British Parliamentarian Sir John Foster of Northwich wryly

federal crimes should be a straight forward proposition. It isn't. "So large is the present body of federal criminal law that there is not conveniently accessible, complete list of federal crimes." *Task Force on Federalization of Criminal Law, American Bar Association, THE FEDERALIZATION OF CRIM. L. 9* (1998) [hereinafter *Federalization Report*]. In 2008 Rep. John Sensenbrenner (R-Wis.) requested the Congressional Research Service to count the number of criminal offenses in the federal code. The Service response to the Congressman stated that they did not have sufficient manpower or resources to accomplish the task. See, e.g., Mike Masnick, *Overcriminalization: Congressional Research Service Doesn't Have The Manpower to List All Federal Crimes*, TECHDIRT (July 19, 2013), <https://www.techdirt.com/articles/20130718/17001523860/overcriminalization-congressional-research-service-doesnt-have-manpower-to-list-all-federal-crimes.shtml>. See also, Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Criminal Laws*, THE WALL STREET J. (July 23, 2011) ("[T]he hunt [for] an exact number of federal crimes is likely to prove futile and inaccurate.") (quoting James Strazzella, author of "The Federalization of Criminal Law," a report of the American Bar Association).

27. Paul M. Spinden, *The Enigma of Engineering's Industrial Exemption to Licensure: The Exception that Swallowed the Profession*, 83 U.M.K.C. L. REV. 637, 637 (2015). "Goldbricking is intentionally wasting time on the job, treating each brick as if it were made of gold.

28. Ignorance of the law is no excuse.

29. Caligula, Roman emperor from AD 37-41, is known for his cruel and tyrannical rule. To promote his arbitrary power over his citizens he posted laws he promulgated high on the pillars of buildings, beyond the vision of his subjects. See Janine Turner, *The infamous Roman Emperor Caligula and the U.S. Congress*, THE WASH. TIMES (October 1, 2015), <https://www.washingtontimes.com/news/2015/oct/1/janine-turner-the-infamous-roman-emperor-caligula-/>; see also Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, in GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 45, 48 (Gene Healy, ed., 2004). Publishing laws and promulgations was ancient practice so that citizens were provided notice so that they could exercise their reason to conform their conduct to the laws. See, e.g., *Exodus* 31:18 (God published his Ten Commandments to Moses); *Deuteronomy* 27:1-3, 8 (Israel was to write its laws); *Deuteronomy* 6:7-8 (Israel was commanded to display its laws); and *Exodus* 24:7 (the laws were to be read to the people).

30. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 481-82 (Robert Campbell ed., 5th ed. 2005) (1885).

observed, “Everyone is deemed to know the law except Her Majesty’s judges who have a Court of Appeal put over them to put them right.”³¹

Ocie Mills’ disorientation became Judge Vinson’s frustration. Two years later, after the Millses served twenty-one months in prison, Judge Vinson considered a challenge to the Millses’ conviction. Vinson recognized that a “general principle” of criminal law requires the law to provide some form of notice as to the type of conduct prohibited, so that “person[s] of common intelligence [are] not . . . forced to guess at the potential applicability of a criminal prohibition to their conduct.”³² Put in a way a five-year-old protesting his punishment understands, “I didn’t know! It’s unfair!”

This general principle is one of the fastly eroding protections that is designed to protect the morally innocent from facing punishment.

To Judge Vinson’s scorn, such basic fairness rings hollow in America’s courts. “I am unable to say,” Judge Vinson continued, “that a person of common intelligence would be able to ascertain that [the] statutory prohibition [of the Clean Water Act] applies to clean fill dirt placed onto [the Millses’] lot”³³

Understandable criminal laws are a primary requisite for justice. “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.”³⁴

Judge Vinson’s comments were prescient and his point was particularly relevant to the Millses’ case. After serving their prison sentence, the Millses were placed on “supervisory release” contingent on successfully completing a “Site Restoration Plan” for the affected former mosquito ditch. The Corps claimed the Millses failed to comply, filing a motion that they be returned to prison. Judge Vinson held an “extended evidentiary hearing” and issued his order rejecting the Corps’ claims on Christmas Eve 1991.

In doing so, Judge Vinson, who did not preside over the criminal trial of the Millses, also found that at the time of the Millses’ conviction, “the

31. 739 Parl Deb HC (5th ser.) (1967) col. 1941 (UK) (quoting British Solicitor Mr. Vachell “a great Oxford” solicitor and his remarks to a jury).

32. *United States v. Mills*, 817 F. Supp. 1546, 1554 (N.D. Fla. 1993).

33. *Id.*

34. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); see also Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. ____ (forthcoming 2018) [hereinafter Folly].

subject land . . . was probably not a ‘wetland’ for purposes of the [C]lean Water Act.”³⁵

Accordingly, concluded Vinson, the Millses went to prison for “polluting” dry land, which—over a period of years—two federal judges and two governmental environmental agencies could not agree constituted “wetlands.”³⁶

Yet, Judge Vinson’s sensible inclinations were constrained by non-sensible³⁷ decisions of the United States Supreme Court that left full discretion with the Corp of Engineers to “flesh out the statute to cover wetlands,” just as the Court does with Congress and scores of other federal agencies. All Vinson could do was to write a judicial protest in the form of an opinion. His words, however, did not reduce the time Ocie and Cary Mills spent in prison nor remove their status as felons.

35. *Mills*, 817 F. Supp. at 1548.

36. In addition to the Corps of Engineers, the Millses were in contact with Florida environmental agencies who advised them their land did not include any wetlands. This evidence was also precluded by the trial judge, the retired Judge. See Daniel Drew, *A Criminal Conviction that Doesn’t Hold Water*, THE DAILY SIGNAL, (June 17, 2013), <http://dailysignal.com/2013/06/17/a-criminal-conviction-that-doesnt-hold-water/>.

37. Professor Steven D. Smith explains that court decisions invoke mere words, or nonsense, when the decisions “employ[] notions that cannot be accounted for in terms of the ontological inventory that the speaker . . . [is] using.” STEVEN D. SMITH, *LAW’S QUANDARY* 36 (2007) [hereinafter *QUANDARY*]. Knowledge of the law is only relevant to a determination of guilt if the accused’s intent is part of the definition of guilt. This, inherently, is a moral consideration as it pertains to what the accused “should” or “ought” to have done or not done. This is a metaphysical question and does not abide in the original frame of legal positivism. The Supreme Court’s deference to a broad delegation of legislative authority as it applies to persons unaware of the reach of the law is unjust, which is itself a metaphysical question. Yet, I acknowledge the Court’s deference may be its abiding by constitutional principles such as the separation of powers. Nevertheless, the result is non-sense according to Smith, because America’s philosophical culture today rejects metaphysics. Otherwise, punishing the innocent in the cause of justice is not “nonsense,” but merely hypocrisy. Interestingly, even the terms sensible – that which can be measured by the senses; and nonsense – that which cannot be measured by the senses, demonstrate our cultural bias for materialism and scientism. Hypocrisy is revealed in all human efforts to reduce the human individual to a means, rather than end. For in the end, these humans are but individuals. This is seen in the evolution of theories of punishment where consequentialist penological aims are left without limits – “hypocrisy has taken the place of legitimation.” Markus Dirk Dubber, *The Right to be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 *LAW & HIST. REV.* 113, 116 (1998). See also *infra* p. 59-71.

The Millsess, as in life, walked together through the gates of Saufley Field Federal Prison Camp and within moments were separated and strip searched.³⁸ Later that night, separated from his son, Ocie Mills, a proud and strong man, quietly sobbed, praying his son would understand and forgive him.³⁹

Judge Vinson lamented that he “must apply the law as it exists, and cannot change it.”⁴⁰ But he accompanied his lament with a warning and an invitation.

“A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency . . . so long as Congress provides an ‘intelligible principle’ . . . calls into question the vitality of the tripartite system”⁴¹ and also “calls into question the nexus that must exist between the law so applied and simple logic and common sense,” he wrote. Opining that the Supreme Court likely didn’t realize its decisions permitted the unleashing of the creative energies of the modern regulatory state,⁴² Vinson observed that any reigning in of modern public welfare criminal liability must start at a different “level,” with the Supreme Court.⁴³

2. Erosion of the Mens Rea Doctrine Accelerated the Modern Regulatory State.

Distinguishing between “morally blameworthy” and “morally innocent” requires the actor to be rational and knowing so that an intent to act is present at the time of the proscribed conduct. These metaphysical presumptions manifest in the traditional requirement of mens rea before conduct is considered criminal. Judge Vinson’s apprehension, that judicial deference to the legislative delegation powers gives rise to potential notice and due process violations, is truly the expression of one overriding concern—that an innocent person might be punished.⁴⁴

38. Author’s Interview, *supra* note 1.

39. *Id.*

40. *Mills*, 817 F. Supp. at 1555.

41. *Id.* at 1555.

42. *See id.* at 1554.

43. *Id.* at 1555.

44. The founders did not express themselves in the language of current constitutional jurisprudence. Rather, they placed procedural protections of individual liberty in the

The primary bulwark preventing his result is the longstanding demand that the state prove intent in order to convict an individual of a crime.

“An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act,”⁴⁵ explained Blackstone in his *Commentaries*, published within a decade of the American Revolution.⁴⁶

In the eighteenth-century “the criminal law took seriously the requirement that a defendant . . . [have] acted in a malicious and malevolent way” prior to a criminal conviction.⁴⁷

And, as late as the early twentieth-century, prominent legal scholars did not believe the United States would broadly eliminate mens rea resulting in imprisonment. “Criminality is and always will be based upon a requisite state of mind as one of its prime factors,” wrote the Dean of Harvard Law School, Francis Bowes Sayre.⁴⁸

The mens rea doctrine began suffering severe erosion in the early twentieth-century with the advent of strict liability “public welfare crimes,” a legislatively created and judicially recognized exception to the mean rea doctrine. Legislative proponents claimed strict liability was necessary to address significant potential societal harms arising from an increasingly complex society in circumstances where proof of guilty knowledge was difficult. In such circumstances, judicial deference was offered partially due to the insignificance of the criminal penalties attached to such crimes.⁴⁹

This evolution has greatly narrowed the Court’s mens rea inquiry to whether “the defendant’s conduct express the specific mental

Constitution alongside aspirational language so that those protections and principles would live beyond their times. See *infra* p. 15. Much of the language articulating those protections and aspirations were placed in the Constitution to prevent the punishment of morally innocent individuals.

45. 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

46. *Id.* at *21-22.

47. Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 860 (1999).

48. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUMBIA L. REV. 55, 55 (1933). In confession, I am a former Republican legislator, state Attorney General and modern conservative who is calling for the judiciary to reign in Congress’s aimless and arbitrary creation of new strict liability crimes that are accompanied by a loss of liberty. I believe, however, this concern and its recommended actions are consistent with the principles that motivated my initial involvement in government service.

49. See generally *id.* at 59-62.

state . . . required by the statute,”⁵⁰ thus converting a “fundamental principle of justice”⁵¹ into an issue of statutory interpretation.

The claimed necessity for strict liability crimes, however, has been overstated, and the penalties are no longer minor, causing increasing discomfort in the Supreme Court.

Recently, the Court has shown greater vigor in finding, or inferring, mens rea in its statutory interpretation, but has not quite elevated mens rea to a constitutional principle, “except sometimes.”⁵² The Court seems unable to extricate itself from a deep philosophical conflict and its institutional respect for its conflicting prior decisions.⁵³ The result is judicial muddle.⁵⁴

I join a long list of commentators calling for the jettisoning of the general prohibition of the mistake or ignorance of law defense.⁵⁵ The doctrine was a mistake at its beginning⁵⁶ and is a harmful judicial fiction today⁵⁷ that allows the morally innocent to suffer in prison.

50. Singer & Husak, *supra* note 46, at 860.

51. *Id.*

52. *Id.* at 859 (quoting Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107). See also *Morissette v. United States*, 342 U.S. 246 (1952); *Cheek v. United States*, 498 U.S. 192 (1991); *Staples v. United States*, 511 U.S. 600 (1994); *Liparota v. United States*, 471 U.S. 419 (1985); *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Rosemond v. United States*, 134 S. Ct. 1240 (2014); *McFadden v. United States*, 135 S. Ct. 2298 (2015); *Yates v. United States*, 135 S. Ct. 1074 (2015); cf. *United States v. Balint*, 258 U.S. 250 (1922); *United States v. Dotterwich*, 320 U.S. 277 (1943); *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558 (1971); *United States v. Freed*, 401 U.S. 601 (1971); and *United States v. Park*, 421 U.S. 658 (1975).

53. See *infra*. at Section III.

54. Some claim the Court’s recent decisions reflect an increased respect for mens rea and “reinvigorate[] its concern with protecting innocent persons as a bedrock of federal criminal law.” Singer & Husak, *supra* note 46, at 861. Others strongly disagree. See Louis Bilionis, *Process: The Constitution and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1278-79 (1998).

55. See, e.g., Folly, *supra* note 33, at 41-42; Reconsidering, *supra* note 24, at 729; see also *infra* at 77-79.

56. *Error juris nocet, error facti non nocet*, that a person must suffer from his mistakes at law but not his mistakes in fact, is found in Blackstone’s interpretations of the Digests. Yet Blackstone was in error. The doctrine was “never applied by the Romans to the field of criminal law.” Paul K. Ryu & Helen Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421, 425 (1957) (citing 3 BINDING, DIE NORMEN UND IHRE UBERTRETUNG 30-79, at 56 (1918)). Blackstone made a linguistic mistake. *Id.* Yet, when America’s founders were perpetuating the mistake, the maxim made sense as virtually all criminal law involved clearly understood morally wrong conduct that harmed others. See Folly, *supra* note 33, at 1-2. “The colonies brought the common law of crimes to American soil, and the first federal criminal statute contained approximately 30 offenses . . . and they were obvious to everyone given their violent nature . . . or religious underpinnings.” *Id.*

These inconsistencies reflect tension between the Court's desire to defer to legislative decisions and the recognition that punishing innocent persons is inherently disproportional to the moral blameworthiness of the individual. Sentencing an innocent person to prison is a grossly disproportionate punishment and one is justified in intuiting its proscription by the Eighth Amendment. But, as with *mens rea*, what appears clear in logic becomes muddled in application.

3. The Eighth Amendment Currently Fails to Protect Innocent Persons from Disproportional Punishment.

The Court's legislative deference in issues of *mens rea* and interpretation of the Eighth Amendment are born of flawed compromises of competing judicial philosophies, and it has eviscerated the Eighth Amendment's prohibition of "cruel and unusual" punishment, joining with Congress's exploitation of the Court's public welfare crime exception to the traditional *mens rea* requirement so that innocent persons face severe punishment.

Although challenging strict liability crimes lies in the Court's due process jurisdiction, the Eighth Amendment's drafters were concerned about pre- and post-conviction punishment and did not express themselves in the language of current constitutional jurisprudence. Rather, they placed procedural protections of individual liberty in the Constitution alongside aspirational language so that those protections and the principles giving birth to those protections would live beyond their times.⁵⁸

"Time works changes Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions . . . enactments . . . 'designed to approach immortality as nearly as human institutions can approach it.'"⁵⁹

Many of the procedural protections of the Constitution are designed to ensure the morally innocent do not face punishment,⁶⁰ and state punishment of the innocent was of grave concern to the drafters.⁶¹ In other words, the framers were purpose-driven.⁶²

57. See *infra* at 74-77.

58. See *infra* at 15.

59. *Weems v. United States*, 217 U.S. 349, 373 (1910) (quoting C.J. Marshall).

60. *Id.*

61. *Infra* p. 52-56.

62. Strict textualism fails to consider the aspirational qualities, or purposes, of the founders. As described by Professor Tory Lucas when describing the "textualist and purposivist legal philosophy" of Judge Henry Friendly "[h]e sought to discover the purpose or essence of what the law was trying to accomplish. He had a resolute understanding that legal principles are not independent islands that we visit for resolution of disputes. Instead,

Contrary to the Orwellian claim that correctional institutions rehabilitate,⁶³ imprisonment is one of society's most harsh punishments, and the application of that punishment to the morally innocent is grossly disproportional and violates the Eighth Amendment's prohibition of cruel and unusual punishment.

The Court should achieve this aim by recognizing the limiting nature of the retributive justice theory, thereby applying the proportionality principle of "lex talionis" to all theories of punishment, including consequentialist objectives. This conforms to the Court's Eighth Amendment approach to the drafter's aims of protecting human dignity and prohibiting the punishment of the morally innocent.

II. ORGANIZATIONAL AND SUBSTANTIVE SUMMARY – PROCEDURAL DUE PROCESS PROTECTIONS AND THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT ARE INTENDED TO PROHIBIT THE PUNISHMENT OF THE MORALLY INNOCENT.

A. *Through the Eighth Amendment, America's Founders Sought to Prohibit All Punishment Not Justly Deserved.*

This Article primarily focuses on the historical origins of mens rea and its erosion throughout the nineteenth and twentieth centuries. This history is necessary to understand the origins and context of today's constitutional protections against unjust state punishment and today's misunderstandings of those origins. The writings and motivations of British jurists of the sixteenth and seventeenth centuries do not fit neatly into the analytical framework of modern jurisprudence.

For example, the United States Supreme Court and its Justices have long struggled with understanding how the framers could expressly prohibit "cruel and unusual punishments"⁶⁴ while contemporaneously, and after the Constitution's ratification, colonial governments and England imposed the barbaric punishments of disembowelment and burning at the stake for treason.⁶⁵ The word "cruel," clearly, did not solely apply to the method of

they form the fabric of our society, and they are only as good as the purposes they serve . . . [for] all law is driven by a purpose." Tory L. Lucas, *Henry J. Friendly: Designed to Be a Great Federal Judge*, 65 DRAKE L. REV. 421, 441-42 (2017) (citations omitted).

63. See generally Dubber, *supra* note 36.

64. U.S. CONST. amend. VIII.

65. See *Harmelin v. Michigan*, 501 U.S. 957, 968 (1991) (citing Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 855-56 (1969)).

punishment. Consistency is only found in understanding the full context of the political struggles of the time.

This history reveals the influence of Christian concepts of equality and the intrinsic value of the individual in the development of *mens rea* and the crucial role the concept of “moral” guilt played in the definition of crime (modern due process questions). The quest to define moral guilt derived from a concern for justice and for ensuring punishment was justified, and its derivative concern of restoring the offender to “right relationship,” or righteousness. The question of when punishment is justified—and what punishment, when justified, is just—identifies the link between modern definitional substantive and procedural due process concerns with modern Eighth Amendment punishment concerns.⁶⁶

This is made more evident by the British Crown’s use of torture as a means of proof in the sixteenth and seventeenth centuries and the prevailing belief, at that time, in the supremacy of the state. The state often used punishment and excessive fines, or *amercements*, to extract unreliable proof and coerced confessions. This practice, common in civil law on the European continent and condemned by British common law, was nevertheless exercised through the Royal prerogative in England and carried out by the King’s Star Chamber and Court of High Commission.

Although in modern terms, torture as a means of proof raises due process concerns, British jurists nevertheless viewed and identified torture as punishment due to doctrines of state supremacy which inherently justified state punishment or torture, at all times, in all circumstances. This dual purpose of the Eighth Amendment, to prevent punishment of the morally innocent and disproportional punishment of the guilty, was once recognized by the Supreme Court. In addressing the Eighth Amendment, the Court in 1910 observed, “We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.”⁶⁷ The Crown’s cruel punishment of the morally innocent served as a primary motivation to restrict state punishment, and Parliament’s efforts to do likewise lent motivation to the drafters of the Eighth Amendment.

British efforts to ensure justice and to prevent cruel or unjust punishment repeatedly failed in application due to adherence to the state supremacy doctrines. This failing is mirrored by the present unjust

See also *Weems v. United States*, 217 U.S. 349, 370 (1910) (recognizing that instruments of “terror, pain [and] disgrace” were present at the nation’s founding).

66. See U.S. CONST. amend. VIII.

67. *Weems*, 217 U.S. at 373.

punishment of the morally innocent deriving from the dominant materialistic jurisprudential deference to legislative empiricist-driven consequentialist theories of punishment.⁶⁸

In the sixteenth and seventeenth centuries, punishing the morally innocent was called torture, or cruel, or both; although often called contrary to ancient rights or a violation of the Great Charter, or Magna Carta, individual rights bowed to the supremacy of the state, whether it be the King and his “divine right,”⁶⁹ or Parliament and its Supremacy.⁷⁰ One can see the same result today, most often in the judgments of foreign courts that often hold a punishment as offensive to human dignity and unjust, yet allowing the punishment to be imposed in deference to the consequentialist

68. See *infra* at 59-69; see also *Harmelin*, 501 U.S. at 957. In his concurrence in *Harmelin*, Justice Kennedy, joined by Justices O’Connor and Souter, argued otherwise, concluding that the Eighth Amendment does contain “a narrow proportionality principle” that applies in sentencing cases. Yet, Justice Kennedy then proceeded to invalidate any proportionality review. Acknowledging the Court has not been totally “clear or consistent” Justice Kennedy identifies five “common principles” in the court’s decisions relating to noncapital Eighth Amendment cases. Three principles Kennedy identifies compel deference to legislative decisions. Fixing the length of prison sentences “involves a substantial penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts’” Kennedy writes. Moreover, the Eighth Amendment does not mandate the adoption of a specific penological scheme and accordingly, “marked divergences . . . in . . . prison terms are . . . inevitable [and] often beneficial.” The Eighth Amendment, therefore, only prohibits punishments in noncapital cases that are “‘grossly disproportionate’ to the crime.” *Id.* at 996-999, 1001 (J. Kennedy, concurring) (citations omitted). Justice White wrote in his dissent that the proportionality must be as measured by “objective factors to the maximum possible extent,” such as intrajurisdictional and interjurisdictional comparisons of sentencing for like crimes and like sentences which reflect the “evolving standards of decency” of a “maturing society.” This comparison is not necessary, however, unless “a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” *Id.* at 1015, 1019 (J. White, dissenting) (citations omitted). The effort to preserve a proportionality test in noncapital cases in constitutional review against flawed textualist claims is not justified. Justices Kennedy and White effectively neutered any meaningful review by untying proportionality from the retributive theory of justice, a flaw in logic that Justice Scalia was quick to highlight. “[S]ince there are many . . . justifications for [sentencing, such as deterrence, rehabilitation, incapacitation and retribution] . . . the penalties for [like crimes] would not necessarily be comparable,” Scalia explains. “In fact, it becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law.” *Id.* at 989 (majority opinion).

69. Fully expressed by King James I and articulated by Hume in the *LEVIATHAN*. See *infra* note 198.

70. Supported by Blackstone and manifested at the time of the American Revolution by Lord Mansfield. See *infra* pp. 52-56.

goals of the legislature.⁷¹ The belief that individual liberty presumptively defeated state utilitarian aims awaited the American Revolution, although its beginnings are found in the Church penitentials of the thirteenth century and as far back as the Old Testament.⁷²

The requirement of mens rea and actus rea as a definitional element of crime and guilt emanated from the Church's answer to the question of when institutional punishment was justified, in other words when it was just. The answer, articulated in the penitentials of the Middle Ages and its requirement of reliable proof of the accused's guilty mind manifested in a guilty act, eventually reached beyond the Church to shape restrictions on the state's power to punish through the requirement proving mens rea and actus rea prior to criminal conviction. For over seven centuries, mens rea and actus rea served diligently as a protector of individual liberty and protection from unjust punishment.⁷³

Then, beginning in the thirteenth century and continuing through the seventeenth century, the right to trial by a jury of peers (as contrasted with a jury controlled by the Crown or by ordeal), the right against self-incrimination, the right to be informed of the charges against one and the prohibition of using excessive fines or punishment to extract confessions, joined mens rea in serving to limit unjust state action and elevated individual liberty.

During these moral and procedural protections, however, the state continued to utilize punishment as a means of proof, subjecting the accused to the rack, or trial by ordeal, to obtain confessions or determine guilt—justifying its actions through various doctrines of state supremacy.

This conduct strongly conflicted with the Church's recognized purpose of punishment—the restoration of right relationship (righteousness), which logically rejects consequentialist or state utilitarian aims. The conflicts between Parliament and the Crown often reflected the conflict between the

71. See, e.g., *Harmelin*, 501 U.S. at 959-61 (Kennedy, J., concurring)(Although recognizing proportionality review is necessitated by the Eighth Amendment, consequentialist penological goals can justify a disproportionate sentence than justified by retributive theories.). Foreign courts have followed J. Kennedy's analysis thereby allowing disproportionate sentencing that violates human dignity if such sentencing is justified by consequentialist penological aims. See e.g., *S v. Dodo* 2001 (3) SA 382 (CC) at para. 29-38 (S. Afr.) (greatly limiting proportionality review to only gross proportionality). The South African High Court held that legislative deference necessitated its consideration of consequentialist penological interests in determining whether a sentence was grossly disproportionate thereby eviscerating proportionality limits and diminishing human dignity. See also *Dawood v. Minister of Home Affairs* 2000 (3) SA 936 (CC) (S. Afr.).

72. See *infra* pp. 31-32; See also *supra* note 67.

73. See *infra* Part III.

established doctrines of state supremacy and existing state power with these emerging concepts of individual dignity.

The world still awaited Jeremy Bentham's Greatest Happiness Principle and the 1789 publication of his *Introduction to the Principles of Morals and Legislation* which, in the nineteenth century, began to erode the victory of individualism.⁷⁴

It is here important to explain that the canonist aim of restoring right relationship is substantively different from the nineteenth century utilitarian concept of state "rehabilitation." Punishment for the purpose of restoring right relationship derives from retributive and punitive goals and its faith that just or proportional punishment serves the best interests of the penitent or convicted. This recognizes the intrinsic value, or the humanity, of the accused. In contrast, modern aims of rehabilitation, focus on the otherness of the convicted, justifying perpetual state manipulation to conform personality to state expectations. However, if this is not possible, then supporting unlimited punishment for purposes of deterrence or incapacitation or general happiness.⁷⁵

As the American Revolution approached, England, the Crown, and now Parliament, used punishment for its utility—to extract unreliable evidence against its enemies (the use of torture) and then to punish those who were not morally guilty (in sentencing), or threatening the same to extract further evidence to use against the Crown's enemies (excessive amercements or threats of execution).

To the Founders, "cruel" punishments, therefore, involved any punishment, pre- or post-conviction, which forwarded unjust interests of the state by ignoring the value, personality, or autonomy of the individual. Using man as a means, rather than recognizing man as the end,⁷⁶ was recognized as inherently unjust.

Punishment and the definition of crime, therefore, were inextricably linked and the developments of substantive and procedural protections of morally innocent persons from unjust state punishment was the aim of those battling the oppressive monarchies in fifteenth and sixteenth-century

74. Utilitarianism is not necessarily a threat to equality as Bentham reasoned the happiness of each person is to be valued equally. It is a direct assault to individualism, however, as reflected in its brutal math – the happiness of two is always greater than the happiness of one.

75. See *infra* pp. 23-52; Also, for an excellent criticism of "rehabilitation" as a state penological goal, see C.S. LEWIS, *THE HUMANITARIAN THEORY OF PUNISHMENT* (criticizing "rehabilitation" as a state penological goal).

76. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 66-67, 429 (Allen W. Wood ed. trans., 2002).

England and the American revolutionaries battling the oppressive sixteenth-century Parliament.⁷⁷

Macroscopically, the entirety of the conflict can be viewed as a struggle to limit the power of the state to punish unjustly, to come to terms with the circumstances when punishment is just, and to establish laws and procedures to ensure state punishment is only imposed in just circumstances. The path to this objective meandered as the personal ambitions of powerful stake-holders often placed personal interests above justice, yet the aim, the purpose for the inquiry, and the struggle was justice. On July 4, 1776, individualism and a radical equality in law reached its zenith in institutional expression.

At that time, the requirement of proving a guilty mind and a guilty act prior to punishment for a crime was, in theory, unquestioned.⁷⁸ Punishment of the morally innocent wasn't contemplated and was considered disproportional.⁷⁹ In the language of today's Eighth Amendment jurisprudence, punishing the innocent was grossly disproportional and contrary to the intent of the Founders.⁸⁰ The American Revolution did not settle the age-old conflict between the individual and the state, and, today, we have moved far away from this understanding.

As early as the turn of the eighteenth century, corresponding with the rise of Bentham, Blackstone, and materialism, Thomas Jefferson observed the bud of absolutism in America's law schools, seeds that blossomed into the modern regulatory state and the acceptance of strict liability public welfare crimes.⁸¹

All of this reveals that it is prudent to address the development and dangers of strict liability crimes in a due process context while considering the Eighth Amendment and not isolate punishment as solely a post-conviction concern. Today, in America, the morally innocent are punished, just as they were by England's Stuart Kings who used the Royal prerogative to justify torture as a means of proof. Today, Americans are voicing increasing concern about the state punishing the morally blameless just as America's Founders criticized Parliamentary enactments denying colonialists the right to trial by a jury of their peers—a parliamentary effort viewed as a not-so-transparent attempt to ensure the conviction and punishment of its enemies who, in the view of the colonists, were exercising

77. *Id.*

78. *Infra* at pp. 50-51.

79. This argument is fully developed in Part II.

80. *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991); *see also Graham v. Florida*, 560 U.S. 48, 59-60 (2010).

81. *Infra* at pp. 50-54.

inherent rights and were morally innocent. The concern is, and always was, justice and as such, is a moral aspiration.

B. An Explanation of This Article's Organizational Structure.

Section III of this paper reviews the birth of *s* as a legal concept in the West by visiting these English struggles of the fifteenth and sixteenth-centuries which gave expression to many of our principles of liberty. It also includes a brief introductory section reviewing recent *mens rea* jurisprudence. Section IV reviews Thomas Jefferson's concerns about American legal education, and its budding support for a state supremacy and the threat posed to individual liberty. Section V chronicles the rise of strict liability crimes and its evolution from legal positivism and Christian fervor from the Second Great Awakening. Specifically, positivism's original rejection of metaphysical contemplations in defining law opened the door to state supremacy through the application of consequentialist moral theories. In Section VI, I join others in suggesting reform to reinvigorate *mens rea* by treating knowledge of the law as a rebuttable presumption. Section VII is the Conclusion.

This history reveals that a strong argument may be made that imprisoning the innocent violates the original intent of the Eighth Amendment prohibition of "cruel and unusual punishment." Imprisoning the morally innocent is contrary to the Founder's intent, and an affront to human dignity and thereby "grossly disproportional" punishment. At its core, punishing the morally innocent offends human dignity, as defined by Kant,⁸² and improperly diminishes the stamp of God's image, as defined by theologians. The full development of this argument, however, awaits another publication—although the argument is foreshadowed here.

82. Kant's "categorical imperative" prohibits using humans for utility, as a means, rather than recognizing the individual as the end. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 66-67, 429 (Allen W. Wood ed. trans., 2002); see generally H.J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* (1948). "Now I say that the human being, and in general every rational being, exists as end in itself, not merely as means to the discretionary use of this or that will . . . The practical imperative will thus be the following: Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as an end and never merely as a means." IMMANUEL KANT, *GROUNDWORK IN METAPHYSICS AND MORALS* 45, 46-47 (Allen W. Wood, ed. trans., 2002). The concept is not new and is commonly referred to as the "golden rule" as articulated by Jesus Christ. *Matthew* 7:12. Kant, however, writes that he reasoned to this understanding rather than receiving it by revelation.

III. MENS REA RADIATES FROM CHURCH DOCTRINE TO LEGAL DOCTRINE.

A. *Brief Review of Current Mens Rea Jurisprudence: Judicial Endorsement of Strict Liability Crimes Conflicts with our Nation's Aspirational Principles and, Therefore, is Unstable and Arbitrary.*

“The federal ‘public welfare offense’⁸³ doctrine [allowing strict criminal liability] has been revealingly unstable from the moment of its inception,⁸⁴ and the instability is reflected in current Supreme Court jurisprudence.

The Court has held—or declared in dictum—that the following persons are “presumptively” innocent, and must be proven to be aware of both the facts as well as the law governing their conduct [in order to be deemed guilty]: (1) restaurateurs who accept food stamps;⁸⁵ (2) taxpayers generally;⁸⁶ (3) persons who seek either to avoid an IRS audit, or to pay more alimony to their spouse[s];⁸⁷ (4) persons who distribute anything that turns out to be illegal;⁸⁸ (5) persons who handle guns, at least insofar as the need to register them is concerned;⁸⁹ and (6) persons whose cars have violated emission standards.⁹⁰

Conversely, the following persons, the Court has suggested, may be subject to strict liability despite mistakes in fact or law: “(1) persons who possess hand grenades,⁹¹ (2) [those] who handle highly toxic acids,⁹² (3)

83. Public welfare offenses constitute “a distinct group of offenses punishable without regard to any mental element.” Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933) [hereinafter *Public Welfare Offenses*]. The Public Welfare Offense Doctrine originally generally allowed for strict criminal liability in cases involving police regulatory offenses with relatively small fines fitting into categories of public nuisances which are less odious than typical criminal convictions. *Id.* at 62-67. Today, however, Congress has moved far beyond the original justification for public welfare offenses and in numerous instances, in fact in an immeasurable number of crimes, innocent persons can be sentenced to prison.

84. John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1102 (1999).

85. *See Liparota v. United States*, 471 U.S. 419 (1985).

86. *See Cheek v. United States*, 498 U.S. 192 (1991) (dictum).

87. *See Ratzlaf v. United States*, 510 U.S. 135 (1994) (dictum).

88. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). Singer and Husak state, “[T]his seems an obvious overstatement of the case, but it seems fair.” Singer & Husak, *supra* note 46, at 938.

89. *See Staples v. United States*, 511 U.S. 600 (1994) (dictum).

90. Singer & Husak, *supra* note 46, at 938; *Staples*, 511 U.S. at 614 (dictum).

91. *See United States v. Freed*, 401 U.S. 601 (1971).

[persons] who are in the business of dealing with regulated food stamps⁹³ and (4) those] who distribute food for public consumption. . . .⁹⁴ In addition, every person . . . is presumed to know—the intricacies of constitutional adjudication.⁹⁵

This discordant approach reflects tension between the intuitive retributive aims of justice and restoration of “right relationship”⁹⁶ and the consequentialist penological aims of incapacitation, rehabilitation, and specific and general deterrence.

This tension is not new, as evidenced in *The Epic of Gilgamesh*. Individuals and states are constantly tempted to view others as a means to an end, in other words—for their utility.

At the beginning of the twentieth-century, utilitarian goals and legal positivism politically merged with fervor from the Second Great Awakening to summon the state to the purpose of establishing a holy and safe nation free from vice and threat. Christians engaged the effort by legislative initiative and social reform while legal positivists placed their moral faith in science-based government reform.⁹⁷ Both efforts inordinately placed faith in government initiative, thus diminishing individual liberty and value.⁹⁸

92. See *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971).

93. *Liparota v. United States*, 471 U.S. 419, 436 (1985).

94. See *United States v. Park*, 421 U.S. 658 (1975).

95. Singer & Husak, *supra* note 47, at 939; see also *Cheek v. United States*, 498 U.S. 192, 205-06 (1991).

96. The restoration of “right relationship,” or righteousness, is a primary aim of punishment. The conditions for the restoration of right relationship between the offender and victim, victim and society, offender and society and sinner and God are established through proportional punishment. Conversely, consequentialist penological purposes sacrifice the individual and such relationships to the aims of the state.

97. I use the term “moral faith” to distinguish faith in the scientific method to assist us in determining what is, as contrasted with a faith that science, or materialism, should inform us as to what “ought” to be. Science informs us of what “is” but when used to dictate what “ought” to be becomes tyrannical, confining the human soul and spirit to material measurements and slaying human aspiration. In short, science as what “ought” to be is fate. Although the “ought-is” argument was first articulated by David Hume as a criticism of the teleological argument for God’s existence, it is equally critical of science dictating, rather than merely informing, morality. Hume argues the “ought-is” dilemma prevents proof of God and I am simply saying it *also* prevents science from proclaiming itself as God. See e.g., DAVID HUME, TREATISE OF HUMAN NATURE § 3.1.1 (1739); see also Charles Pigden, *Hume on Is and Ought*, PHIL. NOW, https://philosophynow.org/issues/83/Hume_on_Is_and_Ought (last visited February 11, 2018); Michael Shermer, *The Is-Ought Fallacy of Science and Morality*, EDGE, <https://www.edge.org/response-detail/23683> (last visited February 11, 2018).

98. See *infra* pp. 59-71.

Conversely, at the time of America's founding, the Judeo-Christian legal concepts of equality before the law and the intrinsic value of the individual as reflected in the moral agency, or image of God, in each individual (individualism) teamed with the age of reason⁹⁹ to reach full expression, but not full implementation, and elevated the individual above the state in our founding documents. This manifested in the establishment of numerous contemporaneous constraints on state power and the aspirational language of these documents laid the foundation for virtually all subsequent efforts to expand equality.¹⁰⁰

With the exception of Genesis chapters 1-3¹⁰¹ and John 3:16, there are few expressions of the intrinsic value of each individual than the Declaration of Independence.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain

99. Contrary to a secularly-biased interpretation of history, religious faith in a purposeful creator gave rise to the age of reason and scientific advancement. This is uniquely true pertaining to the religious beliefs of ancient Greek philosophers, Judaism and Christianity. These beliefs, that God was rational and purposeful, prompted extensive efforts to understand or know God through reason. Conversely, cultures that considered the cosmos a mystery and the gods entirely arbitrary, believed the exercise of reason to understand God's purposes was futile. Plato argued that the order of the universe demonstrated the existence of an intelligent god. "First, there is the evidence of the earth, the sun, the stars, and all the universe, and the beautiful ordering of the seasons, marked out by years and months . . ." PLATO, *THE LAWS*, Bk. 10, § 886a 230 (2000). The existence of an "intelligent first cause" was also articulated by Aquinas. See J.C. DOIG, *AQUINAS ON METAPHYSICS* 291 (1972).

"Such order cannot be explained without an intelligent ordering cause. All science is a search for order. Hence it presupposes that order is there. If it were not, the world would be unintelligible. Hence all science, whether it is aware of the fact or not, presupposes a first ordering principle capable of accounting for the existence of the order it is seeking. This teleological argument is suggested with many variations throughout [Plato's] dialogues."

John Wild, *Plato and Christianity: A Philosophical Comparison*, 17 *J. OF BIBLE & RELIGION* 3, 9 (1949). Judaic beliefs of a purposeful intelligent God are reflected in Genesis which is also a part of the Christian Bible. John chapter one in the New Testament also bears witness to an intelligent creator.

100. The words of the Declaration of Independence revealed America's hypocrisy in the treatment of slaves and women thereby providing persuasive force to the abolitionist and woman's suffrage movements. Recently, the same arguments for individual human dignity have been successfully utilized by those seeking recognition of homosexual rights and the rights of gender-variant persons. Whether endorsed or not, all such movements commonly challenge the jurisdiction of the state to punish or conform conduct.

101. Genesis and the Gospels speak to God's conquering love of humankind and His plan of salvation.

unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it¹⁰²

This statement, naturally and poetically expressed, came at great costs, through centuries of struggle persisting through the doctrine of the Divine Right of Kings¹⁰³ and the later-proclaimed Doctrine of Parliamentary Supremacy,¹⁰⁴ to this nation's founding.

102. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). I recognize the hesitancy of legal scholars to cite to the Bible, however, such failure is to discard a significant source of American political and legal thought. Whether you view the Bible as the inspired word of God, as I do, or you view it as merely literature, you cannot deny its significant historical and ongoing impact nor fully reject its powerful expressions of the important legal concepts of equality, freedom and the intrinsic value of each person. To jettison these teachings because they have been at times misused and are expressed in a religious document, is merely intolerance in the claimed aim of tolerance.

103. The Divine Right of Kings was developed by James VI of Scotland (1567-1625) and was developed fully by King James I of England (1603-1625).

The state of MONARCHIE is the supremest thing upon earth: for Kings are not only Gods Lieutenants vpon earth, and sit upon Gods throne, but euen by God himselfe are called Gods. . . . Kings are justly called Gods, for that they exercise a manner or resemblance of diuine power vpon earth . . . [t]hat as to dispute what God may doe, is Blasphemie . . . So is it sedition in Subiects to dispute what a King may do in the height of his power

James I, *A Speech to the Lords and Commons of the Parliament at White-Hall*, (March, 21 1610), <https://faculty.history.wisc.edu/sommerville/351/Jamesdrk.htm> (last visited December 13, 2017). James's theories echoed French theorist Jean Bodin (1530-1596) who published *Six livres de la republique* in 1576. Bodin argued that sovereignty in any form of government necessarily rested in one person. J. P. Summerville, *Western Civilization II Guides, Absolutism and the Divine Right of Kings*, (Apr. 30, 2012), <http://westerncivguides.umwblogs.org/2012/04/30/absolutism-and-the-divine-rights-of-kings/> (last visited February 11, 2018). Parliament's conflicts with the scope, authority and perceived excesses of Great Britain's kings led to the English Civil War (1642-1651) and eventually a recognition of Parliamentary Supremacy. See, Oliver Wright, *The Independent guide to the UK constitution: The supremacy of Parliament*, THE INDEPENDENT (June 9, 2015), <http://www.independent.co.uk/news/uk/politics/the-independent-guide-to-the-uk-constitution-the-supremacy-of-parliament-10308704.html> (last visited February 11, 2018) ("The institution is nothing short of an elected dictatorship.").

104. See *infra* pp. 41-62.

B. *English Conflict Gives Voice to the Principles of Equality and Individualism.*

1. By the Thirteenth Century Christian Concepts of Moral Guilt Began to Overcome Pagan Notions of Consequentialism and Fate.

Foundational principles of liberty were intermittently articulated and occasionally followed from 1215 in the fields of Runnymede¹⁰⁵ to the House of Commons and the British Declaration of Rights of 1689. Yet, in England, these principles and the procedural protections of liberty were often subsumed by state power.

The institutional struggle between the British Parliament and the monarchy gave voice to developing theological, philosophical, and jurisprudential theories recognizing the intrinsic value of the individual, including the concept of *mens rea* so central to human dignity.

In the fifth century, after the dissolution of the Western Roman Empire, Germanic tribal law generally replaced Roman law on the European continent.¹⁰⁶ The legal structure and organization of Germanic tribes was “remarkably similar.”¹⁰⁷ Households were organized into villages, villages into hundreds of counties and these, in turn, into duchies or small kingdoms.¹⁰⁸ These structures served primarily for protection of persons and property with little legal sophistication. Economic activity, a spur to the creation of legal structure, was limited to cattle raising, subsidiary hunting, and agricultural pursuits.¹⁰⁹

The chief instrument of Germanic law was the “moot,” a public assembly of household elders, and the primary aim of law was to prevent the blood feud and conflict between households and villages by appeasing vengeance and restoring honor.¹¹⁰

105. King John met with British barons in Runnymede in 1215 and was forced to sign the Magna Carta. See Tanya Gupta, *Magna Carta: Runnymede, the meadow where history was made*, BRITISH BROADCASTING CORP. (June 15, 2015), <http://www.bbc.com/news/uk-england-surrey-32828251>.

106. In 476 A.D. the Germanic leader Odacer defeated Romulus, the last Roman emperor of the west. See *The Fall of the Roman Empire*, USHISTORY.ORG, <http://www.ushistory.org/civ/6f.asp> (last visited February 11, 2018). The “fabric of Roman law . . . virtually disappeared” in the Germanic kingdoms surviving only in northern Italy, Spain and southern France. HAROLD J. BERMAN, *LAW AND REVOLUTION* 52-53 (1983).

107. BERMAN, *supra* note 105, at 52.

108. *Id.*

109. *Id.* at 52-53.

110. BERMAN, *supra* note 105, at 56. Interestingly, this governmental organization reflected some democratic principles, yet lacked essential protections for individual

Germanic pagan societies placed a “high value . . . upon honor as a means of winning glory in a world dominated by warring gods and by a hostile arbitrary fate (or *wyrd*). Honor, for Germanic man, meant ‘getting even’; only by getting even could he conquer the forces of darkness surrounding his life.”¹¹¹

The Germanic focus on offended honor left little room to formally consider the nature of the act by which honor suffered. The restoration of honor required complete restoration for the harm caused and, therefore, Germanic tribal law focused on the harm, or consequences, of the act rather than the moral nature of the act. Praise was gained by taking what others defended and lost when someone took what you defended.¹¹²

Moreover, sin, as understood by the tribes, and crime were synonymous in tribal culture because honor determined how one stood in relationship with the gods. The restoration of honor was essential to standing before, with, or against the gods, who were often viewed as arbitrary and mysterious.¹¹³

Wuotan, or Odin, the principal Germanic god is but one example. Pagan gods were “limited by their particularity [and] [f]or Odin, any kind of limitation is something to be overcome by any means necessary, and his actions are carried out within the context of a relentless and ruthless quest for more wisdom, more knowledge, and more power, usually of a magical sort.”¹¹⁴

Odin, and like gods, were unpredictable and to a large extent unknowable. And so too were their subjects. Those blessed by Odin would likely become rulers, or outlaws.¹¹⁵ Fate was the determining force.¹¹⁶

The consequences, or harm, visited upon an individual or family, however, was a tangible measure of the pleasure or displeasure of the gods.

freedoms. Democracy does not, intrinsically, protect liberty as, in its pure form, is merely the rule of the majority. This was also true in Athens, which proved to be an oppressive society for many of its residents. Neither does procedural due process ensure justice. Procedural due process to an unjust law is merely organized injustice. See *infra* note 296 (describing the sterilization of Carrie Buck).

111. BERMAN, *supra* note 105, at 55 (citation omitted).

112. *Id.*

113. Daniel McCoy, *Odin*, NORSE MYTHOLOGY FOR SMART PEOPLE, <https://norse-mythology.org/gods-and-creatures/the-aesir-gods-and-goddesses/odin/> (last visited February 11, 2018).

114. *Id.*

115. If power is the end, these results are logically deduced and one defeats the aim. If truth and purpose are the aim, the results are irrelevant.

116. McCoy, *supra* note 112.

Accordingly, this was seized upon by the Germanic tribes as a measurement of restitution, and also of wrongfulness.

Consequently, the intent of the actor was not relevant to guilt or the punishment. The morality of the act was measured by its consequences, not the inherent nature of the act.

This overriding belief in fate and arbitrary gods “was reflected above all in the use of the ordeal as a principal method of legal proof.”¹¹⁷

Proof of guilt was determined by the ordeal of fire or water, appealing to the gods of each element.¹¹⁸ In the ordeal of fire, for example, the alleged wrongdoer was burned in some fashion and if the wound healed in a set timeframe, or he did not manifest a wound, he was declared innocent by the gods.

Germanic tribal law was thus utilitarian in focus, keeping general peace through the prevention of the blood feud without focusing on the intent or mind of the actor.

The injustice and tragedy of fate and of strict liability approaches is vividly portrayed in the epic *Beowulf*.¹¹⁹ In the epic, *Beowulf* comes to Denmark to defeat a monster oppressing the kingdom. The story relates the tragedy suffered by *Beowulf*'s grand-father King *Hrethel* in the loss of his oldest son *Herebald* by the hands of his second son *Haethcyn* in a hunting accident.¹²⁰

*when Haethcyn, his lord-friend, slew him with an arrow from his
horn-bow;
he missed his mark and shot his kinsman, one brother another,
with a bloody shaft.*¹²¹

King *Hrethel* lost his oldest son and heir at the hands of another son. Moreover, “the death of the slayer was required in expiation, thus requiring the execution of the King’s second son.”¹²² After the execution, the grieving

117. BERMAN, *supra* note 105, at 57.

118. *Id.*

119. *Beowulf* depicts the pagan world of sixth-century Scandinavia but also contains some Christian tradition, likely added as the story was orally related through generations. The earliest dated manuscripts of *Beowulf* date from the end of the 10th century. *Manuscript: Beowulf*, THE BRITISH LIBRARY, <https://www.bl.uk/collection-items/beowulf#> (last visited February 11, 2018).

120. Linda Georgianna, *King Hethrel's Sorrow and the Limits of Heroic Action in Beowulf*, 62 *SPECULUM* 829, 837 (1987).

121. DANIEL H. HAIGH, *THE ANGLO-SAXON SAGAS: AN EXAMINATION OF THEIR VALUES AS AIDS TO HISTORY* 39 (London, John Russel Smith 1861) (quoting *BEOWULF* (Chronicles)).

122. Sayre, at 1026, note 9, *supra* note PDK; See *infra* 24-27.

King Hrethel took his own life. All three, therefore, were the victims of fate and not offered justice.

These consequentialist approaches to guilt and proper punishment contrasted dramatically with Judeo-Christian concepts of guilt and punishment. Jewish and Christian thought rejected paganism and fate, seeking right relationship (righteousness) rather than honor, and expressing hope in divine purpose, rather than residing in the despair of fate.¹²³

This focus on right relationship required an understanding of the individual's heart, or mind, when determining the moral nature of conduct. It became important to determine the intent, or purpose, of the actor's conduct in order to determine the merit of that conduct. This determination was not only important in determining whether the conduct was praiseworthy or condemnable, but also the nature of the proper punishment if wrongful.

Judeo-Christian approaches to criminal guilt, therefore, "were more concerned with the care of souls than with the appeasement of vengeance."¹²⁴

The tension between consequentialist approaches to punishment and recognizing the importance of the moral guilt or innocence of the individual is reflected in the Bible in Deuteronomy 19:1-7. Therein God commands the people of Israel, when possessing the promised land, to "set aside for yourselves three cities centrally located . . . so that anyone who kills a man [without malice aforethought] may flee there . . . Otherwise, the avenger of blood might pursue him in a rage, overtake him . . . and kill him even though he is not deserving."¹²⁵

The city of refuge is to be available to those who kill "unintentionally." For instance, a man may go into the forest with his neighbor to cut wood, and as he swings his ax to fell a tree, the head may fly off and hit his neighbor and kill him. That man may flee to one of these cities and save his life.¹²⁶

123. When encountering a man blind from birth, Jesus's disciples ask him "Rabbi, who sinned, this man or his parents, that he was born blind?" Jesus responded "[n]either this man or his parents sinned, but his happened so that the works of God might be displayed in him." Jesus encouraged his disciples to place faith and hope in the purposes of God and to not judge fellow man. *John* 9:1-7(NIV).

124. BERMAN, *supra* note 105, at 68.

125. *Deuteronomy* 19:1-6 (NIV).

126. *Deuteronomy* 19:5 (NIV).

God commands this of Israel “so that *innocent* blood will not be shed in your land . . . and so that you will not be guilty of bloodshed.”¹²⁷

Here again, is the moral question of when the state has the right to punish or coerce the conduct of the individual. This moral question, a question sounding in justice, is central to the purposes of law and thereby in the determination of what is law.¹²⁸ This debate animates the English conflicts between Parliament and Kings during the sixteenth and seventeenth centuries and is central to the American Revolution.¹²⁹

Yet, ancient Israel retained some mysticism reflected in its laws. Women accused of unfaithfulness were subjected to a trial by ordeal by which the subsequent inability to have children would proclaim their guilt and good health their innocence.¹³⁰ Perceived or real inconsistencies, however, do not defeat the power of truth¹³¹ and Christianity and its evolving concepts of justice slowly marched across Europe through five centuries after the fall of the western empire. At that time, the Church’s doctrinal approach to sin and focus on restoration of the human heart began to impact the legal

127. *Deuteronomy* 19:10 (NIV) (emphasis added).

128. This approach rejects the original positivist claim that law can be defined absent moral references. See *infra* pp. 59-72.

129. Only with the rise of legal positivism, the initiation of public welfare crimes and the application of scientific reductionism to penological aims was the quest for state justification abated by the assumption that the state had inherent authority to “treat” or “rehabilitate” or incapacitate the offender. See *infra* pp. 62-76.

130. *Numbers* 5:11-31. See also COLE, R. D., *NUMBERS* Vol. 3B 117 (2000). Notably, a woman was not subjected to trial by ordeal unless there was a belief in guilt and absence of other proof available. This same concern, the absence of proof in the face of strongly suspected guilt, gave rise to the use of torture as a means of proof in continental Europe during the middle ages. See *infra* pp. 23-51.

131. The creation story in Genesis is often misunderstood as a story of judgment by failing to recognize it as a story of God’s love. Blessing Adam with the stamp of his image, placing before Adam all of God’s first fruits for Adam’s use, God only offered one restriction – Adam could not redesign truth, he could not eat of the apple of the tree of knowledge and good and evil. It is telling that Adam was able to touch the apple and eat of any other fruit in the garden. He was simply prohibited from ingesting truth and spitting out his own version of it. This prohibition was necessary, for Adam was eternal. Imagine the nature of things if man was eternally able to redesign and redefine truth. Upon first sin, man did not curse Adam or Eve but rather sought them out in relationship. *Genesis* 1-3. God did curse the serpent, but while promising humankind’s salvation. *Genesis* 3:15 (NIV) (“I will put enmity between you and the woman and between your offspring and hers; he will crush your head . . .”) God did limit man’s days in order to preserve truth, while immediately making possible eternal life through His love. *John* 1:1-3, 17. In other words, God preserved truth while extending grace through a suffering love. In such truth, grace and love – we can, and should, have faith. See *infra* note 333. Humankind’s failings are real, but the truth, thanks to the grace of God, is not defeated by those failings.

understanding of crime. “[A]t least in the recorded law prior to the twelfth century, a criminal intent was not recognized as an indispensable requisite for criminality.”¹³²

Penitentials, originating in monasteries and influenced by the theology and philosophy of St. Anselm,¹³³ and others gained increased influence. These monasteries established their “own miniature legal order.”¹³⁴ Each penitential was offered as guide for priests in their handling of confessors, so that punishment appropriate, or proportional to the sin,¹³⁵ could be offered to restore righteousness, or right relationship.¹³⁶

The penitentials considered crime an offense against another and an offense against God and possibly the Church, rather than an offense against the state.¹³⁷ The penalty, therefore, required restitution to the victim and some form of proportional punishment, required by divine justice for the restoration of right relationship between the offender and victim, and the offender and God.¹³⁸ This punishment vindicated the law and also

132. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 977 (1932) [hereinafter *Mens Rea*].

133. St. Anselm (1033-1109) developed the satisfaction theory of Christ’s atonement reasoning that God’s just nature compels that “blessedness ought not to be given to anyone unless his sins are wholly remitted, and that this remission ought not to be done except by the payment of the debt” thus necessitating the incarnation of Christ as to afford mercy prior to payment is treat the guilty and not guilty equally thereby rendering “injustice . . . if it is remitted by mercy alone, more free than justice, which seems very improper.” ST. ANSELM, *Whether It Were Proper for God to Put Away Sins by Compassion Alone, Without Any Payment of Debt*, in CUR DEUS HOMO 29-31 (2d ed. 1865); ST. ANSELM, *How, As Long As Man Does Not Restore What He Owes God, He Cannot Be Happy, Nor Is He Excused by Want of Power*, in CUR DEUS HOMO 56-58 (2d ed. 1865);. Anselm added “I do not deny that God is merciful But we are speaking of that ultimate mercy by which he makes men blessed after this life.” ST. ANSELM, *How, As Long As Man Does Not Restore What He Owes God, He Cannot Be Happy, Nor Is He Excused by Want of Power*, in CUR DEUS HOMO 56-58 (2d ed. 1865); See generally Tuomala, *supra* note 7.

134. BERMAN, *supra* note 105, at 69.

135. Proportionality in punishment was also an important concept in the development of the prohibition against cruel and unusual punishment.

136. See, e.g., BERMAN, *supra* note 105, at 69-72, 181-83.

137. *Id.* at 181. Scripture reveals a God of righteousness who desires righteousness in His people. Righteousness encompasses normative concepts, justice, morally right action and other considerations that lead to “right relationship.” See also *supra* note 80 (discussing righteousness premised on right relationship).

138. BERMAN, *supra* note 105, at 182-83. Milne, B. A. (1996). Righteousness. In D. R. W. Wood, I. H. Marshall, A. R. Millard, J. I. Packer, & D. J. Wiseman (Eds.), *New Bible dictionary* (3rd ed., pp. 1020-1021). Leicester, England; Downers Grove, IL: InterVarsity Press..

vindicated the offender as a rational person, capable of choosing good and evil, and intrinsically worthy of restoration.

This necessarily “placed a strong emphasis on the moral nature of the act and [consequently on] the state of [the offender’s] mind at the time of the act.”¹³⁹ The penitentials’s focus on the actor’s mind assists in determining whether punishment is justified to begin with and is only then relevant to determine the nature and degree of punishment. This contrasts with consequentialist penological aims which focus on the actor’s intent, or mindset, not to determine guilt, but only to determine the type and length of punishment (or treatment) to impose. Guilt and the state’s right to punish is, although not admittedly, presumed in consequentialism.¹⁴⁰

Since, at the time of the penitentials, there was not a distinction between crime and tort and crime and sin, and “all have sinned and fall short of the glory of God,”¹⁴¹ the community and the judge identified with the offender.

“[T]he association of crime with sin, and of punishment with atonement, gave the criminal or sinner a certain dignity vis-à-vis his accusers, his judges, and his other fellow Christians. They too were sinners This alleviated [an] element of moral superiority” held by those administering justice¹⁴² and “de-emphasize[d] self-righteous indignation as a component of criminal law.”¹⁴³

Punishment emphasized likeness, rather than otherness, such that witnesses to public punishments in seventeenth century New England all identified as potential and actual sinners.¹⁴⁴ Thus, punishing the offender identified, not separated, the offender from the community of rational beings by “assuming the universalizability of his act, and . . . by applying the universalized norm to him as a rational person.”¹⁴⁵ Otherwise, one is apt to forget “[a] felon is a man and by men should be treated as a man”¹⁴⁶ and

139. *Id.* at 183; see also Tuomala, *supra* note 7.

140. See *infra* at 57-67 ; see generally Dubber, *supra* note 36. Moreover, Jeremy Bentham attacked the notion of inherent or natural rights. See *infra* note 297, 341 and citations therein.

141. *Romans* 3:23 (NIV).

142. BERMAN, *supra* note 105, at 183.

143. *Id.* at 184.

144. For similar views in England see LINCOLN FALLER, TURNED TO ACCOUNT: THE FORMS AND FUNCTIONS OF CRIMINAL BIOGRAPHY IN LATE SEVENTEENTH-AND EARLY EIGHTEENTH CENTURY ENGLAND 54 (1987). See also Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 737 (2003).

145. Dubber, *supra* note 36, at 118.

146. JOHN HOWARD, THE STATE OF PRISONS IN ENGLAND AND WALES 12 (1777).

that punishment should be inflicted “not out of hate but rather out of charity.”¹⁴⁷

Moral blameworthiness, or intent, therefore, determined whether a sin had been committed and if so, the degree of punishment, or penance, necessary for restoration of right relationship with the offender viewed as one worthy of restoration.

By the eleventh-century the “canonists long insiste[nce] that the mental element was the real criterion of guilt . . . was making itself strongly felt,”¹⁴⁸ resulting in moral blameworthiness becoming the “foundation of legal guilt.”¹⁴⁹

Henry de Bracton (1210-1268), in his *De Legibus et Consuetudinibus Angliae*,¹⁵⁰ described by F.W. Maitland as “the crown and flower of English jurisprudence,”¹⁵¹ lifted his law on homicide directly from the canonist Bernard of Pavia,¹⁵² distinguishing between homicide “by [the administration of] justice, necessity, misadventure and desire.”¹⁵³

Bracton also echoed the theology behind the concept of mens rea, or moral guilt.

[W]e must consider with what mind [ammo] or with what intent [voluntate] a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act,

147. *Canon 8, Fourth Lateran Council (1215)*, PAPAL ENCYCLICALS ONLINE, <http://www.papalencyclicals.net/councils/ecum12-2.htm> (last visited Apr. 17, 2018). The Fourth Lateran Council of 1215, in Canon 18 also prohibited priest participation in trial by ordeals, eventually bringing an end to that practice. Moreover, Canon 8 required ecclesiastical courts to afford the accused the right to confront his witnesses, be informed of the charges against him and to call and question witnesses. *Id.* All such concerns reflect the concern for the honest determination of subjective guilt and the restoration of the guilty into right relationship with the Church, society and God.

148. Sayre, *supra* note 131, at 980.

149. *Id.*

150. “On the laws and customs of England.”

151. *Bracton Online*, HARV. L. SCH. LIB., <http://bracton.law.harvard.edu/> (last visited February 11, 2018).

152. 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 477, note 4 (2d ed. 1923); Twiss Travers, *Introduction* to) [hereinafter Maitland]; 2 BRACTON, *DE LEGIBUS* at lviii (Twiss transl. 1879).

153. BRACTON, *supra* note 151, at 120b.

and a crime is not committed unless the intent to injure [nocendi voluntas] intervene, nor is a theft committed except to steal.¹⁵⁴

At the time of Bracton's writings, Church influence was growing yet England still retained strict liability crimes originating from tribal laws. Westgothic law provided that "whoever shall have killed a man whether he committed the homicide intending or not intending to [volens aut nolens] let him be handed over into the potestas [power] of the parents or next of kin of the deceased."¹⁵⁵ And homicide retained its strict liability nature in the twelfth century.

Christian distinctions of the actor's mental state, however, gave justification for different punishments for different conduct that, nevertheless, caused the same consequences. Bracton noted "[i]t appertains to the lord the king and his crown to take cognizance of . . . the crime of homicide, whether by misadventure or by design, although these do not entail the same punishment, because in the one case rigor obtains and in the other mercy."¹⁵⁶

Moreover, the Church's focus on moral guilt served to protect human agency in another manner. The Church, at least theologically, acted in humility by recognizing its limits. Although the Church recognized sin as a matter of the mind, "for the very essence of moral guilt is a mental element,"¹⁵⁷ it distinguished between venial (pardonable sins requiring no punishment) and criminal sins (violations of ecclesiastical law which required punishment) by prohibiting conviction for criminal sins unless a guilty mind was *accompanied by a guilty act*, or *actus rea*. Moreover, the guilty act must be, in some form, substantial or vexatious.

Peter Abelard (1079-1142) argued there were three conditions for criminal sins: (1) mortal sins sufficiently grave to warrant punishment; (2) that were manifested by an external act as evidence of wrongful intent; and (3) that the sin is vexatious to the Church and not merely a private harm.¹⁵⁸

154. *Id.* at 101b.

155. John H. Wigmore, *Responsibility for Tortious Acts*, 7 HARV. L. REV. 315, 321 (1894) (quoting 1 WALTER, CORPUS JURIS GERMANICA 668).

156. BRACTON, *supra* note 151, at 104b. At the time of his writing, England still retained strict liability crimes stemming from tribal law. Yet, the Church's influence was felt in the expression of punishment for the act. Unintentional acts generally received the King's mercy rather than punishment. See Sayre, *supra* note 131, at 977-82.

157. Sayre, *supra* note 131, at 988. See also *Matthew 5:27-28* (NIV) ("You have heard that it was said, 'Do not commit adultery.' But I tell you that anyone who looks at a woman lustfully has already committed adultery in his heart.").

158. BERMAN, *supra* note 105, at 185.

The requirement of an external act was necessary because “only God can see the human heart”¹⁵⁹ and, also, in order to value that which God values—who has declared “nothing more valuable than a rational creature capable of enjoying him”—man should refrain from judging reason alone.¹⁶⁰

Guilt and punishment were determined by a more humble means than honor and pride, and, thus, mens rea and actus rea became a bulwark of personal freedom and protection against state and church punishment.¹⁶¹ “[T]he teaching of the penitential books that punishment should be dependent upon the moral guilt . . . [had such a powerful impact that] [h]enceforth, the criminal law of England, developing in the general direction of moral blameworthiness, begins to insist upon a mens rea as an essential of criminality.”¹⁶²

Christian teaching supplanted fate with hope, thus gifting purpose to the Christian teaching that each individual must concern himself with his personal salvation implied purpose and free will.¹⁶³

The penitentials, therefore, postulated that each individual is “a free moral agent, confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”¹⁶⁴

“If, as Shakespeare wrote, the fault is ‘in ourselves,’ it is because we believe we have the opportunity to choose well. Unlike the Greeks and Romans, whose gods were remarkably lacking in virtue and did not concern themselves with human misbehavior (other than failures to propitiate them

159. *Id.* This is not to say that a corrupt Church did not, at times, punish unnecessarily or unjustly, nor to argue that the Church was not, at times, motivated by power, rather than the preservation of souls. Such is the human condition. Yet, these failings do not defeat the logic or reason behind creating a distinction between sin and crimes and separating jurisdiction between the state and church.

160. ST. ANSELM, *How Nothing Less Was to Be Endured, in the Order of Things, Than That the Creature Should Take Away the Honor Due the Creator and Not Restore What He Takes Away*, in *CUR DEUS HOMO* 26-28 (2d ed. 1865); ST. ANSELM, *How the Honor of God Exists in the Punishment of the Wicked*, in *CUR DEUS HOMO* 28-29 (2d ed. 1865). See also BERMAN, *supra* note 105, at 183.

161. I argue that legal positivism and the legal reform movement emanating from the Second Great Awakening both committed the same error, that of hubris or pride, in defining the purpose of law. Both had the same motivation, the creation by the state of utopia, and the same faith in the institutions of man. See *infra* pp. 52-61.

162. Sayre, *supra* note 131, at 988.

163. Most modern, mid-eighteenth and early-nineteenth century, penological theories are premised on a materialistic non-metaphysical belief system which denies the free will or personality of the offender. See generally Dubber, *supra* note 36.

164. See GARLAND, *supra* note 14, at 550-51 (quoting ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 33 (1930)).

in an appropriate manner), the Christian God is a judge who rewards ‘virtue’ and punishes ‘sin’¹⁶⁵ to satisfy justice and lay the foundation for restoration.

The concept of free will was reconciled with an all knowing omnipotent God by Augustine, among others. “God knows all things before they come to pass, and that we do by our free will whatsoever we know and feel to be done by us only because we will it. But that all things come to pass by fate, we do not say; nay we affirm that nothing comes to pass by fate”¹⁶⁶

Christ’s command to “go and sin no more”¹⁶⁷ is irrational in a world controlled by fate.

Jesus’s radical teaching of radical moral equality, not premised on outcomes but rather the intrinsic value of the individual as gifted by God, was having an impact. Jesus constantly violated the letter of the law and cultural convention in order to highlight the purpose of law—the restoration of right relationship and the expression of the love of God. He healed on the Sabbath, touched the untouchable, and lectured legal experts and law-keepers.¹⁶⁸ Jesus eviscerated status and man-made boundaries by associating with sinners, outcasts, publicans, beggars, and the unclean. As Paul exhorted, “There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus.”¹⁶⁹

165. RODNEY STAR, *THE VICTORY OF REASON – HOW CHRISTIANITY LED TO FREEDOM, CAPITALISM, AND WESTERN SUCCESS* 32 (Random House, 2005)[hereinafter *VICTORY*].

166. AUGUSTINE, *Concerning the Foreknowledge of God and the Free Will of Man, in Opposition to the Definition of Cicero, in CITY OF GOD (BOOK V)* (Marcus Dods trans., T. & T. Clark 1872-76) .

167. *John* 8:11 (NIV). See also *Luke* 10:37 (NIV) (Christ instructs the lawyer to love his neighbor with the command “go and do likewise”).

168. See, e.g., *John* 5:1-45 (Jesus heals a paralytic on the Sabbath and lectures the Pharisees for placing their faith in the law rather than the love of God stating “I will [not] accuse you before the father. Your accuser is Moses on whom your hopes are set.”); *John* 9:1-41 (Jesus heals a blind man on the Sabbath and calls the Pharisees spiritually blind and guilty); *Mark* 5:21-36 (Jesus, through touch, heals a bleeding woman who was considered unclean under Jewish law and therefore untouchable). Jesus lectured a Jewish lawyer on the meaning of loving one’s neighbor, portraying a Samaritan, a race of people abhorrent to observant Jews, as fulfilling God’s commandment to love one’s neighbor in the face of the Jewish elite’s sidestepping the law. *Luke* 10:25:37 (the parable of the Good Samaritan). Samaritan’s were descendants of Israel who inter-married with Assyrians and were despised by the Jews.

169. *Galatians* 3:28 (NIV).

And Jesus's grace and love placed the disciple Peter on the same ground as the thief crucified with Christ, restoring both into the Kingdom of God through faith.¹⁷⁰

This moral equality expressed itself in Christian concepts of justice. Third century theologian L. Caecilius Firmianus Lactantius reasoned "the second constituent of Justice is equity," or equality.¹⁷¹

[I]t is plain that I am not speaking of the equity of judging well, though this also is praiseworthy in a just man, but of making himself equal to others, which Cicero calls equalbity. For God, who produces and gives breath to men, will that all should be equal, that is, equally matched. He has imposed on all the same condition of living; He has produced all to wisdom; He has promised immortality to all; no one is cut off from His heavenly benefits. For as He distributes to all alike His one light, sends forth His fountains to all, supplies food, and gives most pleasant rest of sleep; so He bestows on all equity and virtue. In His sight no one is slave, no one a master; for [all have the same Father].¹⁷²

Individualism and equality bolstered the belief that an innocent persons should not suffer from state punishment and strengthened the position of those who sought protection of the morally innocent in law.

In 1215, the Magna Carta, or the Great Charter, gave voice to these concepts of individualism and equality. At the time England was suffering under the disastrous reign of King John (1199-1216).¹⁷³ John, within five

170. See *Luke* 23:40-43 (Jesus promising the thief will join Him in paradise); *John* 21:15-21 (Jesus reinstates Peter after Peter denies Christ).

171. Lactantius, *Divine Institutes*, Book V, Chapter 15, CHURCH FATHERS, <http://www.newadvent.org/fathers/07015.htm> (last visited February 11, 2018). Lactantius identifies piety, "the conception of God," as the first principle of justice, inseparable from equity. *Id.* "Piety is the worship of God, and it is the 'originating impulse' of justice." DAVID P. GUSHEE & ISAAC B. SHARP, *EVANGELICAL ETHICS* 111 (Westminster John Knox Press, 2015).

172. *Lactantius*, *supra* note 170. Lactantius added,

Although our attitude of humility makes us one another's equals, free and slave, rich and poor, there are, in fact, distinctions which God makes, distinctions in virtue, that is: the juster the higher. For if justice means behaving as the equal of inferiors, then although it is equality that one excels in, yet by conducting oneself not merely as the equal of one's inferior, but as their subordinate, one will attain a far higher rank of dignity in God's sight . . .

Id.

173. Marc Morris, *King John: the most evil monarch in Britain's history*, THE TELEGRAPH (June 13, 2015), <https://www.telegraph.co.uk/culture/11671441/King-John-the-most-evil-monarch-in-Britains-history.html>.

years of assuming the throne, had lost most of England's continental territories.¹⁷⁴ Determined to recoup his losses, John dramatically increased taxes to raise funds for a campaign, thus offending the nobles.¹⁷⁵ John's cruelty also set him at odds with his subjects. John imprisoned and tortured Jews until they agreed to pay confiscatory taxes and ordered the torture and execution of those who opposed him.¹⁷⁶

When John's campaign to reclaim his lands failed, the English barons grew determined to bring reform to England. On June 15, 1215, the Barons forced John to sign the Magna Carta.¹⁷⁷ The document contains 4,000 words and 63 clauses. Over time, the Magna Carta came to serve as the foundation of England's uncodified constitution.¹⁷⁸

Among the charter's clauses is a prohibition against disproportionate punishment and fines, and the requirement of "the oaths of honest men of the neighborhood"¹⁷⁹ prior to any criminal conviction.¹⁸⁰ Moreover, no punishment was to be imposed on subjects "except by the legal judgment of his peers or by the law of the land."¹⁸¹ The right to a trial by a jury of one's

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. Magna Carta 1215, 17 John, § 20 (1215), *reprinted in* SOURCES OF OUR LIBERTIES 15 (Richard L. Perry ed., 1991) [hereinafter SOURCES OF OUR LIBERTIES].

180. *Id.* § 38, at 17.

181. *Id.* § 39, at 17. Justice Story recognized the Magna Carta as the source of our Constitutional right to a jury trial in an essay published in 1873:

It seems hardly necessary in this place to expatiate upon the antiquity, or importance of the trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes the fundamental articles of Magna Carta The judgment of his peers here alluded to, and commonly called in the quaint language of former times a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the state. When our more immediate ancestors removed to America, they bought this great privilege with them, as their birth-right and inheritance, as a part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 652-53 (4th ed. 1873). *See also* Kenneth Pennington, *Reform in 1215: Magna Carta and the Fourth Lateran Council*, 32 BULL. MEDIEVAL CANON L.

peers was necessary to prevent the King from using the criminal process to punish his enemies—in other words, to convict and punish the innocent.¹⁸²

The same concerns found expression in Pope Innocent III's efforts to address Church corruption by calling the Fourth Lateran Council which met in November of 1215.¹⁸³ The council was widely attended, with 71 patriarchs and metropolitans, 412 bishops, 900 abbots and priors, envoys from Emperors Fredrick II and Henry Latin of Constantinople, and envoys from the Kings of France, England, Aragon, Hungary, Cyprus, and Jerusalem.¹⁸⁴

The Canons emanating from the Fourth Lateran Council reflect the impact of theology on Europe's emerging jurisprudence and its concern to limit institutional power to punish the innocent. For instance, Canon 8 provides strict limits on ecclesiastical inquests or investigations: "How and in what way a prelate ought to proceed¹⁸⁵ to inquire into and punish the offences of his subjects may be clearly ascertained from the authorities of the new and old Testament, from which subsequent sanctions in canon law derive."¹⁸⁶

The Council confirms an investigation should only be joined when "prudent and honest persons" come forward with accusations and should only be an effort to "diligently . . . seek out the truth."¹⁸⁷ Moreover, any

criminal accusation which entails loss of status [for the church official] shall in no wise be allowed unless it is preceded by a charge in lawful form. . . . The person about whom the inquiry is

97, 104-05 (2015) (quoting MAGNA CARTA, Chapter 39). Pennington argues this Chapter also prohibited trial by ordeal which was routinely exercised by Royal prerogative. *Id.* at 105-10.

182. England did not have an independent judiciary at the time. See, e.g., *History of the Judiciary*, CTS. & TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/history-of-the-judiciary/> (last visited Apr. 17, 2018); *Judicial Independence*, POLITICS.CO.UK, <http://www.politics.co.uk/reference/judicial-independence> (last visited Apr. 17, 2018).

183. Henri Leclercq, *Fourth Lateran Council (1215)*, NEW ADVENT, <http://www.newadvent.org/cathen/09018a.htm> (last visited Feb. 10, 2018).

184. *Id.*

185. Here, we have another example of the inherent metaphysical contemplations of law with the use of the term *ought*, rather than *is*. See *infra* at 56.

186. *Fourth Lateran Council: 1215*, Canon 8, PAPAL ENCYCLICALS ONLINE, <http://www.papalencyclicals.net/councils/ecum12-2.htm> (last visited Apr. 17, 2018) [hereinafter *Lateran*].

187. *Id.* This requirement of witnesses is reflected in Chapter 38 of the Magna Carta which reads, "[f]rom this time forward no bailiff shall bring anyone to court on just his authority alone, unless good witnesses provide evidence." Pennington, *supra* note 176, at 103 (quoting MAGNA CARTA, Chapter 38).

being made ought to be present . . . [, and] [t]he articles of the inquiry should be shown to him so that he may be able to defend himself.¹⁸⁸ The names of witnesses as well as their depositions are to be made known to him so that both what has been said and by whom will be apparent; and legitimate exceptions and responses are to be admitted, lest the suppression of names leads to the bold bringing false charges and the exclusion of exceptions leads to false depositions being made.¹⁸⁹

Also, Canon 18 prohibits priests participating in or blessing trials by ordeal.¹⁹⁰ These procedural protections were confirmed in the Magna Carta in Chapter 39.¹⁹¹

The Magna Carta also addresses concerns with punishing the innocent by prohibiting excessive fines, or amercements. Such fines were often applied by royal prerogative to coerce confessions from the innocent.¹⁹² Chapter 40 reads, “[a] nulli ne vendrons, a nullui n’escondirons, ne porloignersons dreit ne justice To no one will we sell, to no one will we deny or delay right or justice.”¹⁹³

188. This is an express rejection of the civil law procedures on the European continent that allowed a procurator to question the accused while keeping the accused ignorant of the charge. This technique, at times, was also used in England by the Court of High Commission and Privy Council and by ecclesiastical courts even after the Fourth Lateran Council.

189. Lateran, *supra* note 185, Canon 8. Here ,we have the beginnings of the Sixth Amendment right of confrontation.

190. *Id.* at Canon 18.

191. Pennington, *supra* note 176, at 105-10 (arguing this Chapter also prohibited trial by ordeal which was routinely exercised by Royal prerogative).

192. Amercements replaced the bot and were after the Norman Conquests and a requirement of proportionality was soon imposed to limit Royal extravagance. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 928-29 (2011). This included the procedural protection that amercements were to be levied, not by the King, but rather by “the oath of lawful men of the neighborhood.” *Id.* at 929 (citing WILLIAM MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 285 (1914)). But during his reign, King John abandoned proportionality in amercements in order to use the threat of prison to force payment. *Id.* Three chapters of the Magna Carta address excessive penalties. *Id.*

193. Pennington, *supra* note 176, at 110 (quoting *MAGNA CARTA*, Chapter 40). *See also* ENG. BILL OF RIGHTS, ¶¶ 10-12 (1689), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 174, at 246.

2. Doctrines of State Supremacy begin to Challenge the Christian Moral Concept of Guilt.

Parliament's struggle with the monarchy was rejoined in 1297 as Royal officials strayed from the principles of the Magna Carta. Because King Edward I was locked in conflict in Scotland and in the continent of Europe, he required new taxes and, thus, a summons of Parliament.¹⁹⁴ English nobles refused to support the King's tax unless Edward confirmed the Magna Carta.¹⁹⁵ In 1297, he did so.¹⁹⁶ The *Confirmatio Cartarum* confirmed the liberties of the charter and stated "[t]hat if any judgment be given from henceforth contrary to the points of the [Magna Carta] by the justices, or by any other our minsters that hold plea before them against the points of the charters, it shall be undone, and holden for nought."¹⁹⁷

The *Confirmatio Cartarum* represented the strongest assault on the power of the monarchy to date by expressly declaring the King's conduct subject to the common law. These documents gained their power over time as Parliament responded to the Crown's new unusual methods of avoiding its prohibitions.¹⁹⁸

By the Seventeenth Century, British monarchs justified their royal excesses by the Doctrine of the Divine Right of Kings, philosophically developed by Thomas Hobbes (1588-1679) in the *Leviathan*¹⁹⁹ and forwarded by King James I of England.²⁰⁰ Exercising this "divine right,"

194. Parliament served at the pleasure of the King but the consent of Parliament was practically, if not legally, necessary in order to collect taxes. See, e.g., *Magna Carta and Parliament*, MAGNA CARTA, <http://www.magnacarta.senate.gov.au/index.php/parliament/> (last visited Apr. 17, 2018); SOURCES OF OUR LIBERTIES, *supra* note 174, at 24-25.

195. SOURCES OF OUR LIBERTIES, *supra* note 174, at 24-25.

196. *Id.*

197. CONFIRMATIO CARTARUM, ¶ 2 (1297), reprinted in SOURCES OF OUR LIBERTIES, *supra* note 174, at 30. The document also required the "common assent of the realm" prior to the imposition of new taxes. *Id.* at 31, ¶ 6. This clause is recognized as the origin of the right to not be taxed without representation. SOURCES OF OUR LIBERTIES, *supra* note 174.

198. Parliament often criticized the conduct of monarch's by describing their actions as "unusual," or contrary to long usage or precedent. SOURCES OF OUR LIBERTIES, *supra* note 174. This language was also used to prohibit certain punishments in the Eighth Amendment. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

199. Hobbes postulated that the state of nature is brutal and insecure with each individual aiming at self-preservation. To suppress this natural expression of man, a strong government with powers vested in a singular person was necessary. See generally THOMAS HOBBS, *LEVIATHAN* (1651).

200. James was also King James IV of Scotland and served as the first monarch of both kingdoms.

King James levied impositions,²⁰¹ exercised the power to remove judges not to his liking, and increased the power of courts formed under the Royal Prerogative, including the Court of Star Chamber and the Court of High Commission.²⁰² The Court of High Commission adopted torture as a method of proof, consistent with civil law on the European Continent.²⁰³

Charles I succeeded James in 1625, and he continued James's methods, forcing his subjects to loan funds to the Crown to fund his war with Spain. Those who refused the "loan" were imprisoned by the King's judges. Some sought review of their imprisonment by a writ of habeas corpus before the Court of King's Bench. This was an effort to remove themselves from jurisdiction of the Star Chamber Court comprised of members of the King's Privy Council.²⁰⁴

Writs, however, had to be approved by the King. Prior to approval of the writs, Charles met with the judges of the King's Bench and obtained assurances the court's decision would favor the King.²⁰⁵ The King's Bench later rejected all of the writs in the "Five Knights Case" and returned the subjects to prison.²⁰⁶ Outrage with the King's manipulation of the courts "focused public attention upon the right of personal liberty" and led to Parliament passing the Petition of Right in 1628.²⁰⁷

In passing the petition, Sir Benjamin Rudyard proclaimed that it was time for the Magna Carta "which hath been kept so long, and lien bed-rid, . . . [to] walk abroad again with new vigour and lustre."²⁰⁸ Sir Edward Coke, a former member of the Star Chamber and former Chief Justice of the Court of Common Pleas, also rose in defense of individually liberty and railed against the imprisonment of the innocent stating imprisonment at the King's command is "the utter subversion of the choice Liberty and Right belonging to every free born Subject of this Kingdom."²⁰⁹ Coke then

201. Impositions were customs duties not approved by Parliament. SOURCES OF OUR LIBERTIES, *supra* note 174, at 63.

202. *Id.* at 62-63 (The British Monarch retained sole authority over these specially created courts, thereby passing crucial rights secured by the Magna Carta.).

203. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 CAL. L. REV. 839, 848 (1969).

204. SOURCES OF OUR LIBERTIES, *supra* note 174, at 64.

205. Francis H. Relf, *The Petition of Right* at 2, reprinted in BULL. UNIV. MINN. (Dec. 1917).

206. SOURCES OF OUR LIBERTIES, *supra* note 174, at 64-65.

207. *Id.*

208. *Id.* (citing I HISTORICAL COLLECTIONS 552 (John Rushworth ed., 1721)).

209. *Id.* at 66.

introduced a bill limiting the ability of the Crown to detain a person prior to trial and calling for “due process of law” before punishment.²¹⁰

The House of Commons unanimously passed the provision but the House of Lords objected insisting the right of imprisonment for reasons of state was an essential part of the royal prerogative and should be preserved:

As touching his Majesty's Royal Prerogative, intrinsical to his Sovereignty, and betruſted him withal from God, *ad communem totius populi ſalutem, & non ad destructionem*, That his Majesty would reſolve not to uſe or divert the ſame, to the prejudice of any his loyal People in the propriety of their Goods, or liberty of their Perſons: *And in caſe, for the ſecurity of his Majesty's Royal Perſon, the common ſafety of his People, or the peaceable Government of this Kingdom, his Majesty ſhall find juſt cauſe for reaſon of State to impruſon or reſtrain any man's Perſon, his Majesty would graciously Declare, That within a convenient time he ſhall, and will expreſs the cauſe of the Commitment or reſtraint, either General or Special; and upon a cauſe ſo expreſſed, will leave him immediately to be tried according to the common Juſtice of the Kingdom.*²¹¹

Coke diſapproved, arguing that the Lords poſition rendered the liberties of the realm's ſubjects dependent on an “act of grace on the part of the king inſtead of” an inherent right, which the ſubjects could demand.²¹² The Houſe of Lords withdrew their demands and approved Coke's draft of the Petition of Right thereby placing Charles at odds with a unified Parliament.²¹³ Charles conſulted with his judges who advised him that aſſenting to the Petition of Right would “acknowledge the illegality of his former conduct and” reſtrict the powers he formerly aſſumed.²¹⁴

He again attempted to ſide-step the petition by renewing his promiſe to reſpect the liberties of all his ſubjects, but Parliament inſiſted on acceptance which was finally given on June 7, 1628.²¹⁵

210. *Id.* at 65-66.

211. John Ruſhworth, *Historical Collections: 1628 (part 2 of 7)*, BRITISH HISTORY ONLINE, <http://www.british-history.ac.uk/rushworth-papers/vol1/pp538-549> (laſt viſited Dec. 14, 2017) (emphaſis added).

212. SOURCES OF OUR LIBERTIES, *supra* note 178, at 67; SAMUEL RAWSON GARDINER, *HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 1601-1642*, 261 (1899).

213. *Id.* at 69.

214. *Id.*

215. *Id.*

The Petition of Right greatly strengthened the writ of habeas corpus by prohibiting imprisonment at the King's command without just cause and also strengthened due process of law by prohibiting the trial of civilians by tribunals formed in accordance with martial law.²¹⁶ Moreover, these steps implied that the King, and perhaps the state itself, were subject to some form of higher law.

These written and acknowledged protections, however, were immediately challenged by Charles who dissolved Parliament, not calling another for eleven years.²¹⁷ The King also expanded his use of the Star Chamber to imprison his enemies.²¹⁸

By 1640, King Charles I was in desperate need of funds to prosecute the second Bishops War in Scotland which necessitated his summons of

216. The prohibition of civilian trial by courts-martial was first addressed when Parliament annulled the attainder of the Earl of Lancaster and the principle was repeated in the English Mutiny Act of 1689. These principles are reflected in Article III and Amendments V and VI of the Constitution guaranteeing the right to trial by jury and due process of law. Speaking to martial law, the United States Supreme Court has said,

As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

Ex Parte Milligan, 71 U.S. 2, 127 (1866). See U.S. CONST. art. III, § 3. The Petition of Right also prohibited the quartering of soldiers in private homes. "They do therefore humbly pray your most excellent Majesty . . . would be pleased to remove the said solders and mariners, and that your people may not be so burthened in time to come." PETITION OF RIGHT art. X, cl. 4 (1628), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 75. Nevertheless, Parliament in 1765, at the request of General Gage, passed the Quartering Act to aid in enforcing the Stamp Act. SOURCES OF OUR LIBERTIES, *supra* note 178, at 72. The Quartering Act allowed the quartering of troops on private property. *Id.* In 1774 Parliament passed a new Quartering Act, again providing that British troops could be quartered in the private homes of the colonists. *Id.* The Act was considered one of the "Intolerable Acts" and was one of the grievances cited in the Declaration of Independence. *Id.* The King "has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation: For quartering large bodies of armed troops among us." DECLARATION OF INDEPENDENCE paras. 14-15 (U.S. 1776). Such conduct is prohibited in the Third Amendment. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

217. This period is known as the "Eleven Years Tyranny." *Eleven Years Tyranny*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095746958> (last visited Feb. 11, 2018).

218. *Id.*

Parliament for the first time in eleven years.²¹⁹ Parliament, first meeting on April 13, 1640, focused less on funding the King's war than stating grievances against the King.²²⁰ Parliament did set aside May 7 to debate the Scottish issue.²²¹ Charles rightly suspected Parliament on that date would pass a petition *against* the war and dissolved Parliament two days before the scheduled debate.²²²

Scottish resisters, emboldened by Charles's dissolution of Parliament, invaded northern England in November, forcing Charles to once again call Parliament in order to raise funds for his army. Parliament acted boldly and swiftly to diminish the power of the crown, "swe[eping] away the machinery of conciliar government developed by the Tudors and early Stuarts"²²³ and, in the process, abolishing the Star Chamber.²²⁴

Initially, under the reign of Elizabeth I, the Star Chamber protected persons oppressed by corrupt nobility.²²⁵ But, by the time of James I, in his exercise of his Divine Right and the Royal Prerogative, the court turned oppressive, imposing penalties not authorized by law.²²⁶ James' conduct drew the rebuke of the King's Chief Justice of the Court of Common Pleas, Edward Coke.²²⁷ Coke informed him "[t]hat the King by his proclamation cannot create any offence which was not an offence before" and "[t]hat the King hath no prerogative but that which the law of the land allows him."²²⁸

King James didn't flinch, but continued, after condemning Coke, to use the extraordinary powers of the Star Chamber to impose cruel sentences on

219. *Short Parliament*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Short-Parliament> (last visited Feb. 11, 2018) (Conflict arose from Charles's efforts to impose Anglican liturgy on the Church of Scotland.).

220. *Id.*

221. *Id.*

222. *Id.* Concerns about the improper dissolution of legislative bodies were consistently articulated by colonialists leading up to the American Revolution.

223. *Long Parliament*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Long-Parliament> (last visited Feb. 11, 2018).

224. The Star Chamber designated the room in Westminster Palace where the King's Privy Council, and later the Star Chamber Court met as a judicial body. See SOURCES OF OUR LIBERTIES, *supra* note 178, at 127.

225. SOURCES OF OUR LIBERTIES, *supra* note 178, at 128.

226. *Id.* at 130.

227. Coke, at various times, was a member of the King's Privy Council, served on the Star Chamber and served in the House of Commons. Gareth H. Jones, *Sir Edward Coke: English Jurist*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Edward-Coke> (last visited Apr. 17, 2018).

228. J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689, 38 (1928).

his opponents.²²⁹ The Star Chamber's exercise of power effectively neutered the Magna Carta. The Star Chamber Court could punish jurors who returned verdicts unfavorable to the King, compel the accused to answer under oath, retain jurisdiction to punish any person consistent with the King's prerogative,²³⁰ and exercise legislative and executive functions through its ability to enforce its proclamations.²³¹

Parliament, in 1641, decided to use Charles' vulnerability from the Bishops War to abolish the Star Chamber Court and another prerogative court, the Court of High Commission, thereby more firmly establishing due process of law and forwarding the development of the right against self-incrimination²³² and the prevention of the cruel punishments imposed by the court,²³³ and the use of the Court of High Commission by Charles I to punish theological opponents.²³⁴

The struggle between Parliament and the monarchy erupted in war in 1642.²³⁵ In 1649, Charles I was executed and the Commonwealth of England, governed by Parliament and an English Council of State, was established.²³⁶ In 1653, Oliver Cromwell was named Lords Protector and ruled England, advised by the Council of State, until his death in 1658.²³⁷ His son Richard succeeded him, but Royalists successfully restored the House of Stuart when Charles II assumed the throne on May 29, 1660.²³⁸

In 1689, Parliament had new and lingering grievances with the monarchy and used the weakness of King James II to offer the crown to William of Orange and his wife Mary on condition that they assent to a Declaration of Rights.²³⁹ This would later be followed by Parliament's passage of the English Bill of Rights.²⁴⁰ Parliament requested William's aid in deposing

229. SOURCES OF OUR LIBERTIES, *supra* note 178, at 130-31.

230. *Id.* at 129.

231. *Id.*

232. *Id.* at 132.

233. *Id.*

234. *Id.* at 136.

235. *Oliver Cromwell*, HISTORY.COM (2009), <http://www.history.com/topics/british-history/oliver-cromwell> (last visited Feb. 10, 2018).

236. *Id.*

237. *Id.*

238. *Id.*

239. SOURCES OF OUR LIBERTIES, *supra* note 178, at 222-24.

240. *Id.*

King James to restore “English liberties and [deliver] the realm from the absolutism of James II.”²⁴¹

The English Bill of Rights, much like the United States Declaration of Independence, begins with a list of grievances against the monarchy. Paragraphs 10-12 lay the foundation for the prohibition against cruel and unusual punishments:

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.
11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.
12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons, upon whom the same were to be levied.²⁴²

These grievances emanated from pre- and post-conviction punishment used for improper purposes. The monarchy had detained persons by excessive bail to coerce confessions, used torture to obtain evidence, imposed unusual and excessive sentences on its enemies, and threatened extreme punishment to coerce cooperation.²⁴³ All of this conduct was considered cruel and unusual and illegal by Parliament.²⁴⁴ “All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.”²⁴⁵

“The prohibition of cruel and unusual punishments was based on the longstanding principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.”²⁴⁶ Clause 10 in the English Bill of Rights provides “[t]hat excessive bail ought

241. *Id.* at 222.

242. ENG. BILL OF RIGHTS (1689), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 246.

243. *See e.g.*, Mirjan Damaska, *The Death of Legal Torture* (Book Review), 87 YALE L.J. 860, 865 (1978)[hereinafter Damaska].

244. *See generally* John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1786 (2008){hereinafter Stinneford}.

245. ENG. BILL OF RIGHTS (1689), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 246.

246. SOURCES OF OUR LIBERTIES, *supra* note 178, at 236.

not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.²⁴⁷

It is notable that the prohibition against excessive fines addressed, in addition to concerns about disproportionate punishment, the use of large fines to coerce proof in the form of a confession. Fines and torture as modes of proof were long condemned in England, in contrast to continental Europe.²⁴⁸ The fact that the prohibition against cruel and unusual punishments was also directed to prevent punishing the morally innocent has profound implications to originalist interpretations of the Eighth Amendment. Punishment and torture, as well as excessive amercements or fines, were used as a means of proof in order to coerce confessions for the political purposes of the crown.²⁴⁹ Using the individual, or freeman, as a means by the King to achieve his goals offended the inherent rights of English subjects.²⁵⁰

Because of this Act, the Royal prerogative was greatly diminished as the King was prohibited from suspending laws,²⁵¹ prosecuting members of

247. ENG. BILL OF RIGHTS (1689), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 247.

248. *See generally* Damaska, *supra* note 243.

249. *See, e.g.*, Ellen Castelow, *Torture in the Tower of London*, HISTORIC UK, <http://www.historic-uk.com/HistoryUK/HistoryofEngland/Torture-in-the-Tower-of-London/> (last visited Apr. 17, 2018).

250. Although a thorough analysis of the Eighth Amendment is beyond the scope of this article, I posit that the English struggles and America's founding are rightly focused on justifying and thereby limiting the state's power to coerce and punish. In this context, punishment is not viewed cleanly through originalist tools, procedural due process, or methods of punishment as such generally emphasize procedure over substance. Rather, history reveals the battle was not over methods or procedures of punishment but rather under what circumstances it was proper to punish. The long and incessant struggle of justice is to prevent the punishment of the morally innocent. For this reason, the state's punishment of the innocent by imprisonment violates the Eighth Amendment's prohibition against cruel (using the individual as a means for state concerns) and unusual (disregarding the inquiry into the moral blameworthiness of the accused) punishment. In terms of the evolving standards of decency, the test used by the current majority of the Supreme Court, punishing the innocent is grossly disproportionate. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 59-60 (2010). *Graham* articulates the "grossly disproportionate" standard but the Court has not held that strict liability crimes violate the Eighth Amendment and has expressly rejected that such public welfare crimes violate due process. *Id.* The full argument that imposing prison sentences violates the Constitution awaits another paper.

251. *See* ENG. BILL OF RIGHTS (1689), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 246.

Parliament,²⁵² impaneling jurors of the King's choosing in cases of high treason,²⁵³ and again abolishing the Court of High Commission.²⁵⁴

Innocent persons were also protected by other provisions of the Act. Torture, or cruel punishment through trial by ordeal, was prohibited, according to Lord Coke, by Chapter 29 of the Magna Carta²⁵⁵ and by Parliament through statute in 1219,²⁵⁶ and its use continued to offend in 1689.

Despite its continued use by Royal prerogative, by the early seventeenth-century, torture was viewed as by English jurists as representing the unusual, or foreign, practice of the civil law of continental Europe²⁵⁷ as "[o]ne of the distinguishing features of the English common law writing, from its earliest inception, was its rejection of torture as a method of proof."²⁵⁸ And yet, through the exercise of the Royal Prerogative, torture continued.²⁵⁹

Parliament, in the English Bill of Rights, again found it necessary to declare its prohibition as a means of proof by prohibiting the use of excessive fines and cruel and unusual punishments.²⁶⁰ Punishing the innocent through such devices was viewed as unjustified. The guilty, on the other hand, faced punishments we would view as barbarous today. Men convicted of treason were disemboweled alive and drawn and quartered while women faced burning at the stake.²⁶¹

Clearly, the English Bill of Rights was concerned as much with protecting the morally innocent from being used as a tool of the state as it was with the

252. *Id.* at 247.

253. *Id.*

254. *Id.* at 226. The Court's Chief Commissioner, Lord Jeffreys, used the High Commission to place Oxford and Cambridge Universities under Catholic control. *Id.* at 226-27.

255. SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES*, 34-37 (1797).

256. Danny Friedman, *Torture and the Common Law*, 2 *EUR. HUM. RTS. L. REV.* 180, 182 (2006).

257. *Id.* at 186; *see also* JAMES HEATH, *TORTURE AND ENGLISH LAW: AN ADMINISTRATIVE AND LEGAL HISTORY FROM THE PLANTAGENETS TO THE STUARTS* 38-45 (1982).

258. Friedman, *supra* note 255, at 184.

259. *Id.* at 187-92.

260. *ENG. BILL OF RIGHTS (1689)*, *reprinted in* *SOURCES OF OUR LIBERTIES*, *supra* note 178, at 247.

261. *See supra* note 63.

methods of punishment applied to the guilty.²⁶² “[T]here can be no transgression” where there is no will to commit an offense, “[a]nd because the liberty . . . presupposeth an act of the understanding . . . , it follows that where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions” and, therefore, no transgression.²⁶³

These English struggles, in hindsight, were centered on individual liberty and equality, and when and whether the state had a right to coerce or punish the individual. This issue was masked by individual ambitions as a struggle primarily about the form of government. Despite asserting individual liberty, Parliamentarians were often content to bring the monarchy under the rule of law, as stated by Parliament, while not creating a law superior to Parliament and the state itself. Yet, they spoke aspirational language of a superior law. The American revolution gave full expression to these aspirations.

IV. THE AMERICAN REVOLUTIONARIES ELEVATE EQUALITY AND INDIVIDUALISM ABOVE THE STATE EVEN AS THE FOUNDATION IS LAID FOR THE UTILITARIAN ASSAULT ON THE INDIVIDUAL.

A. *The American Revolutionaries Lift Man’s Inherent Rights above the State, Subjecting the State to the Rule of Law.*

The struggle between Parliamentary Supremacy and the Divine Right of Kings was not central to American colonialists, who were fleeing religious persecution, whether unjustly imposed by the monarchy or Parliament. Colonial charters generally expressed that colonialists retained “all liberties and Immunities of free and naturall Subjects within any of the Domyinions of Vs, our Heires or Successors, to all Intents, Construccõns, and Purposes whatsoever, as yf they and everie of them were borne within the Realme of England.”²⁶⁴

Various statements of rights and proclamations, also considered Acts of Parliament, or statutes contrary to such rights and privileges, null and void, thus elevating the status of the individual rights articulated in the Magna

262. See also *Weems v. United States*, 217 U.S. 349, 373 (1910).

263. Dubin, *supra* note 7, at 352 (quoting 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 14-15 (1736)).

264. CHARTER OF MASSACHUSETTS BAY (1629), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 93. See also CHARTER OF MARYLAND art. X (1632), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 109 (providing that all freemen shall enjoy “all Privileges, Franchises and Liberties of this our Kingdom of England” and providing that any “Statute, Act, Ordinance, or Provision to the contrary thereof, notwithstanding.”).

Carta and Petition of Rights as a form of supreme law of a constitutional nature.²⁶⁵ Distance and dissatisfaction with the King and Parliament fomented growing discussion that these rights were inherent, not subject to the grace of Parliament or the King.

America did not adopt British Parliamentary Supremacy, for once it gained supremacy, Parliament utilized the methods of the monarchy to enforce conformance on the colonies with the passage of the Intolerable Acts.²⁶⁶ On October 25, 1774 the First Continental Congress petitioned King George III, articulating grievances against Parliament that mirror Parliament's earlier complaints against the monarchy:

[J]udges of the courts of common law have been made entirely dependent on one part [of] the legislature for their salaries as well as for the duration of their commissions. Councilors, holding their commissions during pleasure, exercise legislative authority. Assemblies have been frequently and injuriously dissolved. . . .

. . . .

By several acts of Parliament . . .

the powers of admiralty and vice-admiralty courts are extended beyond their ancient limits . . .

the trial by jury in many civil cases is abolished;

enormous forfeitures are incurred for slight offenses;

. . . .

oppressive security is required from owners before they are allowed to defend their rights.

. . . Parliament ha[s] resolved that the colonists may be tried in England for offenses alleged to have been committed in America

. . . .²⁶⁷

When King George rejected America's petitions, the Continental Congress turned its ire on the King, justifying a declaration of independence due to the King's "repeated injuries and usurpations, all

265. THE CHARTER OF MASSACHUSETTS BAY (1629) *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 82; THE CHARTER OF MARYLAND (1632) *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 178, at 105.

266. *Intolerable Acts: Great Britain [1774]*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Intolerable-Acts> (last visited Apr. 17, 2018).

267. First Continental Congress, *Petition to King George III* (1774), <http://americainclass.org/sources/makingrevolution/crisis/text7/petitionkinggeorge3.pdf> (last visited Feb. 11, 2018).

having in direct object of the establishment of an absolute tyranny over these States.”²⁶⁸

American revolutionaries were not as concerned with the English battle over the form of government as much as they were concerned that any form of government be subject to the rule of law and to fundamental principles respecting individual liberty.²⁶⁹ This purpose directed their formation of their government, but its form was not their purpose.

And the Founders used experience to condemn the King and Parliament for their excessive use of power in defiance of liberty by drawing on “(1) their rights as Englishmen; (2) natural law; (3) the emigration contract; (4) the original contract; (5) the original American contract; (6) the emigration purchase; (7) colonial charters; (8) equality with other British subjects . . . ; (9) principles of the British constitution; and (10) principles of the customary American constitution.”²⁷⁰ In other words, any source that limited the state’s reach.

The United States Bill of Rights articulated procedural barriers to that exercise of state power *and* principles that prohibited its exercise, thus expressing the radical individualism and equality reflected in the gospels which guided the development of common law criminal theory.

Mens rea and actus rea is not directly addressed in the Constitution because it was inherent in the definition of crime and moral understanding of the time.

In 1816, when reversing the conviction of letting a carriage out for hire on Sunday, the Connecticut Supreme Court opined that if “a man acts honestly . . . he is not a criminal. . . . Unless this construction be adopted, a man may be convicted of a crime, when he had no intent to violate the law. . . . This would oppugn the maxim that a criminal intent is essential to constitute a crime.”²⁷¹

In the colonies, individualism and equality before the law were sufficiently culturally entrenched that the concept of the state criminally punishing the morally innocent was abhorrent to the concept of law and individual liberties.

268. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

269. This recognition is important in that it calls into question the legitimacy of Justice Scalia’s originalism, confining the intent of America’s founders to the forms and procedures of government and refusing to contemplate the documents aspirational qualities.

270. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 293 (1996) (citation omitted).

271. *Myers v. State*, 1 Conn. 502, 504 (1816).

B. *Jefferson Sees the Seeds of Despotism in America's Law Schools.*

Yet, even at that time, Thomas Jefferson saw signs that the liberty of America's citizens was in jeopardy because of a new textbook in America's law schools. Although, some have referred to Blackstone's Commentaries as the "handbook of the American revolutionary"²⁷² and Blackstone wrote eloquently on the necessity of mens rea,²⁷³ Jefferson saw within Blackstone's writings the seed of despotism. Blackstone was out of step with the fullness of American individualism and equality.

Jefferson identified Republicanism with the Whig Party, which opposed absolute monarchy, as against the Tory Party which originally supported such. Moreover, in the middle seventeenth century, during Lord Coke's prominence, the Tories resisted religious toleration.²⁷⁴ Tory conservatism, adherence to tradition, parliamentary supremacy, and religious intolerance was—in Jefferson's estimate—embodied in William Murray, First Earl of Mansfield, better known as Lord Mansfield.²⁷⁵

Mansfield served as Chief Justice of the King's Bench and Solicitor General and secured a "rigid dogma that saw any threat or challenge to British authority or culture as inherently illegitimate . . . and he immediately rejected the earliest complaints of the Americans over British rule."²⁷⁶ Colonials ascribed to him an "arbitrary, unconstitutional, and tyrannical posture toward everything."²⁷⁷

Jefferson, writing to James Madison on February 17, 1826, lamented the substitution in American's law schools of William Blackstone's Commentaries, first published in 1770, in place of Edward Coke's

272. Stinneford, *supra* note 244, at 1786; *see also* Briehl v. Dulles, 248 F.2d 561 (D.C. Cir. 1957); ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM 92 (1997).

273. *See supra* p. 12.

274. *See Whig and Tory: Historical Political Party England*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Whig-Party-England> (last visited Feb. 12, 2018).

275. *See* ARI HELO, THOMAS JEFFERSON'S ETHICS AND THE POLITICS OF HUMAN PROGRESS: THE MORALITY OF A SLAVEHOLDER 142-43 (2014); CLAUDE HALSTEAD VAN TYNE, THE CAUSES OF THE WAR OF INDEPENDENCE, BEING THE FIRST VOLUME OF A HISTORY OF THE FOUNDING OF THE AMERICAN REPUBLIC 218 (1922).

276. Henry Nicholas Buehner, *Manfsfieldism: Law and Politics in Anglo-America 1700-1865*, Abstract (unpublished Ph.D. dissertation, Temple University), <http://digital.library.temple.edu/cdm/ref/collection/p245801coll10/id/258169>.

277. *Id.*; *see also* Stinneford, *supra* note 243, at 1786.

Institutes²⁷⁸ as the premier American legal textbook.²⁷⁹ “[B]efore the [American] revolution, Coke Littleton [the title of the first volume of Coke’s Institutes] was the universal elementary book of law students, and a sounder [W]hig²⁸⁰ never wrote, nor profounder learning in the orthodox doctrines of the British [C]onstitution, or in what were called English liberties,”²⁸¹ Jefferson wrote.

As for Blackstone, Jefferson labelled his legal theory “honeyed Manfieldism.”²⁸² In other words, Blackstone believed in state supremacy through the exercise of its authority. This belief that representative government, or democracy, is inherently virtuous deeply concerned Jefferson. Limiting the national government and ensuring individual liberty was foremost in Jefferson’s mind as he discussed the founding of the University of Virginia School of Law with Madison.

“In the selection of our Law Professor, we must be rigorously attentive to his political principles,” he wrote.²⁸³ Use of Blackstone’s hornbook started the

slide into toryism, and nearly all of your young brood of lawyers now are of that hue. They . . . no longer know what whigism or republicanism means. It is in our seminary that that vestal flame is to be kept alive; it is thence it is to spread anew over our own and the sister States. If we are true and vigilant in our trust, within a dozen or twenty years a majority of our own legislature will be from one school, and many disciples will have carried its doctrines home with them to their several States, and will have leavened thus the whole mass.²⁸⁴

278. Coke’s 4 Volumes of the *Institutes of the Lawes of England*, was published from 1628-1644. *Coke, Sir Edward [1552-1634]*, ONLINE LIBRARY OF LIBERTY, <https://oll.libertyfund.org/pages/coke-sir-edward-1552-1634> (last modified Apr. 13, 2016).

279. 12 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 456 (Paul Leicester Ford ed., 1905), <http://oll.libertyfund.org/titles/jefferson-the-works-of-thomas-jefferson-12-vols> (last visited Feb. 12, 2018).

280. The British Whig party opposed absolutism. See e.g., *Whig and Tory: Historical Political Party, England*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Whig-Party-England> (last visited Apr. 17, 2018).

281. 10 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 376, (Paul Leicester Ford ed., 1899).

282. Stinneford, *supra* note 244, at 1786.

283. JEFFERSON, *supra* note 278, at 456.

284. *Id.*

Jefferson's concern about Blackstone predated his letter to Madison. In 1814, he wrote, "Blackstone and Hume . . . are making Tories of those young [lawyers] These two books . . . have done more towards the suppression of the liberties of man than all the millions of men in arms of Bonaparte"285

Throughout Jefferson's lifetime, the various denominations of Christianity and the Catholic Church, at times, stood against the official religion of the state, and served as a training ground for those dedicated to individual liberty and tolerance. In England, whiggism sought to limit the King's power, and in America, it became republicanism which stressed inalienable rights.²⁸⁶

Mansfield's, and Blackstone's, support of the state and the state's coercive policies in support of the official state church, the Anglican Church, remained a harbinger of the loss of liberty and the rise of absolutism.

Jefferson viewed both the Divine Right of Kings and Parliamentary Supremacy as offensive to inherent rights and lived at a time when the state often used religion to forward its cause. At the same time, Jefferson recognized the inspiration Christian faith offered to the long struggle against unjust state power. He, therefore, logically viewed the marriage of state and religion as offensive to liberty while viewing the cultural absence of faith also threatening. And so, he nurtured fear that the state may merge with the church, while nurturing hope that our seminaries would continue its teaching of the radical equality and liberty of the individual.

Jefferson's criticism of Blackstone was not without merit. Blackstone was a champion of Parliamentary Supremacy. "[T]he legislature, being in truth the sovereign power, is always . . . of absolute authority."²⁸⁷ It "hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws . . . this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted."²⁸⁸

"Like James I, Milton, Halifax, and Hobbes, Blackstone asserted, as a matter of logic, the sovereign must possess uncontrolled absolute, and arbitrary power."²⁸⁹ This was opposed to the views of Lord Coke, that judges

285. Alschuler, *supra* note 8, at 11.

286. Stinneford, *supra* note 244, at 1786 (citing GEORGE HERBERT GUTTRIDGE, ENGLISH WHIGGISM AND THE AMERICAN REVOLUTION 10, 68 (1974)).

287. *Id.* at 1789 (citation omitted).

288. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *160).

289. *Id.*

could disregard legislation inconsistent with reason or foundational rights²⁹⁰ and that positive law inconsistent with the principles of common law are void.²⁹¹

Yet, Blackstone's seeds, watered by legal positivism and the fervor of the Second Great Awakening, grew into the legal doctrine of Public Welfare Crimes.²⁹² Close to one century later, and three decades after Jefferson's warnings, strict liability crimes, placing the state's interest above the individual, began appearing consistently in the United States overwhelming common law protections of the innocent.²⁹³

C. *Legal Positivism, the Separation of Law from Morality and Metaphysics, Takes Root in the Second Great Awakening.*

Jeremy Bentham first posited that the law is dependent on social facts, and not morality, in the late eighteenth century, and the concept was further developed by John Austin in 1832.²⁹⁴ In its first expressions, positivism was similar to theories of state supremacy in its requirement of a "sovereign" with "supreme and absolute *de facto* power" joined with the ability to command conformity "backed up by threat of force or 'sanction.'"²⁹⁵

This definition of law places an emphasis on procedures ensuring that the proper authority enacts laws as the source of legitimacy. This source-based focus offers nothing regarding the purposes or merits of law, as such are considered by positivists, at least initially, irrelevant. "No legal positivist argues that the *systemic validity* of law establishes its *moral validity*, i.e., that it should be obeyed by subjects or applied by judges."²⁹⁶

But Bentham's articulation of utilitarianism corresponded with the growing use of the scientific method and the temptation to utilize the

290. Alschuler, *supra* note 8, at 19 n.106.

291. See *Dr. Bonham's Case*, 8 Co. Rep. 114 (1610). Both Royalists and radical democrats used Coke's reasoning in *Dr. Bonham's Case* to argue acts "against common right or reason" were void. See DAVID JENKINS, *DISCOURSE TOUCHING INCONVENIENCES OF A LONG-CONTINUED PARLIAMENT* 123 (1647); J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 104 (Fred. B. Rothman Publ'ns 1985) (quoting JENKINS, *supra* note 290, at 123)

292. Sayre, *supra* note 48, at 56-57.

293. *Id.*

294. See Leslie Green, *Legal Positivism*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Jan. 3, 2003), <https://plato.stanford.edu/entries/legal-positivism#1>.

295. *Id.*

296. *Id.*

method to determine not only what “is” but also what “ought” to be.²⁹⁷ Bentham’s insistent empiricism²⁹⁸ in determining “moral” applications of hedonism misuses the scientific method to determine what “ought” to be and fills the void of legal positivism.

Science, properly, requires observing what is measureable and rejects that which is non-observable or not measureable (non-sensible).²⁹⁹ Accordingly, metaphysics, today, has no influence on science unless it can be reduced to material, or atoms. The danger presents when this method purports to be the only valid description of reality thereby attempting to posit an answer to what “ought” to be through a consequentialist moral construct, or what “will be” through determinism. When it does so, science presupposes that God does not, or cannot, work through matter and thereby applies a metaphysics it purports to reject. This confusion, the application of morals objectives to science, mirrors the confusion of attempting to contemplate law without contemplating its purpose or merits.

The debate is not new. Plato’s Athenian lamented his “youthful irreligion” arising from a naturalistic view.³⁰⁰ As a youth, he stated that he held the predominant view—that “all that is in in the heaven, as well as animals and all plants, and all the seasons come from these elements [that is, fire and water, earth and air], not by the action of mind, as they say, or of any God, or from art, but, as I was saying, nature and chance only.”³⁰¹ This determinism is mirrored by science when it claims province over all that exists.

As philosopher John R. Seale writes:

The world consists entirely of entities that we find it convenient, though not entirely accurate, to describe as particles. These particles exist in fields of force, and are organized into systems. The boundaries of [these] systems are set by causal relations. . . . Types of living systems evolve through natural selection, and

297. See *supra* notes 36 and 81 (discussing the “ought-is” dilemma).

298. See, e.g., William Sweet, *Jeremy Bentham (1748-1832)*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/bentham/> (last visited Apr. 25, 2018). Although Bentham viewed the creation of law as *prima facie* diminishing the greater happiness, he also viewed law as a necessity for societal order and individual rights as acquired from law and not pre-existing. Bentham, thereby, helped re-open the door to Blackstone’s doctrine of state supremacy.

299. Interestingly, we are learning that the very act of measurement matter alters that matter such that we are currently unable, with exact precision, to measure anything.

300. PLATO, THE LAWS 889c-892c [hereinafter THE LAWS]. Although, the Athenian came to his “senses” recognizing the significance of the pre-existing soul.

301. *Id.*

some of them have evolved certain sorts of cellular structures, specifically, nervous systems capable of causing and sustaining consciousness. Consciousness is a biological, and therefore physical, though of course also mental feature of certain higher-level nervous systems, such as human brains and a large number of different types of animal brains.³⁰²

Seale adds, “[T]he truth is . . . our metaphysics is derived from physics.”³⁰³

One of materialisms’ greatest challenges is to explain the subjective mental state and consciousness of a human being. Desperate to shut the door on subjectivity, lest metaphysics sneak back in the discussion, materialists have forwarded three approaches to reject the relevance of metaphysics. They attempt “to show how statements about mental states can be analysed [sic] into statements . . . about physical states [or they] courageous[ly] and desperate[ly] [claim] statements about states of consciousness [are] false [or] . . . attempt to show that materialism can accommodate irreducibly subjective psychical [sic] states without ceasing to be genuinely materialistic.”³⁰⁴

Regardless of the approach, we are left in a soulless state.

In science, Luigi Giussani observes, “Even the most noble expressions of the human experience are rendered banal, commonplace . . . [T]he entire phenomenon of love is reduced, with bitter ease, to biological fact.”³⁰⁵ Frederick Nietzsche captures the calamity befalling man’s nature with the death of metaphysics, or the death of god, with the ranting of his madman in the square.

God is dead. God remains dead. And we have killed him.

How shall we comfort ourselves, the murderers of all murderers? What was holiest and mightiest of all that the world has yet owned has bled to death under our knives: who will wipe this blood off us? What water is there for us to clean ourselves? What festivals of atonement, what sacred games shall we have to invent? Is not the greatness of this deed too great for us? Must we ourselves not become gods simply to appear worthy of it?³⁰⁶

302. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 6 (1995). See also Quandary, *supra* note 36, at 26-28 (detailing the reductionism of materialistic science).

303. Searle, *supra* note 301, at 6.

304. HOWARD ROBINSON, *MATTER AND SENSE* 2 (1982).

305. LUIGI GIUSSANI, *THE RELIGIOUS SENSE* 42 (John Zucchi trans., 1997).

306. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE: Book III —Aphorism #125* (1887).

Removing God from the inquiry defeats the reason to inquire in the first place. God exists, or we will proclaim ourselves as gods to fill the vacuum. All that is left is to determine what is right by whomever has the greatest power. Nietzsche was acutely aware of this result; however, Bentham was not, and legal positivists still aren't.

D. Rejecting Metaphysics is a Rejection of Justice.

Just as Holmes rejected the “brooding omnipresence in the sky,” Judge Richard Posner “laments that judges and the law do not look to empirical information to resolve issues, but rather look to moral principles.”³⁰⁷ “Holmes and his successors operated in an era that was determined to purge itself of ‘metaphysics.’”³⁰⁸ “It would not be much of a stretch . . . to say that the central effort from Holmes through the modern proponents of ‘policy science’ has been precisely to improve the law by ridding it of the curse of metaphysics.”³⁰⁹

Defining something without reference to purpose defeats the very reason for seeking the definition—that of gaining an understanding of its function.

On the one hand, we have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it. On the other hand, we have a moral duty to do what we think is right and decent. When we are confronted by a statute we believe to be thoroughly evil, we have to choose between these two duties.

If this is the positivist position, then I have no hesitancy in rejecting it.³¹⁰

Here, Lon Fuller, although a positivist, recognizes the dilemma.

Law is “justice-apt . . . [I]t always makes sense to ask whether law is just . . . Law stands continuously exposed to demands for justification.”³¹¹ The law’s purpose is justice, and justice is a metaphysical question that is not value neutral.

Purpose is intrinsic to creation, as it is to any endeavor by a rational being. To describe law solely from form entirely focused on what “is,” without considering purpose is akin to designing a car, or anything for that

307. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (2017) (Holmes, J., dissenting); Quandary, *supra* note 36, at 1.

308. Quandary, *supra* note 36, at xi.

309. *Id.* at 2–3.

310. Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 656 (1958).

311. Green, *supra* note 293.

matter, without seeking first to understand the purpose of its creation. A car purposed to go fast will look much different than a car purposed to transport a family safely to a new destination. The exercise is fruitless and the human condition will not withstand the vacuum.

So we fill the void, often by declaring ourselves or our institutions as gods. As did Bentham with the consequentialist moral construct of utilitarianism, granting the trait of virtue to democracy.³¹²

Social scientists, inspired by the materialism of Darwin, also rushed the fill the void left by the law's refusal to consider metaphysical concepts like justice and developed justification for state tyranny. Ernst Haeckel (1834-1919), biologist, physician and professor, wrote in 1877 that evolution exposes the illusory nature of free will and that the "golden rule"³¹³ is rooted in "a natural science basis,"³¹⁴ foretelling the loss of soul and human agency in a world of materialism. Austrian parliamentarian Bartholomaus von Caneri, argued "the value of Darwin is that the human no longer needs to have a supernatural soul, and that one no longer needs purpose to explain creation."³¹⁵ Therefore, "[a]n ethic consistent with Darwin's theory knows no natural or innate rights, and therefore, only speaks of acquired rights."³¹⁶

We believe that the evolution of the human species as well as all other species is perhaps only possible—and in any case furthered—through natural selection, and that the struggle for existence shapes in its widest sense all of human history as well as the existence of the most obscure individual; and (the struggle for existence) is the basis for all phenomena of politics as well as social life. That is our worldview. From this flows all our principles of life and our conceptions of law and morality.³¹⁷

The individual is miniscule, next to the power of the state in the "struggle for existence." Thus, purpose as defined by science, reduces the individual

312. Democracy without constraint is merely two wolves and a sheep deciding what's for dinner. An observation attributed to Benjamin Franklin.

313. The golden rule, "do unto others you would have them do unto you" has its origins in Jesus's command to "do to others as you would have them do to you." Matthew 7:12 (NIV); see also Luke 6:31. It is also reflected in Kant's "Categorical Imperative."

314. Ernst Haeckel, Ueber die heutige Entwicklungslehre im Verhältnisse zur Gesamtwissenschaft, in *AMTLICHER BERICHT DER 50, 1877*, at 19-20.

315. Letter from Bartholomaus von Carneri to Ernst Haeckel and Fridrish Jodl (Sept. 4, 1883).

316. *Id.*

317. MAX NORDAU, *DIE KONVENTIONELLEN LUGEN DER KULTURMENSCHHEIT* 26 (Leipzig, 1909).

and elevates the state. But its work was not done, as it developed further tools to undermine moral arguments for recognizing the intrinsic value of the individual.

Good and bad derive not only their existence but their measure and their significance from the views of the community. They are therefore not absolute but variable; they are not an immutable standard amid the ever-changing conditions of humanity . . . but are subject to the laws of evolution in society and therefore in a constant state of flux What is virtue here and now may have been vice formerly . . . and vice versa.

claimed German physician Max Nordau.³¹⁸

With history serving as merely a reflection of natural processes which, at that time of its expression, behind the current evolutionary forces, history's lessons are lost and the individual loses a significant weapon against state hegemony.³¹⁹ Virtue can no longer be measured and is powerless in persuasion. It is an illusion. As is justice.

In *Mein Kampf*, Hitler begins describing the application of such a worldview, indicating it by no means believes in the equality of races, but recognizes along with their differences their higher or lower value, and through this knowledge feels obliged, according to the eternal will that rules this universe [the survival of the fittest], to promote the victory of the better, the stronger, and to demand the submission of the worse and weaker. It embraces thereby in principle the aristocratic law of nature and believes in the validity of this law down to the last individual being. It recognizes not only the different value of races, but also the different value of individuals. . . . But by no means can it approve of the right of an ethical idea existing, if this idea is a danger for the racial life of the bearer of a higher ethic.³²⁰

This thinking found fertile ground in the United States, as policy drifted towards preserving America's ethnic and genetic heritage. In 1907, Indiana became the first state to pass forced sterilization to prevent genetic decay³²¹

318. MAX NORDAU, *MORALS AND THE EVOLUTION OF MAN* 73 (Marie A. Lewenz trans., New York, Funk and Wagnalls Co. 1922).

319. See Fridrich Jodl, *Morals in History*, 1 INT'L J. OF ETHICS 204, 207-08 (1891).

320. A. E. SAMAN, *FROM A RACE OF MASTERS TO A MASTER RACE* 521 (2012) (quoting Adolph Hitler, *MEIN KAMPF* 420).

321. See, e.g., *Indiana Eugenics: History and Legacy 1907-2007*, www.iupui.edu/eugenics/.

and the Eugenics Office of Cold Spring Harbor, New York was founded in 1910, largely funded by the Carnegie and Rockefeller charitable trusts.³²² The Eugenics Office encouraged the establishment of “Eugenics Registries,” such as the registry in Battle Creek, Michigan created for the purposes of “assit[ing] in the maintenance and increase of natural endowments and to combat race decay.”³²³

In 1924 Virginia passed the Preservation of Racial Integrity Act and Sterilization Act³²⁴ promoting the eugenical goals of prohibiting interracial marriage and allowing forced sterilization of certain persons exhibiting undesirable genetic traits. Eugenics supporters selected the Virginia’s sterilization of rape victim Carrie Buck as a test case for the constitutionality of forced sterilization.³²⁵ The eugenicists’ timing was impeccable.

322. Edwin Black, *The Horrifying American Roots of Nazi Eugenics*, *History News Network* (Sept. 2003), <https://historynewsnetwork.org/article/1796>.

323. RUTH CLIFFORD ENGS, *THE PROGRESSIVE ERA’S HEALTH REFORM MOVEMENT: A HISTORICAL DICTIONARY* 119-20 (2003).

324. See *An Act To Preserve Racial Integrity*, http://www2.vcdh.virginia.edu/lewisandclark/students/projects/monacans/Contemporary_Monacans/racial.html (last visited Apr. 17, 2018); see also Brendan Wolfe, *Racial Integrity Laws (1924-1930)*, *ENCYCLOPEDIA VIRGINIA*, https://www.encyclopediavirginia.org/Racial_Integrity_Laws_of_the_1920s (last visited Apr. 17, 2018).

325. See, e.g., *The Supreme Court and the Sterilization of Carrie Buck*, *FACING HIST. & OURSELVES*, <https://www.facinghistory.org/resource-library/supreme-court-and-sterilization-carrie-buck> (last visited Apr. 17, 2018). Carrie Buck, who was of average intelligence, was committed to the Virginia Colony for the Feebleminded at the insistence of her landlord in order to conceal their son’s rape of Carrie. Carrie’s commitment and sterilization was partially due to her pregnancy out of wedlock, demonstrating, according to the State, loose morals. Carrie’s mother, physically abused and abandoned by her husband, chose prostitution for income, also, according to the state, exhibiting undesirable traits. Eugenics supporters, therefore, argued that Carrie represented two generations of defective genes that burdened and threatened the state’s welfare. While committed, Carrie gave birth to a daughter, the product of the rape. State officials conducted a cursory examination falsely concluding the child suffered from mental deficiencies, and thus represented a third generation of undesirables. Carrie was sterilized and her daughter adopted by the parents of her rapist. In order to receive Supreme Court sanction for eugenical goals, a show trial was fashioned with Carrie represented by an attorney who supported eugenics thereby satisfying procedural due process. *Id.*, see also *Buck v. Bell: The Test Case for Virginia’s Eugenic Sterilization Act*, U. OF VA. HIST. COLLECTION, <http://exhibits.hsl.virginia.edu/eugenics/3-buckvbell/> (last visited Apr. 17, 2018). The case was appealed and the United States Supreme Court in 1927 upheld Virginia’s sterilization policy 8-1 with Justice Oliver Wendell Holmes, Jr. writing the majority opinion. *Buck v. Bell*, 274 U.S. 200 (1927); see generally ADAM

In December of 1925, Justice Oliver Wendell Holmes wrote his friend, British MP Harold Laski, suggesting the law's purpose is to forward the interests of the state.³²⁶ Holmes disdained the constant march of judges into the foggy marshes of subjective intent and zealously relied on empirical evidence to assess the law. In the letter, Holmes informed Laski that the only relief he would provide to an innocent person facing execution is the comfort of knowing he died as a "good soldier" for his country, serving the state's purpose of deterring others from committing the conduct of which he was innocent, but nevertheless convicted, for "the law must keep its promises."³²⁷

Holmes, as the *Buck* case reached the Supreme Court in 1927, was clearly not concerned with Carrie Buck's moral innocence, as much as he was concerned about the state burden she represented. Writing for an 8-1 majority, Holmes announced the state had the inherent authority to prevent those who "sap the strength" of the state from continuing in their kind and that "three generations of imbeciles are enough."³²⁸ *Buck v. Bell* had ramifications across the Atlantic.

By 1933, Hitler achieved his rise to German political power and in 1935, initiated his racial policies by ushering the passage of the Nurnberger Gesetze (Nuremberg Laws). Modeled after Virginia's Preservation of the Race Act, the German Law for the Protection of German Blood and Honour prohibited marriages and intercourse between Jews and Germans, and forbade the employment of German females under 45 in Jewish households.³²⁹

Many in America applauded Hitler's racial policies. In 1936, Dr. C.G. Campbell, Honorary President of the Eugenics Research Association, keened, "It is unfortunate that the anti-Nazi propaganda with which all countries have been flooded has gone far to obscure the correct

COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS AND THE STERILIZATION OF CARRIE BUCK (2016).

326. OLIVER WENDELL HOLMES, *Letter to Harold Laski (Dec. 19, 1925)*, in 1 HOLMES-LASKI LETTERS 806 (Mark DeWolfe Howe ed., Oxford University Press 1953).

327. *Id.* Holmes felt "no doubt nor scruple" with such a result concluding punishment of the morally innocent a more efficient legal outcome than being "lost in the maze" of discerning and accused's state of mind.

328. *Buck*, 274 U.S. at 207.

329. *Law for the Protection of German Blood and German Honor* §§ 2, 3, HOLOCAUST EDUCATION & ARCHIVE RESEARCH TEAM (Sept. 15, 1935), <http://www.holocaustresearchproject.org/holoprelude/pbgh.html>.

understanding and the great importance of German racial policy No earnest eugenicist can fail to give approbation to such a national policy.”³³⁰

But after World War II, and after the full implications of elevating the state above human dignity were understood, the allies were challenged to disprove that the efficacy of utilitarianism justified state torture. In prosecuting Dr. Karl Brandt, Germany’s Reich Commissioner for Sanitation and Health, the Allies called as a witness Professor and ethicist Werner Leibbrandt. Brandt was accused of crimes against humanity for his participation in euthanizing “useless eaters” (aged, insane, incurably ill and deformed children), as well as authorizing medical experiments on the incarcerated.³³¹

The German medical experiments, conducted on concentration camp victims, served the state’s interests in acquiring knowledge to better provide for the safety of its soldiers and “valued” citizens. For example, concentration camp victims were subjected to altitude experiments to the point of death in order to inform the Luftwaffe, Germany’s air force, of the safe ceiling for its aircraft and how to safely exceed those limits. Researchers had exhausted animal experimentation and the German government gave authority to initiate the research on inmates.³³²

Brandt, represented by German lawyer Robert Servatius, argued his innocence since his conduct was fully authorized by the laws of Germany at the time he participated in the “mercy killings” and authorized medical experiments—Germany’s positive law endorsed Dr. Brandt’s actions. The briefs filed by Brandt and the other doctors on trial, cited *Buck v. Bell* in support of this position.³³³

330. Dr. C. G. Campbell, “*The German Racial Policy*,” XXI EUGENICAL NEWS, No. 2 (Mar.-Apr. 1936).

331. VOLUME II TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949) [hereinafter Nuremberg Transcript] (transcripts of the Nuremberg Medical Trial)(Nuremberg misspelled in the original). See also *Karl Brandt*, JEWISH VIRTUAL LIBRARY, www.jewishvirtuallibrary.org/karl-brandt.

332. Eugenics in the United States took a similar path with its earliest expressions found in the forced sterilization of Indiana inmates initiated by Dr. Harry Clay Sharp. Indiana became the first state to pass legislation authorizing forcible sterilization of persons exhibiting “defective” traits undesired by the state and Sharp used his influence in the American Medical Association to attract adherents who influenced 29 more states to follow suit. See e.g., *Sterilization Laws*, EUGENICS ARCHIVE, www.eugenicsarchive.org/html/eugenics/static/themes/3.html (last visited Apr. 17, 2018).

333. See, e.g., *Influence of Virginia’s Eugenic Sterilization Act*, U. OF VA. HIST. COLLECTIONS, <http://exhibits.hsl.virginia.edu/eugenics/4-influence/> (last visited Apr. 17, 2018); see also *Nuremberg Documents*, THE READING ROOM (2009), <https://readingroom.law.gsu.edu/buckvbell/45/>.

Servatius, however, knew that the “justice-apt” nature of law compelled a moral justification for Germany’s law and Servatius knew the radical equality of Christianity that enshrined human dignity in law was the enemy of this effort.³³⁴

Accordingly, Servatius attempted to justify his legal positivism with a utilitarian moral justification during his cross examination of Professor Leibbrandt. His colloquy with Professor Leibbrandt reveals the danger utilitarianism poses to the individual and the folly of science ruling human conscience.

Dr. Servatius: Witness, you stated that the performance of experiments on human beings, as is the subject of the indictment

334. The concept of human “dignity” appears in a United States Supreme Court decision as early as 1793 in the case of *Chisholm v. Georgia*, 2 U.S. 419 (1793). There Justice Wilson wrote that “[m]an, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.” *Id.*, at 455 (citations omitted). Emmanuel Kant, recognizing the intrinsic value of the individual, formulated the concept of “categorical imperatives”, absolute unconditional requirements dictated by moral reasoning; such that one acts according to the maxim whereby you can, at the same time, will that it should be an universal law. Kant, *supra* note 75. Kant applied such an imperative to our relationships to each other stating: “Now I say that the human being, and in general every rational being, exists as end in itself, not merely as means to the discretionary use of this or that will The practical imperative will thus be the following: Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as an end never merely as a means.” *Id.*, at 45-47. In other words, Kant’s exercise of reason led him to Jesus Christ’s formulation of the Golden Rule. Human dignity, or the stamp of God’s image, requires that each individual be treated as an end, not a means. This logically requires utilitarian punishments to be limited by recognizing the intrinsic value of both the victim and the offender. Without such limits both are merely considered means for state objectives. Herein lies the error, when the United States Supreme Court allows, through legislative deference, utilitarian penological interests to justify punishment thereby violating human dignity, the preservation of which was the primary aim of the Eighth Amendment. Only proportional retributive punishment is constrained by and formulated in recognition of the dignity of both the offender and victim. For this reason, a plurality of the United States Supreme Court acknowledged “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man” when applying a proportionality test to punishment. *Trop v. Dulles*, 356 U.S. 86, 100 (1958)(Warren, C.J., joined by Black, Douglas, and Whittaker, JJ.). After WWII, and the world’s awakening to the atrocities perpetrated by Nazi Germany, “the concept of dignity gained significant traction, and, today, references to dignity can be found in national constitutions and international treaties around the globe.” Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, U. ILL. L. REV. 2129, 2132 (2016). Yet the world’s courts and commentators struggle with defining dignity absent the metaphysical concepts of intrinsic value and justice. Dignity is only reflected through faith that just or proportional punishment aids in restoration of “right relationship” and because it is just, is the only right thing to do.

here, can be ascribed to biological thought. What do you mean by biological thought?

Witness Leibbrandt: By biological thought I mean the attitude of a physician who does not take the subject (the individual on whom the experiment is being performed) into consideration at all, but for whom the patient has become a mere object, so that the human relationship no longer exists, and a man becomes a mere object like a mail package [T]he physician is not merely a biologist. . . . Primarily . . . [the] physician is a man who assists the human being and not a scientific judge of biological events.

Q: Could there not be other causes for the experiments, such as a collective state thinking?

A: Yes.

. . . .

Q: But in your opinion, Professor, how should a doctor work in the interest of suffering humanity in cases where . . . there is no possibility of experiments on animals?

A: [I]t is part of a physician's morals to restrain his urge for natural research in favor of the basic medical attitude as laid down in the oath of Hippocrates, namely, to cause no arbitrary harm to his patient . . . [t]he concept of humanity is a very dangerous concept. It is most dangerous of all for the physician For the physician, the individual stands above all humanity and the individual unfortunately has sunk very low in these last few years.³³⁵

Science and materialism assist in discovering what "is" but must not dictate what "ought" to be. Dr. Karl Brandt was executed on June 2, 1948.³³⁶

335. Nuremberg Transcript, *supra* note 330, at 80-81.

336. The 2010 federal census reveals that more African-American males, aged 19-24, were in prison than employed. Twenty-six percent were incarcerated and only 19% employed. George Gao, *Chart of the Week: The black-white gap in incarceration rates*, PEW RESEARCH (July 18, 2014), <http://www.pewresearch.org/fact-tank/2014/07/18/chart-of-the-week-the-black-white-gap-in-incarceration-rates/>. This fact is stunning, morally compelling and cannot stand. Much of the increase in U.S. incarceration rates have been attributed to enhanced punishment for drug use which, in turn, has disproportionately impacted African-American males. See Derek Neal & Armin Rick, *The Prison Boom & Lack of Black Progress After Smith & Welch*, NAT'L BUREAU OF ECON. RES. (July 2014), <http://www.nber.org/papers/w20283>. Prison for addiction should be questioned. It is inconsistent with limiting punishment to just deserts in that the punishment is

The human condition abhors the moral vacuum of scientific materialism just as it protests the moral vacuum of legal positivism. For this reason, legal positivists have struggled for more than a century to explain why morality is not a necessity in defining law but is still relevant to discussing law.³³⁷ Wishing to avoid moral discussion does not make morality cease or render its consideration irrelevant,³³⁸ its power remains.

Yesterday upon the stair,
I met a man who wasn't there.
He wasn't there again today.
My gosh, I wish he'd go away.³³⁹

Although positivists often view metaphysics as “the effort of a blind man in a dark room to find a black cat that isn't there,”³⁴⁰ we still engage in the search as reflected in the ontology of the language of jurisprudence.³⁴¹ And thank God, the thirst for justice has not disappeared.

But justice still struggles as consequentialism seeks to fill the moral void of early legal positivism thereby eroding the radical individualism and equality of the American Revolution.

Consequentialist aims, be it deterrence, rehabilitation, or incapacitation, do not contain any inherent or defining limits on the ability of the state to

disproportional to the moral blameworthiness of the offender. The distribution of illegal narcotics, however, is an altogether separate issue.

337. See generally Green, *supra* note 293, and citations therein.

338. Judge Richard Posner admits “nervousness” about issues of subjective intent and the relation of those issues to metaphysical concepts yet, Posner admits the law is as orthodox today as it was 100 years previous. See Quandary, *supra* note 36, at 27, 157: Richard Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039, 1040-41 (1997). “[T]he history of philosophy plainly shows that the problems facing the materialist . . . reside . . . in the genuine difficulty of providing a plausible materialist account of consciousness and the subjective dimension.” HOWARD ROBINSON, MATTER AND SENSE 1 (1982).

339. Quandary, *supra* note 36, at 25.

340. *Id.* at 3 (quoting Morris and Felix Cohen, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 665 (1st ed. 1951)). For another example of the tendency of modern jurisprudence to discard the influence of metaphysics on law, see Rodney D. Chrisman, *Can a Merchant Please God?: The Church's Historic Teaching on the Goodness of Just Commercial Activity as a Foundational Principle of Commercial Law Jurisprudence*, 6 LIBERTY U. L. REV. 453 (2012). Chrisman explains that the question “of whether a merchant can please God . . . was central to the consideration of commercial law during the period when the Western legal tradition, Western commercial law, and the institutions therein, were being formed.” *Id.*, at 454-55 (citations omitted).

341. See generally Quandary, *supra* note 36.

restrict or punish the conduct of the individual.³⁴² C.S. Lewis captured the dilemma when addressing state claims of “rehabilitation” in his essay “The Humanitarian Theory of Punishment.”³⁴³

My contention is that this doctrine, merciful though it appears, really means that each one of us, from the moment he breaks the law, is deprived of the rights of a human being The Humanitarian theory removes from Punishment the concept of Desert. But the concept of Desert is the only connecting link between punishment and justice There is no sense in talking about a ‘just deterrent’ or a ‘just cure.’³⁴⁴

Justice Scalia agrees. “[I]t becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law.”³⁴⁵

When consequentialist theories claim such limits, the application of these limits requires more faith than our ability to intuit what is just. Neither Bentham’s hedonism³⁴⁶ nor professor and philosopher Peter Singer’s preferences³⁴⁷ provide greater certainty or a more just result than the everyday decisions of mothers who only punish as deserved, scilicet, the mother who punishes her child’s theft of his siblings desert by requiring the

342. Except for the most recent individual liberty rationale—there “has been the almost total lack of concern for identifying limitations upon the use of the criminal sanction except those limitations that are thought to be required by the general purposes for which the criminal sanction is employed.” Dubin, *supra* note 7, at 336. For example, Lady Barbara Wootton of England, philosopher and social reformer, claimed “the whole doctrine of *mens rea* and the conception of responsibility embodied in it is an irrational hinderance to sound social policy [and the] doctrine should be eliminated.” H.L.A. Hart, *Crime and Criminal Law* 74 Yale L.J. 1325, 1325 (1965) (book review); see Richard Singer, *The Resurgence of Mens Rea: I – Provocation, Emotional Disturbance, and the Model Penal Code*, 27 BOSTON COLL. L. REV. 243, 244 (1986).

343. C. S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1953), <http://www.angelfire.com/pro/lewiscs/humanitarian.html>.

344. *Id.*

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

346. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789; republished Oxford: Clarendon Press, 1907).

347. See Peter Singer, *Taking Life: Humans*, in PRACTICAL ETHICS 175-217 (2d ed. 1993). Professor Singer argues for a utilitarian moral outcome determined by the majority preferences of the enlightened.

thief to provide restitution of his desert on the next dining occasion.³⁴⁸ As Holmes wrote, even a dog knows the difference between being kicked and tripped over.³⁴⁹ Providing only just, proportional punishment is an intuitive exercise. Just as the conclusion that punishing the morally innocent is grossly disproportional punishment is also intuitive. Deferring to legislative efforts to discern what punishment will serve as sufficient deterrence for a society of more than 300 million people, while also increasing general happiness,³⁵⁰ is to invite the chaos and arbitrary application of criminal law we have today. Yet, it is here that our jurisprudence places its' faith and to which we subjugate personal liberty, due to modern jurisprudential aversion to metaphysical concepts.

And so by the mid-nineteenth century, the utilitarian interests of the state, and its willingness to view individuals as a means to an end, inseminated the new nation with the justification for punishing the innocent through strict liability, or "public welfare" crimes.

Bentham advocated that the sole justification for the state to punish was to maximize public welfare.³⁵¹ This significantly broadens the justification for punishment and removes consideration of the individual offender, except to conform that person, if possible, to societal expectations.³⁵² Initially, this broadening of state justification manifested in narrowing the available defenses for the accused.

348. The insistence by the legal positivist of empirical verification of all legal claims is another effort to presuppose the irrelevance of metaphysics while demonstrating greater faith than what is due in social science. See QUANDARY, *supra* note 36, at 14 (describing the insistence as "naivete—pleasingly disguised . . . as tough-minded rigor").

349. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 2 (1881).

350. Consequentialist theories regarding the state's right to punish have experienced the same evolution of legal positivism, an initial claim that justice and metaphysics aren't relevant slowing moving towards an acknowledgment of the relevance of justice without the ability to justify its application. Prof. Markus Dubber provides an excellent description of this process in *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought* published in 1998. See generally Dubber, *supra* note 36. Dubber's account also reveals the ontological failings of consequentialist justifications explained in Prof. Steven Smith's book, *Law's Quandary*. See generally QUANDARY, *supra* note 36.

351. See Dubin, *supra* note 7, at 340.

352. *Id.* at 340-50. Hart criticized Bentham's approach, arguing Bentham's public welfare justification would not allow defenses of excuse (duress or mistake of fact), stating it was proper to also consider concepts such as "universal ideas of fairness or justice and the value of individual liberty." See Dubin, *supra* note 7, at 343. Utilitarian justification for punishment, therefore, followed the same path as legal positivism—initially rejecting metaphysical concepts and then struggling to acknowledge the need to consider metaphysics while denying its legitimacy. To constrain the state, it was necessary for Hart to turn to moral concepts. *Id.*

There was a tendency to disregard the mental element in crimes [and] definitions of the requisite mental states began to be fictionalized . . . also proof required to establish certain requisite mental states began to be fictionalized; conclusive presumptions and objectively phrased reasonable man tests became controlling, the actual state of mind of the accused notwithstanding.³⁵³

It was a short step to disregarding the subjective intent of the accused altogether and to simply criminalize conduct perceived to be contrary to the general welfare of the state.

Utilitarianism brutally assaults the individual. Its unit of measurement is conjecture and its math savagely honest, for two is always greater than one.

The justification for “treating” Carrie Buck with institutionalization or sterilization also existed for the innocent whose conduct unknowingly violates state proscriptions. Buck had no control over her condition, her alleged feeble-mindedness,³⁵⁴ and neither do the insane, mistaken, or ignorant. And, just as their innocence is known, so too is their burden to the state.

“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”³⁵⁵ Or, if the unfit were not treated with sterilization, then they could be treated with incarceration. Society’s challenges were now recognized as larger, and as more compelling than protecting individual liberty.

And this milieu of scientism, positivism, determinism, and materialism reached this zenith as the new nation experienced the Second Great Awakening and soon after misguided Christian public zeal joined in an unrelenting assault on individual liberty.³⁵⁶

353. BISHOP, CRIMINAL LAW SECTION 303a, 540 (9th ed. 1923).

354. Buck was of average intelligence and performed well academically. Her commitment to the Virginia Colony for the Feeble-minded was orchestrated to conceal a rape. See *supra* notes 64-65 and citations therein.

355. *Buck v. Bell*, 274 U.S. 200, 207 (1927). Examination of Holmes’s opinion reveals the reach of materialism and determinism in American jurisprudence in the early 20th century.

356. Christian faith informs me the jurisdiction of government is limited, humans are flawed, and God values human agency and personality through His willingness to suffer to restore us to a right and loving relationship with Him. This compels humility when judging the conduct of others and a radical empathy that is a manifestation of love. Although I strongly support Christian involvement in government, I also believe many of the demands on government first initiated in the wake of the Second Great Awakening reveal the inappropriate idolization of government often displayed by those not humbled by a belief in

In 1799, America was booming and expanding. Manufacturing was transforming small towns to cities, immigrants were pouring onto America's shores and migrants were moving beyond the Blue Ridge Mountains into the western reaches of Virginia, Kentucky and Tennessee. In 1803, Jefferson's Louisiana Purchase doubled the size of the United States. America's population, estimated to be 2.5 million at the revolution, would be over 7.2 million by 1810 and more than 17 million by 1840.

The nation's religious leaders were worried. Thousands, untold millions of immigrants had not been exposed to scripture. In Kentucky, for example, life "was primitive in the extreme, and the pioneers lived hard lives, full of danger, loneliness, and privation."³⁵⁷ Some communities were godless and lawless by design. The area of Logan County, Kentucky, was called "Rogue's Harbor" as refugees from the northeast fled justice. "It was a desperate state of society," lamented Methodist preacher Peter Cartwright. "Murderers, horse-thieves, highway robbers, and counterfeiters fled there . . . and actually formed a majority."³⁵⁸ America's rapid cultural, economic, and industrial change was unsettling to the individual and families with "radical transformation of agriculture and industry, rapid geographic expansion and urbanization"³⁵⁹ creating "rootless individualists"³⁶⁰ desiring order and structure. America's religious leaders grew increasingly concerned with evidence of Sabbath-breaking, the existence of slavery, loose sexual morals, and the lack of temperance.

Then the spark of revival occurred. In June of 1800, Pastor James McGready hosted five pastors and five-hundred congregants at a "camp meeting" for several days in Red River, Kentucky. "On the final day 'a mighty effusion of [God's] Spirit' came upon the people" and the grounds were strewn with those stricken with guilt and crying out for God's mercy and forgiveness.³⁶¹

In late July, McGready held a camp meeting in Gasper River, Kentucky attended by 8,000 where "[t]he power of God seemed to shake the whole

God and who view government as the pinnacle of all achievement. The full scope of this critique awaits another paper.

357. *The Return of the Spirit: The Second Great Awakening*, CHRISTIANITY TODAY/CHRISTIAN HISTORY (1989) [hereinafter *The Return*].

358. *Id.*

359. Geoffrey R. Stone, *The Second Great Awakening: A Christian Nation*, 26 GA. ST. U. L. REV. 1305, 1308 (2010) [hereinafter Stone].

360. PAUL E. JOHNSON, *A SHOPKEEPER'S MILLENNIUM: SOCIETY AND REVIVALS IN ROCHESTER NEW YORK* 9 (1978).

361. See generally *The Return*, *supra* note 355.

assembly No person seemed to wish to go home—hunger and sleep seemed to affect nobody—eternal things were the vast concern.”³⁶²

The camp meetings continued, drawing 10,000 then 25,000 souls as revival also swept the northeast, with Timothy Dwight, president of Yale College. His leadership soon resulted in the conversion of 80 of Yale’s 160 students.³⁶³ In Virginia’s Hampden-Sydney College, sudden conversions and reformed lives spread the awakening amongst several Virginia counties.³⁶⁴

America was aflame with tens of thousands of souls saved and reformed. Yet, the zeal of the Second Great Awakening soon turned its attention from the salvation of souls to the shaping of a nation and its zeal outran its reason, seeking government sanction and imposition of a purified culture readying itself for the return of Jesus Christ.³⁶⁵

The vigor of new Christian converts and leaders joined the faith of the positivists and consequentialists to demand government intervention in the lives of its citizens. To prevent drunkenness was must ban alcohol. To prevent disregard of God, we must prevent postal service on Sunday. Government, rather than protecting individual liberty, though often flawed in its exercise, became viewed as a means to create the perfect society.³⁶⁶

By the mid-nineteenth century, the absence of metaphysical considerations removed the philosophical barrier of inherent individual rights to the shaping of law and, for many Christians, the presence of individual vices compelled the use of law to remove those vices. For both, the answer was found in our nation’s legislative chambers.

362. *Id.*

363. *Id.*

364. *Id.*

365. *See, e.g., Stone, supra* note 328, at 1310.

366. I have always encouraged and supported persons of all faiths in their involvement in government, and still do. Christian involvement in government is necessary and laudable. Moreover, I reject the notion that a good public servant must leave his faith at the door. Our faith, in whatever it is place, informs all of our decisions. A democratic republic demands transparency, not conformity. To claim my faith in Jesus Christ does not inform my decisions is either to lie about my faith and to conduct myself as if my faith in Jesus Christ does not impact my conduct is to lie to myself. As flawed as I am, I attempt to do neither. Yet, I do believe, many people of faith call for government to do too much and to do that which it is not designed to do. This lack of consideration of the appropriate jurisdictions of the church, government and the family are where the error lies, it does not lie in living our faith.

In contrast with England,³⁶⁷ whose strict liability crimes evolved independently of America to plug a gap in privity, America's first strict liability laws were driven by the vices of prostitution, liquor, and Sabbath breaking.³⁶⁸ In the early nineteenth century, America's courts upheld the common law requirement of mens rea. In 1816, Connecticut Supreme Court reversed the conviction of a livery driver for violating a law prohibiting the letting a carriage out for hire on Sunday, unless of necessity or for charity.³⁶⁹ The accused claimed he honestly believed the hire was for charity. "If . . . a man acts honestly . . . he is not a criminal [and to convict him] would oppugn the maxim that a criminal intent is essential to constitute a crime."³⁷⁰

Thirty-one years later, things had changed. The same court, in *Barnes v. State*,³⁷¹ upheld the conviction and fine of \$10 for selling liquor "to a common drunkard."³⁷² Knowledge the purchaser was an alcoholic was presumed and subjective intent deemed irrelevant.

The race was on. "Massachusetts decisions later became the fountain head of the new ideas."³⁷³ Convictions for selling intoxicating liquor were upheld despite the seller's ignorance their product was intoxicating or met the definition of an "intoxicating liquor."³⁷⁴

After 1868, writes Professor Sayre, the doctrine of "public welfare crimes" became widely accepted in other states.³⁷⁵ This "movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests. The result was almost inevitable."³⁷⁶

367. In England, strict liability crime was developed to address a gap in privity. Singer, *supra* note 313, at 243.

368. See generally Sayre, *supra* note 82, at 56-62.

369. *Myers v. State*, 1 Conn. 502 (1816).

370. *Id.* at 504.

371. *Barnes v. State*, 19 Conn. 398 (1849).

372. *Id.*

373. Sayre, *supra* note 81, at 64.

374. See, e.g., *Commonwealth v. Boyton*, 2 Allen 160 (Mass. 1861); *Commonwealth v. Goodman*, 97 Mass. 117, 119 (1867).

375. Sayre, *supra* note 81, at 66. The growth of the modern regulatory state also corresponds with Karl Marx's publication of *Das Kapital* and the *Communist Manifesto* in 1848. Marx's arguments claimed solutions to the perplexing problems faced by workers swept up in the industrial revolution through the exercise of state power and coercion. Marx's justification for use of state power are often used today in support of the regulatory state.

376. Sayre, *supra* note 81, at 67.

V. CONCLUSION AND POSSIBLE SOLUTIONS.

The public welfare exception to the mens rea doctrine was viewed as harmless at its inception. Courts limited it to crimes of meager fines of a regulatory nature made necessary by the potential far-reaching harm to society involving and involving mens rea proof issues rendering conviction nearly impossible.

Moreover, originally courts indicated the doctrine would apply only to cases with meager and non-odious punishment.

This is no longer the case. Strict liability crimes involve ruinous punishments with lifelong odious repercussions and are enacted without addressing concerns of proof, often by regulatory officials far removed from the deliberative democratic process.

But the train can be stopped, the ship turned. The doctrine that ignorance of the law is no excuse must be tossed aside. It was first articulated by Blackstone through an error in interpretation³⁷⁷ and it is error to apply it in the modern regulatory state.³⁷⁸ The breadth, reach, and complexity of today's criminal law renders knowledge of the law far beyond the most learned person.³⁷⁹

If the concern is evidentiary, knowledge of the law can be treated as a presumption, allowing the defendant the opportunity to present evidence in rebuttal.³⁸⁰ Congress should pass a law requiring mens rea for every material element of any federal crime and states can do likewise with state crimes. And the Supreme Court should vigorously enforce the rule of lenity.³⁸¹

Most importantly, the American public must demand that its government perform its most basic function, protect the intrinsic and inherent rights of its citizens, treating all as equal and presumed innocent before the law and herein lies the greatest challenge. American's greatest

377. Blackstone misinterpreted Roman law due to a mistranslation of Latin and thereby mistakenly concluded Roman criminal law did not allow an ignorance of law defense. Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 867 n.25 (1999).

378. See *Folly*, *supra* note 33. There were very few common law felonies and the first federal criminal statute only had 30 felony offenses. *Id.* at 33 n.5.

379. For excellent and thorough support of this position, see *Folly*, *supra* note 33.

380. *Folly*, *supra* note 34. This would have been of great benefit to the Millses who claimed their conduct was approved by state regulators. Evidence of that approval, however, was excluded by the trial judge.

381. See Paul Larkin & John Michael Seibler, *Turning the Rule of Lenity Into a Rule of Lenity*, HERITAGE FOUND. (Nov. 17, 2015), <https://www.heritage.org/crime-and-justice/report/turning-the-rule-lenity-rule-lenity>.

strength is it generally gets what it wants. And, American's greatest weakness is it generally gets what it wants.

And America's idolization of government continues to increase. Driven by fear and the nationalization of all issues by a national media, citizens increasingly turn to government to solve all problems, and Congress and the executive branch appease those demands, often, through new criminal statutes. There is little concern about the innocent person punished by the claimed solution as long as a solution can be touted and the citizenry remains, except for immediate personal interests or passions, generally distracted.

Years after his conviction, Ocie Mills received a phone call from Quenton Wise who served on the jury that convicted Mr. Mills. Mr. Wise related how the jury foreperson, whose son worked for the Corps of Engineers, cajoled the jury to convict Mr. Mills.³⁸² The foreperson argued a conviction was necessary to "send an important message" and promised other jurors that if convicted the Millses would receive a "slap on the wrist."³⁸³

Mr. Wise, not learned in law, exercised more wisdom than Justice Oliver Wendell Holmes when confronting the morally innocent individual punished by the state. Rather than demeaning Mr. Mills due to an alleged lack of utility to the state,³⁸⁴ or thanking Mr. Mills for being a "good soldier" and suffering punishment as in innocent in the cause of deterring others,³⁸⁵ Mr. Wise apologized.³⁸⁶

Besides, Ocie Mills had already served his country as a good soldier, in uniform, in the Korean War.

382. The Millses did not retain an attorney for their trial and the foreperson did not reveal the potential conflict when the judge conducted *voire dire*. Author's Interview *supra* note 1; see also William F. Jasper, *Victims of the Federal Bootprint*, NEW AM. (Feb. 9, 2016), www.thenewamerican.com/tech/environment/item/22498-victims-of-the-federal-bootprint.

383. Author Interview, *supra* note 1; see also New American, *supra* note 380.

384. See *Buck v. Bell*, 274 U.S. 200 (1927); see also *supra* note 70 (quoting *Buck v. Bell*, 274 U.S. 200 (1927)).

385. See *Letter to Harold Laski*, *supra* note 325.

386. See *supra* note 380 and accompanying citations.