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Chapter 6

Textualism and the Discovery of Rights[1]

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> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
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> US Constitution, Eighth Amendment

> Mr Livermore:…No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we

[1] I am grateful to Anne Gardner, Scott Soames, Andrei Marmor, and students in the Soames-Marmor fall 2009 seminar on law and language at USC for helpful discussion.

> have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.
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> 1 Annals of Congress 782–3 (1789)

1. Introduction

1.1. Textualism

Textualism is the view that the content of a statute—basically, what actions it mandates, forbids, or protects—is determined by the original meaning of the text of the statute. The original meaning is determined by the words of the text and the meanings they were commonly understood to have had at the time of enactment. Textualism is the view espoused by US Supreme Court Associate Justice Antonin Scalia;[2] sometimes he calls it ‘textualism-originalism’, but I will just call it ‘textualism’.

In this paper I distinguish between two understandings of textualism, which I will call ‘meaning-textualism’ and ‘conception-textualism’. Meaning-textualism strikes me

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[2] Scalia (1998a).

as commonsensical and attractive; conception-textualism as confused, implausible, and unworkable.[3]

Meaning-textualism is the view that the content of a statute is determined by the words in the text of the statute, given the meaning that those words had at the time of enactment or ratification, or, in the case of ambiguity, those meanings or *senses*,[4] among those the words had at the time, which the enactors intended to exploit and the ratifiers understood the text as written to be using.[5] Of course, the writer may spell out a

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[3] Rakove (1996) has a useful set of distinctions among kinds of textualism, somewhat more historically nuanced than the one I make.

[4] I use 'sense' when a word has more than one meaning, and speak of the *sense exploited* by the speaker and *understood* by those hearing or reading and interpreting the words as *operative*.

[5] Ordinary statutes are enacted by legislative bodies. Constitutions, amendments, and the like are typically ratified by groups that were not responsible for writing them. The US Constitution was ratified by the state legislatures. James Madison argued persuasively that in the case of the Constitution it was the understanding of the ratifiers,

special meaning for a term in the text itself. If the writer only spells out the special meaning in his own notes or diary, the meaning-textualist should regard this, *prima facie*, as only of historical interest.

Conception-textualism is the view that the conceptions that the enactors had of the states, conditions, phenomena, and the like referred to by their words, used with their commonly understood meanings, in the operative senses, are determinative. Here by 'conception' I mean 'the way a thing is perceived or regarded,' or more broadly what is believed about a thing—that is, about an object, kind of object, condition, activity, kind of activity, and so forth. In giving us the meaning of a word, the dictionary basically tells us what condition, phenomena, etc the word refers to, either in other words, or with familiar examples, or a combination. This provides some small amount of agreement that is necessary for different individuals to use the word with the same meaning, but it does not determine a conception of the thing in question. You may love tomatoes, think they are vegetables, nutritious, and best served uncooked. I may hate them, think they are fruits and for that reason not vegetables, and think that they are poisonous if served

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not the writers, that should be authoritative. So the distinction is important. Nevertheless, I will usually just say 'enactors'.

uncooked. Still, we can talk about tomatoes, argue about tomatoes, and perhaps agree on a policy that forbids our city or state from importing tomatoes grown elsewhere. Samuel Livermore, the senator quoted above, may have thought that hanging was cruel, and so would be banned by the Eighth Amendment, while others with whom he was debating did not share this opinion. Still, they use the same word, with the same meaning, in the same sense, in conducting their debate.

Sometimes Scalia seems to advocate meaning-textualism, at other times conception-textualism, and sometimes it is hard to tell exactly how he is thinking of things.

'Meaning' of course has many meanings, and can be used for both meanings and conceptions, and a number of other related things, from the intentions of agents to the significance of an event.[6] I use it in the sense in which dictionaries give us the meanings of words. They do not tell us what a given utterance meant historically (its significance in the grand scheme of things), or what the speaker or speakers meant (intended to achieve in uttering it). For descriptive nouns, verbs, adjectives, and adverbs at any rate, the dictionary tells us what conditions an object of the appropriate sort has to meet to

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[6] Rakove (1996) has a good discussion of this from a historian's point of view.

truly be described by the word. Many, perhaps most, words can be used for different conditions, corresponding to different senses. If we look up 'irritate', for example, we find two senses: to irritate is to make someone annoyed, impatient, or angry or to cause inflammation or other discomfort in a part of the body. As I understand meaning-textualism, it is the *sense* of the words that was originally operative, which will typically be among the meanings a good dictionary of the time will explain, that is at issue. It is what we learn about a word in a specific text by looking up the meaning of the word in a dictionary, and, if more than one meaning is given, by figuring out which one was being employed. This latter issue is often, although certainly not always, fairly clear from the linguistic and communicative contexts. If the dictionary is accurate, this procedure will tell us what the writers, signers, ratifiers, etc took the meaning of the word to be, if they were 'semantically competent,' and what they assumed the semantically competent contemporary readers of the statute would take it to mean.

Meaning-textualism seems like common sense to me because it seems to apply to statutes the same apparatus we use to determine what some individual *says* when they are talking to us, which is a somewhat different question than what they intend to achieve or imply. If my wife, who knows a lot about where things are but can be confused about right and left when things are happening fast, tells me 'turn left at the

stop sign', and I turn left, I have done what she *said* I should do, even if, in fact, she wanted me to go to the right. If I suspect she is confused, and turn right, then I have done what she meant to tell me to do, but I have not done what she said to do, given the meanings of the words she used. We have a fairly robust concept of what a person says. Meaning-textualism takes it that statutes prohibit or allow what the person who uttered the words, at the time they were enacted, said was prohibited or allowed. And that seems like common sense.

But more importantly, perhaps, is that meaning-textualism seems necessary for understanding how people of diverse opinions about matters can nevertheless agree on principles, rules, policies, and laws, and expect the principles, rules, policies, and laws to be followed by others with different conceptions about things. People can use words in the same meaning, and intend the same meaning, while disagreeing about very important issues concerning the things the words refer to. Members of a philosophy department may agree about the meaning of 'philosophical' and the meaning of 'talent' and the meaning of 'philosophical talent'. They may agree, say, that it is a trait that some people have and others do not, such that those who have it are more likely, other things being equal, to do well in rigorous philosophy programmes and produce good works of philosophy. Within that agreement about meaning, they may have

considerable disagreement about philosophical talent. Some may think that the mathematics Graduate Record Examination (GRE) score is the single best indicator of philosophical talent; others may think it is of virtually no value at all. Some may think that great logicians exhibit the highest kind of philosophical talent; others may think that most of them are deficient in it. Some may think that many leaders of the field completely lack philosophical talent, while others may think that these same individuals are philosophically very talented. What I mean by a person's conception of a thing (property, relation, kind, condition, phenomenon, trait, etc), referred to by a term T, is basically what they believe more or less firmly about it; the beliefs that guide them are determining which things are or are not, or probably are, or probably are not, correctly described with the term T.

Without some agreement in or overlap of conceptions of what is referred to by a term T, people cannot use T with the same meaning. They must be able to arrive at some acceptable definition, or agree on a range of examples that exemplify the trait, to be talking about the same phenomenon at all. But considerable disagreement in conception is compatible with agreement in meaning. If it were not, most departmental policies would never be enacted. If we agree on what we mean by 'philosophical talent', it makes sense for us to pass a policy statement stating that our department, in

considering graduate applications, will make the decision solely on the basis of expected philosophical talent. We might pass the policy, publish it in the catalogue, and remind ourselves of it each year when we consider which students to admit. This agreement in policy, and what the meaning of the text of the policy is, will not at all preclude vigorous debates about which students exhibit philosophical talent, what good signs of it are, and whether those most talented are more or less likely to go on to successful careers.

Conception-textualism, as a philosophy of interpretation for documents, such as constitutions, statutes, policy statements, committee reports, and all sorts of other things that are prepared by groups of people with the intention of communicating with and regulating the behavior of themselves and others, seems to me a rather bizarre and hopeless idea. If one finds in the policies of a philosophy department the statement that only philosophical talent shall be used as a criterion for the admission of graduate students, one should not assume that the department members who enacted this policy shared a conception of philosophical talent. Most likely they had different opinions about who had talent, what the nature of philosophical talent mainly consisted of, and what good tests for it were. All we can conclude is that a majority thought that philosophical talent should be the sole criterion for admission. If they take the policies

of the department seriously, future department members should either use philosophical talent as the sole criterion for admission, or change the policy.

Even if there were a conception of philosophical talent shared by the writers and original enactors of the policy, that would not mean that their conception is authoritative and binding on later department members. If a philosophy department was dominated by logicians at the time the policy was adopted, they may have expected and intended that by passing the policy they would guarantee that future graduate classes will be made up of logically sophisticated students. If with time the department comes to be dominated by historians of philosophy, existentialists, and social and political philosophers, the remaining logicians may be sorely disappointed. They can argue that the policy is not being followed, because the people being admitted are not being admitted on the basis of what really is philosophical talent but on the basis of other traits that their incompetent colleagues confuse for philosophical talent. Their colleagues can argue back that many of the students the writers of the policy admitted in years past were in fact completely without philosophical talent. That argument is fair enough. But the logicians cannot legitimately argue that, because they wrote the policy, their conception of philosophical talent is authoritative. Their argument has to be

conducted on the issue of what the best evidence for philosophical talent is, not on the basis of what they hoped to achieve.

So, I think there are two forms of textualism, and I like one and not the other, and I think both are espoused in different places by Scalia.

1.2. Discovering rights

The general question I wish to explore is whether the discovery of previously unrecognized rights makes sense within a textualist framework. It seems to me that it surely does make sense within the framework of meaning-textualism, but it may not in the framework of conception-textualism. In a collection of Scalia's opinions, *Scalia Dissents*, the editor Kevin Ring notes the peculiar history of the right to sodomy. In 1986 the US Supreme Court decided that sodomy was not protected; the Constitution does not mention it and there was no history of protection of it, and in fact all states prohibited it until 1961. In 2003, the Supreme Court ruled that it was a constitutional right. According to Ring, this sort of thing may make sense for advocates of a 'living constitution', but does not make sense for textualists: 'For textualists like Scalia, the result does not change unless the law, that is, the text, changes.'[7]

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[7] Ring (2004) at p 7.

I will call this ‘Ring’s Principle’. If the facts of the lack of protection of sodomy are fixed, the words of the text are fixed, and the original meanings are fixed, what then can have changed between 1986, or 1789, and 2003, so that sodomy was not a constitutionally protected right for such a long time, but then became one?

If one is a meaning-textualist, there seems to be at least the possibility of an answer: something has been learned about sodomy that was not previously known, and this fact shows that sodomy falls under one of the general protections in the text of the Constitution. If one is a conception-textualist, Ring’s Principle seems unassailable (or at least pretty plausible).

Consider the open sentence (1), where ‘A’ is a variable for actions broadly construed, that is, anything from expressing one’s ideas to committing sodomy to living without being executed, and ‘S’ is the name of a particular statute:

(1) The right to A is guaranteed by statute S.

Could (1) be *discovered* to hold for some action A, at some date after the statute was enacted? It seems this might happen in two ways. First, it could be for some reason or another action A did not qualify for protection at the time the statute was enacted and some period of time thereafter; then things changed and from then on the action did

qualify for protection. The discovery involved is simply the discovery that relevant facts have changed. I will call this the ‘Change Model’.

A second possibility is that the relevant facts do not change, that A was protected from the moment statute S was enacted, but for some reason this fact was not *discovered* until some time later. I will call this the ‘Knowledge Model’. Do either of these possibilities make sense if one stipulates that the text of the statute, with its original meaning, determines what it and is not protected?

1.3. Meaning-textualism and the death penalty

I will focus on the death penalty. Given meaning-textualism, could we discover now or at some point in the future that the death penalty was unconstitutional? That is, that we have the right to live out our lives without being executed, no matter what crimes we commit? Scalia finds it especially absurd to suppose that the right not to be executed could be found in the Eighth Amendment to the Constitution, since the promulgators clearly contemplate this punishment in the Fifth Amendment, which required due process before one could be deprived of ‘life, liberty, or property’. As Dworkin puts Scalia’s point:

> The 'framers' would hardly have bothered to stipulate that 'life' may be taken only after due process if they thought that the Eighth Amendment made capital punishment unconstitutional anyway.[8]

Scalia says:

> No textualist-originalist interpretation that passes the laugh test could, for example, extract from the United States Constitution the prohibition of capital punishment that three nontextualist justices have discovered.[9]

Dworkin, however, thinks that it at least makes sense that the death penalty could be discovered to be unconstitutional. There is no contradiction, he says, in claiming that the framers' original meaning was that punishments that are cruel should be forbidden; that they did not think that the death penalty was cruel and did not intend to forbid it; and that it turns out nevertheless to be cruel.

Dworkin offers the following example as an analogy:

> Suppose some legislature enacts a law forbidding the hunting of animals that are members of an 'endangered species' and then, later in its term, imposes special

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[8] Dworkin (1998) at p 120.

[9] Scalia (1998b) at p 132.

> license requirements for hunting, among other animals, minks. We would assume that the members who voted for both provisions did not think that minks were endangered. But we would not be justified in concluding from that fact that, as a matter of law, minks were excluded from the ban even if they plainly *were* endangered.[10]

Dworkin's analogy suggests the Change Model.[11] Although what is at issue is a prohibition, rather than a protection, of a kind of action, we shall see that the Eighth Amendment itself suggests cases of this type involving rights.

2. Two models for discovering rights

2.1. Preliminaries: meaning, reference, extension, and conception

I begin by making a number of distinctions drawn from the philosophy of language, which seem necessary for a clear understanding of what meaning-textualism implies. I will not explain them in their full generality, but focus on issues relevant to phrases of

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[10] Dworkin (1998) at p 121.

[11] Although it does not require it, for, as he words it, minks may have already been endangered at the time the statute was enacted.

the sort that occur in the Eighth Amendment: ‘excessive bail’, ‘excessive fines’, ‘cruel and unusual punishments’. One such phrase is ‘endangered species’, which occurs in Dworkin’s example, and I will start with that.

Consider a simple sentence:

(1) Red-eared frogs are an endangered species.

This sentence appears to work in the following straightforward way. The term ‘red-eared frogs’ stands for a certain group of frogs. The word ‘species’ stands for the set of all species. ‘Endangered’ is an adjective, applied to species. Its effect is to narrow what ‘endangered species’ stands for: it stands for a subset of the set of species. The statement is true if the group of frogs that ‘red-eared frogs’ stands for is a member of that narrowed-down set; that is, if that group is an endangered species; that is, if red-eared frogs are a species, and are, in addition, endangered.

If we look up the words ‘species’ and ‘endangered’ in the dictionary, we will not find a list of the members of all the species, nor a list of things that are endangered. Rather, we will find conditions, explained in other words, that things must satisfy to be members of those sets. A species is a group of living organisms that meets the condition that its members can interbreed. Something is endangered, in the relevant sense, if it is threatened with extinction. Now we might also say that the words ‘species’ and

‘endangered’ stand for these conditions. We need to distinguish between these two intuitive uses of ‘stands for’.

Following standard usage in the philosophy of language, I will call the *set* of species the *extension* of the word ‘species.’ I will call the condition of *being a group of living organisms that can interbreed* the *reference* of ‘species’. (The word ‘reference’ is not always used this way.) The extension of the word ‘endangered’ is a function, which takes us from a set to a subset of that set. The extension of ‘endangered species’ is a set, the set that results from applying this function to the set of species. ‘Endangered’ refers to the condition of *being near extinction.* ‘Endangered species’ refers to the condition of *being a group of living organisms that can interbreed and is near extinction.* All of this should strike readers as an elaborate way of telling them something they already know.

This picture, however, will not quite do. Red-eared frogs were not endangered in 1789, or in 1867 when Mark Twain wrote a famous story about them.[12] They are

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[12] ‘The Celebrated Jumping Frog of Calaveras County.’ At least, red-eared frogs were the dominant species when Twain lived in Calaveras County. A jumping frog contest is held each year at the Calaveras County Fair, but red-eared frogs are seldom if ever contestants, since various non-native frogs are much better jumpers.

endangered now, in 2009. Which species are endangered changes with time, and time must somehow figure into our story. The word ‘endangered’ gives us a *time-relative condition*, so we really cannot simply say that (2) is true or false. It really is not sentences, but statements—uses of sentences on particular occasions by persons or groups of persons to say something—that are true and false, and a statement made with (2) in 1867 would have been false, while one made today would be true.

The meaning of ‘endangered’ does not really give us a condition on species, but a condition on species relative to time. To narrow down the set of species to the relevant set of endangered species, we need time. The present tense tells us that the relevant time for the statement made in 1867 is that year, and 2009 for the statement made today. The same information could have been conveyed by an indexical, like ‘now’, or an explicit date, like ‘1867’.

The fact that the extension of a phrase varies with time does not imply that the meaning of the phrase has changed. Bald eagles are now not an endangered species in the very same meaning of the phrase ‘endangered species’ in which they once were endangered, and red-eared frogs are now an endangered species in the very same meaning of the phrase in which they once were not. If the phrase ‘original meaning’ in the formulation of textualism comes to ‘original meaning’, then textualism does not rule

out in general that the extension of protected or prohibited actions according to a statute will vary with time.

It is important, to repeat myself, that we distinguish conditions from the conceptions that people may have about those conditions; that is, mainly, beliefs about which objects meet the conditions, what is good evidence for meeting the condition, what are underlying causes and effects of the condition, and so on.

2.2. The Change Model

It is typical of statutes to confer a status on actions for the indefinite future: 'Excessive bail *shall not be* required.' The time at which excessive bail shall not be *required* is clear: any time in the future. But relative to which time or times should the bail be *excessive*? In 1789, or when the indictment occurs? 'Endangered species shall not be hunted.' *When* can they not be hunted? Any time after the statute is enacted. But as of when do they need to be endangered, to fall under the statute's protection? At the time of enactment, or the time of hunting?

We can give the statue either a *fixed* or *functional* interpretation. In the first case, it is the set of species that are endangered at the time of the legislation that cannot be hunted, even if they cease to be endangered, or if other species come to be endangered. If we give the statute the functional interpretation, on the other hand, then hunting for a

species is prohibited at each time, if at that time the species is endangered. Thus hunting for minks might be prohibited, by the original meaning of the statute, even though at the time it was enacted it did not outlaw the hunting of minks, and was even part of legislation that licensed hunting for them.

In his discussion of Dworkin's example, Scalia says that, in my terminology, he would be inclined to interpret the statute with a fixed rather than functional interpretation. However, such an inclination is surely not required by textualism. Language in general is rife with predicates and general terms whose extension varies with time, and many such predicates and general terms make their way into statutes, and the natural interpretation is most often functional. A statute enacted in 1960, say, prohibiting the sale of alcohol to minors, understood as those under 21 years of age, would not prohibit for the indefinite future the sale of alcohol to those persons who happened to be born after 1939; it would be given a functional rather than a fixed interpretation. I assume that in the late eighteenth century a bail of, say, $100,000 would have been excessive for the crime of involuntary manslaughter. Nowadays that would not be excessive bail for such a crime. Does a correct interpretation of the bail clause of the Eighth Amendment fix excessiveness thresholds at their 1789 values, or deem them be a function of the time of indictment? The latter is surely correct. We seem to have an

example of losing a right when the threshold of excessiveness passed $100,000, namely, the right not to have one's bail set at $100,000 for involuntary manslaughter.

Still, being endangered, as a condition on species, or being excessive, as a condition on bail, does not seem like a completely apt analogy for being cruel, as a condition on punishments. There seems to be no set of facts, like the varying sizes of animal and plant populations, that would make some punishments cruel at one time that were not cruel at others. Of course, which punishments people *consider* to be cruel, and the conception of cruelty itself, certainly vary, with all sorts of factors—not only time, but social class, culture, familiarity, and the like—and in bizarre ways. A few years ago Americans were aghast when a Californian in Singapore was sentenced to caning for chewing gum on a subway. In spite of the sensitivity manifested in this reaction, Americans do not seem to regard sentencing people to overcrowded and dangerous prisons for long periods of time for non-violent offenses such as selling small quantities of marijuana as cruel. In fact, both punishments are cruel.

Scalia's second objection to the mink example is in effect that 'cruel' is not relevantly analogous to 'endangered'. This is a much better objection to Dworkin, I think. The discovery that a given punishment is cruel will not be very much like the

discovery that a given species is endangered. However, there is still plenty of conceptual room for such discoveries, even given textualism.

What is required, of course, is not simply a case where the conception of what is cruel has changed. Perhaps some day people in Singapore will agree that caning is a cruel punishment for chewing gum, and Americans will come to see that many of the sentences currently imposed for drug offenses are quite cruel. I myself would be dubious that such changes in opinion would reflect either an abandonment of the current meaning of 'cruel' or a change in the extension of 'cruel' due to some temporal parameter buried in the structure of its meaning. I think such punishments are cruel now, and people who do not realize this are simply wrong.

To make a distinction between change in meaning, and hence the condition associated with a term, and mere change in the opinions people have about the condition, presupposes a certain degree of realism about the condition, allowing for objectivity, and the possibility that opinions can vary from person to person and time to time, although the condition and the facts are the same. There are many kinds of human discourse where such realism might seem implausible. I will argue below that cruelty should be treated realistically.

2.3. The Knowledge Model

Suppose that in 1956 a legislature passes a statute to ban the sale of ‘toxic paint’, defined within the statute as paint that when dry will expose children who chew and lick the painted surface to dangerous levels of toxins. Now at that time, lead-based paint was widely used for painting houses, windowsills, toys, and all sorts of other chewable and lickable objects. And lead-based paint, when dried, exposes children who lick and chew the painted surface to dangerous levels of toxins. However, this was not known until the 1970s.

One can imagine such a statute being passed in concert with other paint-oriented statutes, perhaps requiring that 60 per cent of the lead in lead-based paint comes from American sources of lead, that make it clear that the legislators did not plan or expect or in any way intend or contemplate that the use of lead-based paint would be banned. Indeed, they may have all been in the pockets of a lead-based paint company, who thought the legislation would clear the market of modern alternatives to their product.

Perhaps it sounds odd to say that the legislature banned the sale of lead-based paint but did not know that it had. This oddness is simply because we expect bans, once made, to be put into effect, and do not think to allow for the case of ignorance of the extension of the relevant predicate. So it sounds odd, but it is correct. At any rate, it seems clear that the statute, with its original meaning, provides the statutory basis for

preventing the sale of lead-based paint once it is established that lead-based paint in fact leaves toxic residue. What changes, when this is discovered to be true of lead-based paint, is not the text of the statute, nor the conditions to which it refers, nor an implicit temporal parameter, nor even the extension of kinds of paint that in fact meet the condition for banning. What changes is knowledge of which kinds of paints meet the condition, and, as a result, what steps are taken to put the ban on toxic paints into effect.

This also does not seem to be a perfect analogy with ‘cruel punishments’, at least at first glance. The issue of whether a type of punishment is cruel or not does not seem to depend on hidden properties of the punishment, analogous to the toxic properties of lead-based paint, any more than it seems to depend on time-sensitive conditions, as ‘endangered species’ or ‘excessive bail’ does.

Still, I think that when we look closely at the original meaning of ‘cruel punishments’, we shall see that both the Change Model and the Knowledge Model have some application.

3. Cruel and unusual punishments

3.1. Introduction

All four words in the phrase ‘cruel and unusual punishments’ are interesting and problematic. We can start with ‘and’. The punishment clause of the Eighth Amendment comes to this: ‘Cruel and unusual punishments shall not be inflicted.’ Does this mean to prohibit punishments that are either cruel or unusual (the union of the set of cruel punishments and the set of unusual ones)? Or only punishments that are *both* cruel and unusual (the intersection of the two sets)?

Logic teaches us that ‘and’ means conjunction and ‘or’ means disjunction, but this does not resolve the issue. Are we interested in the set of punishments that are cruel *and* unusual (the intersection)? Or are we interested in the set consisting of the cruel *and* the unusual (the union)?

Suppose a restaurant has a sign: ‘Shirtless and shoeless customers shall not be admitted.’ This means the same as: No shoes, no shirt, no admittance. That is, it would exclude shirtless shod people, and shoeless shirted people, as well as barefoot, bare-chested people; not just those in the intersection of the two sets, but all of those in their union, are unwelcome. Similarly, if a more welcoming bar has a sign that says, ‘Shirtless and shoeless customers are especially welcome, the shirtless shod and the shoeless shirted should feel as welcome as those both unshod and unshirted.’ Not just those in the intersection, but also those in the union, are welcome.

On the other hand, if the sign at the unwelcoming restaurant had said, ‘Shirtless, shoeless customers shall not admitted’, it would seem that the shirtless and shod and the shirted and shoeless are welcome; it would not have been quite as unwelcoming. And if the bar had said ‘Shoeless, shirtless customers are especially welcome’, we would expect the shirtless to be removing their shoes and the shoeless to be removing their shirts to be welcome.

It seems to me that the punishment clause, as a case of relatively unexceptional English, naturally has the union reading. If it had read, ‘Cruel, unusual punishments shall not be inflicted’, it would have the intersection reading.

If we take ‘unusual’ in its normal meaning, of not being habitually or commonly done, then the condition of being an unusual punishment is clearly time sensitive, as well as involving some reference class. That is, the questions: unusual when? unusual where? and unusual among whom? naturally arise. A conceivable hard-nosed interpreter could support a fixed interpretation of ‘unusual’ and an intersection reading of ‘and’, and we would not be protected from any punishment, no matter how cruel, if it

was not unusual in 1789.[13] A softie might claim that the death penalty is no longer usual in the appropriate reference class, the community of civilized nations, and so is unconstitutional for being unusual, whether or not it is cruel.

In 1789, the phrase 'cruel and unusual' may have suggested methods of executing people that were definitely cruel and also unusual outside of Spain and Germany, and which met with widespread disapproval in the English-speaking world. And they might also have had in mind the arbitrary decrees of earlier English Tudor and Stuart monarchs: the clause is lifted intact from the English Bill of Rights of 1689, following the Glorious Revolution. The death penalty itself, most likely carried out by hanging, may not have been thought by many to be cruel in 1789, although US Senator Samuel Livermore, quoted at the beginning of this chapter, who does not seem to be particularly soft hearted, clearly thought it was cruel. He thought that cutting off ears and the death

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[13] In *Harmelin v Michigan* 501 US 957 (1991), Scalia argued that common—that is, not unusual—punishments are not prohibited even if they are cruel, and unusual punishments are not prohibited as long as they are not cruel. These opinions deserve a close analysis, but I am not able to do that here.

penalty, though cruel, were necessary to deter the crimes for which they were used as punishments, and so argued against including the clause in the American Bill of Rights. However, I believe that Scalia is correct that the cruelty of the death penalty as such was not a live issue in 1789, but that certain modes of execution, such as death on the rack, or drawing and quartering, were thought to be cruel.

3.2. Cruel punishments

The meaning of 'cruel'

One possibility that would support Scalia's reasoning and Ring's Principle, even within the context of meaning-textualism, is that in 1789 the word 'cruel', used with its usual meaning, directly picked out a subset of punishments. I will call the subset 'Cruel-1789'. If this possibility were actual, only punishments that belong to this set would be prohibited by the Eighth Amendment. It could be that in, say, 1965, the word 'cruel' used with its usual import at that time picks out a different set of punishments, Cruel-1965. It may well be that execution belongs to Cruel-1965. But that would be irrelevant to whether it is prohibited by the Eighth Amendment. We have very clear evidence, the fact that execution is clearly contemplated as a possible outcome of due process elsewhere in the Bill of Rights, that execution was not, and so is not, a member of

Cruel-1789. *If* this were how the meaning of 'cruel' worked, no meaning-textualist could reasonably suppose that in 1965 execution was prohibited by the Eighth Amendment; the set Cruel-1965 is irrelevant. The view would not pass the laugh test.

But descriptive adjectives do not usually work that way, and 'cruel' is no exception. If we compare, say, the 1755 definition from Samuel Johnson's *A Dictionary of the English Language*,[14] Noah Webster's 1828 definition from *An American Dictionary of the English Language*,[15] and the definition from my Apple computer's dictionary,[16] we do not gain the impression that there has been a significant change in meaning, and none of them gives the meaning of 'cruel' by enumerating its extension. Johnson defines 'cruel' as 'Pleased with hurting others; inhuman; hardhearted; void of pity; wanting compassion; savage; barbarous; unrelenting.'[17] Webster says:

> Disposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness; fierce;

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[14] Johnson (1785).

[15] Webster (1828).

[16] McKean (2005).

> ferocious; savage; barbarous; hardhearted; applied to persons or their dispositions.[18]

My computer's dictionary defines it as 'having or showing a sadistic disregard for the pain or suffering of others'.

It is extremely important to note that all these definitions define 'cruel' as an attribute of humans, not of actions generally or of punishments, so none of them tells us directly what we need to know to interpret the amendment. The *Oxford English Dictionary (OED)* does provide a definition of 'cruel' as applied to actions, clearly derived from its meaning when applied to persons:

> 1. Of persons (also transf. and fig. of things): Disposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress; destitute of kindness or compassion; merciless, pitiless, hard-hearted.
>
> c. Of actions, etc: Proceeding from or showing indifference to or pleasure in another's distress.[19]

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[19] Simson & Weiner (1989).

The sense of ‘cruel’ the *OED* gives for ‘actions’ seems clearly to pertain to specific acts, and not types of acts. I will reserve the term ‘action’ for *types* of acts, so I take clause (c) of the *OED* definition to be about particular acts. Whether an *act* is cruel, the *OED* tells us, depends on the attributes of the agent that causes it, or that it shows him to have. In my terminology, the second part of the *OED* quote tells us that acts are cruel if they proceed from the cruelty of the person—that is, the quality, of the person, to be disposed to inflict suffering, and to be indifferent or take pleasure from it.

Consider the *action* of cutting off a child’s arm. It is definitely an action that could be done by a cruel person; it does cause pain and suffering, and so might well be the sort of thing that a (particularly) cruel person would do for that reason. However, a given *act* of cutting off a child’s arm might not express insensitivity to pain and suffering or hard-heartedness if it were done to stop the spread of gangrene or cancer. In deciding whether a particular act that induces pain and suffering is cruel or not, we want to know why the pain and suffering-inducing action was performed on the given occasion, as a part of the particular act.

Acts, actions, executions, accomplishments: action structures

At this point it will be helpful to reflect a bit on the structure of acts. By ‘action’, as I said, I mean a type of act, while acts are particular events. *Acts* involve agents at times

moving their bodies and parts of their bodies in various ways, in the circumstances they are in, and thereby bringing about certain results, and thus performing indefinitely many *actions*. The act that inaugurated this sentence was a moving of my right forefinger, a depressing of a key, a typing of a 't', a disturbing of the air around me, and many other things. *By* moving my finger, while it was perched over the keyboard in a certain way, I depressed the 't' key. Moving my finger is a *way of* depressing the 't' key in those circumstances. If my computer is turned on and functioning properly, by depressing the 't' key I make a 't' appear on my monitor. And so on. Acts have structure, studied in the philosophy of action, and recognized in ordinary ways of thinking and talking about actions, in particular the word 'by' and the phrase 'is a way of'. What we do *by* performing one action in one set of circumstances can be quite different from what we do by performing the same action in a different set of circumstances. For example, making a certain poking movement with my forefinger in certain circumstances is a way of calling an elevator, and thereby inconveniencing its current hurried occupants, who would have preferred to bypass my floor. In different circumstances, the same movement might be a way of poking a short man in the eye, thereby making him angry. In the one case, *by* poking my finger, I called the elevator and annoyed its occupants; in the other, *by* poking my finger, I made a short man angry.

We can distinguish between basic actions or *executions* (no pun intended) and *accomplishments*, the latter being the things brought about by executing movements in circumstances. From certain points of view, one might think that the real act simply consists of a person moving in a certain way at a certain time. For most purposes, however, we think of an act as having a more complex and interesting structure. This will involve the way it was done (what movements were executed to perform the action, in what circumstances) and what it was a way of doing (the actions that were done by performing it, in the circumstances). In the case of intentional actions, the relevant structure includes the reasons for which it was done, and so its intended as well as its actual results. How much of the action structure exemplified by an act will be brought into its description depends on what we are interested in. A statement like 'Fred went to the store to buy pickles', implies that he somehow moved his body, but does not tell us much about how he did it. If he went to the store, he either drove or walked or biked; if he walked, he either started with his left foot or right foot; and so on. Such details are brought in as they are relevant. The description focuses on the actual result (getting to the store) and the goal or intended result (being in a position to buy pickles).

Properties of action structures

Suppose now that someone cuts off a child's arm, simply to demonstrate surgical technique. Such an act would be cruel. What are we saying when we say the act is cruel, and how does the cruelty of the act connect with cruelty as a disposition of persons?

When we bring actions and other things under general terms, we imply that they meet some condition associated with the term, and that this term would be applicable to other things that share this characteristic. (We do not, as Wittgenstein's example of 'game' reminds us, imply that all things to which the term applies share a characteristic; there may be many combinations of characteristics sufficient for an activity to be a game that have a quite complicated relation to one another.)

Having an arm cut off is a cruel fate for a child. But is it a cruel act by the physician? We cannot say unless we know more about the structure of actions that the act exemplified. Part of what we need to know is the goal the physician had in mind: to save the child's life? Or to demonstrate a surgical technique? We also need to know what other means were available to accomplish the same thing. If the goal of cutting off the child's arm is to save the child's life, but this worthwhile goal could have been accomplished in a less painful way, with antibiotics say, and the physician was motivated by sadism or indifference (he did not want to go across town to get the

antibiotics), the act could still be cruel. Cruelty is properly attributed to acts in virtue of the action structure they exemplify.

The point mentioned above—that in 1789 (and in much of the world today), execution is not deemed a cruel punishment for certain crimes, but certain methods of carrying it out are considered cruel—is another example of the same general point. Knowing that an act is of a certain type—a cutting off of a child's arm, or an execution—may not give us enough information about the act to say whether it is cruel. We need to know more about the action structure; in the one case, *how* the execution was performed, in the other, *why* the arm was cut off.

The need to look at the whole structure of the act, including the reasons for which it was done, falls out of the connection made in the *OED* definition between cruelty, as a property of acts, and cruelty as a property of people. Cruelty is, according to the *OED*, a disposition to cause suffering and indifference to the suffering of others. A surgeon who cuts off a child's arm to demonstrate a surgical technique shows such indifference and strongly suggests such a disposition. A surgeon who cuts off a child's arm to stop an infection from spreading, but could have achieved the same goal by a more elaborate and time-consuming procedure that would leave the arm intact, also shows such a character trait. So these acts are cruel.

Here then is a provisional definition of ‘cruel’ as an adjective of acts: acts that cause others pain and suffering are cruel if done to produce pain and suffering, or for no reason, or for a worthwhile goal for which there are other available less painful methods of achieving that the agent knows, or for a goal that is not worthwhile.

An important point that follows from this way of saying what it is for an act to be cruel, and would remain valid if the analysis were made more complicated, is that an act’s being cruel is not an observational property of the act. This is not to say that it might not be obvious in many cases, but an act’s being cruel or not depends on some factors—such as the disposition of the agent that led to it, his goal, and the alternatives available—that cannot always be simply read off from observing the act.

Consider mid-nineteenth century teachers in charge of 12-year-olds at a residential school. The teachers have been taught that masturbation is quite harmful, and have been trained in what is considered the proper technique of caning as punishment for it. One can imagine a teacher, who is not at all disposed to cause pain in others and gets no pleasure from it, caning a masturbator. The act is not cruel under the above definition. The act causes pain and suffering and is quite misguided. The teacher may be criticizably unreflective and gullible. But the teacher is not cruel, and the act does not show a disposition toward causing pain in others or an indifference to such pain.

Imagine another teacher, similarly trained and indoctrinated, but more reflective and less gullible. Reflecting on his own masturbation, the teacher comes to believe that the practice is at worst harmless and also realizes that caning is unlikely to significantly inhibit it. His goal in caning his masturbating charges is simply to comply with what he is expected to do. However, he canes his masturbators quite vigorously, even though he believes, correctly, that a quite-mild caning would be equally (in)effective. This teacher is indifferent to the suffering he causes, and perhaps even enjoys it; he is cruel, and his act is cruel.

So much for cruel acts. But what of cruel *actions*? It makes sense not only to say that the second teacher's act was cruel, but that caning was and is cruel. But how can caning be cruel, if the first teacher's act was a case of caning but was not cruel?

The question assumes a simple rule for dealing with cases like this one where the same predicate is applied both to specific things and to types of those things. In this case the word 'cruel' is applied both to acts and to actions. The simple rule is that if the predicate applies to the type, it must apply to every act that is an instance of the type. However, this simple rule does not seem to be correct in a wide variety of cases where we apply predicates to types.

Consider, ‘Birds fly.’ Here we have a predicate, ‘fly’, that is applied both to individual birds like Tweety, and also to the type or category of being a bird, and also to subtypes of that category: pelicans fly, hummingbirds fly, and so on. ‘Birds fly’ seems like an unremarkable assertion, and one might suppose that it implied that all birds fly. But penguins are birds, and penguins do not fly.

This phenomenon is called ‘non-monotonicity’. If a predicate is monotonic, then if it applies to a type, it will apply to every subtype of that type, and to every instance of that type. ‘Flies’ applies to birds, penguins are a subtype of birds, but ‘flies’ does not apply to penguins. So it seems ‘flies’ is not monotonic.

Some philosophers are inclined to say that non-monotonicity is an illusion: it is really not true that birds fly, it’s just close enough to the truth to be useful to say. Computer scientists working in artificial intelligence find such non-monotonic rules to be essential in understanding expert reasoning; they are more inclined to say that the phenomena is real: it is true that birds fly, it simply does not follow that penguins do. I will side with the computer scientists, motivated more by simplicity of exposition than deep conviction.

The important lesson is that we often use truths, or near truths, like ‘Birds fly’, in reasoning and discourse. The import of the remark seems to be that paradigmatic birds

fly; *prima facie*, if something is a bird, it flies. If it is a bird, assume it flies until you find out otherwise, and so forth. For our purposes, the point is that attributions of characteristics to types are often made and deemed to be true (or close enough), even though not every instance of the type shares the characteristic, and it cannot be attributed to every subtype. Thus one can say 'Cutting off a child's arm *is* cruel', and then consistently allow, 'But of course cutting off a child's arm to keep gangrene from spreading is *not* cruel', and then consistently allow 'But of course cutting off a child's arm to keep gangrene from spreading because one is too lazy to walk across the street and get some antibiotics' *is* cruel, and so on.

Similarly, it would seem true or close enough to deny that lightly kissing someone on the cheek is cruel. Still, if the rest of the action structure that the act exemplifies is of a certain sort, an act of this type could be quite cruel. The person kissed may have been badly burned, so that the act does cause pain, and this could be the reason the agent did it. Or perhaps the act is intended to make the agent's spouse feel emotional pain.

Combining these reflections, the guidance of the dictionary, and some ideas suggested, if not exactly espoused, by Livermore, I suggest that the connection between cruelness as a personal attribute, cruel acts, and cruel actions is this:

(i) A *person* is cruel if he or she is disposed to inflict suffering because of being indifferent to or taking pleasure in the pain or distress of others;

(ii) An *act* is cruel if it proceeds from or shows indifference to or pleasure in another's distress, ie if it is the result of a person’s cruel disposition;

(iii) An *action* structure: G-ing by A-ing is cruel (that is, A-ing is a cruel way of achieving a goal G), if:

- A-ing typically causes pain and suffering;
- there are other, equally effective ways of achieving goal G that are typically available and known to agents to be available that cause less pain and suffering;

(iv) Being cruel is non-monotonic: instances of cruel action structures will typically be cruel acts, and subtypes of cruel action structures will typically be cruel, but not always.

In 1789, it seems Americans in general did not think it was cruel to hang people, but they did think it was cruel to draw and quarter them, or to torture them on the rack until they died, or to kill them in an iron maiden. They no doubt realized that hanging caused pain and suffering, but did not see a more humane way of achieving the goal of execution. We can understand this on the present analysis. Death on the rack was more

painful than is required to bring about the goal of death, so it was cruel. The pain and suffering involved in hanging, however, was unavoidable.

The attribution of cruelty to types of actions, then, is two steps removed from the robust meaning the dictionary provides for ‘cruel’, which has to do with dispositions of persons. There is a step from cruelty as a trait of persons to cruelty as a property of individual acts; then there is a further step from cruelty as a property of acts to cruelty as a property of types of actions. There is a lot of play in each step. Does this show that cruelty, as attributed to actions, is not really a matter of objective fact? That there is no room for distinguishing between what is really a cruel action, and what people, at a given time, or in a given culture, think of as a cruel action? This no more in the case of ‘cruelty’ than in the case of other adjectives with a similar range of application, adjectives such as ‘intelligent’, ‘stupid’, ‘rude’, and the like. In all such cases, attributions are non-monotonic: the connection between the adjective applied to the type and the adjective applied to it in some instances is somewhat loose because of some condition of typicality, normality, and the like. This means that such adjectives will tend to be vague rather than precise. But it does not point to anything particularly *subjective* about their use. It does not imply that they are a mere matter of taste, perspective, or inclination. The opposite of ‘subjective’ is not ‘precise’ but ‘objective’. For example, it

is a matter of objective fact that keeping one's receipts to get reimbursed is intelligent and that throwing them away is stupid.

Cruel punishments

The Eighth Amendment prohibits certain types of punishments. Punishment is, according to the dictionary, the infliction or imposition of a penalty as retribution for an offense. 'Penalty' and 'punishment' usually are part of a small circle of interdefined terms, but somewhere in the circle the idea that penalties and punishments are bad for the person punished comes in. What seems to be prohibited by the Eighth Amendment, then, are certain types of action structures, where cruel actions are performed by way of imposing penalties as retributions for offenses.

The term 'retributive' is often used as a label for a theory about the justification of punishment. The theory is basically that the offense justifies the punishment. No further justification, in terms of deterrent effect, removal of the perpetrator from society, or improving of the perpetrator's character, is needed. However, one need not accept the retributive theory of the justification of punishment to accept that retribution is part of the *nature* of punishment, that is, a punishment is *for* an offense.

Webster defined the verb 'retribute', now uncommon, in this way:

> To pay back; to make payment, compensation or reward in return; as, to retribute one for his kindness; to retribute to a criminal what is proportionate to his offense.[20]

The parameters of a punishing then are a punisher, a punished, an offense, and what the punisher does to the punished: the punishment. Webster's definition highlights the relation of the nature of the offense and the nature of the punishment. The issue is at least as old as Deuteronomy: an eye for an eye, an ear for an ear, a foot for a foot, and so on. An ear for an eye is disproportionally lenient; an eye for an ear is disproportionally harsh.

There are arguments in Eighth Amendment cases, mostly by Scalia, to the effect that proportionality has nothing to do with the prohibition of cruel and unusual punishments. One argument is that the intent of the authors was not to preclude punishments that were cruel relative to the offenses punished, but only to preclude punishments, like drawing and quartering or execution by the Spanish rack or the German iron maiden, that were cruel ways of executing people no matter what the offense. Another is that if the punishment clause had been meant to treat punishments

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[20] Webster (1828).

that are cruel relative to the offense, then the fines clause would not have been necessary, for what are excessive fines if not cruel punishments in the meaning of cruel for the offense? But as Webster's definition of 'punishment' points out, although any kind of a penalty, including a fine, can be called a 'punishment', the word usually suggests physical pain. And excessive fines might not be excessive because they are cruel: the motive is more likely to be greed on the part of the government that imposes the fine than enjoyment of the malefactor's pain.

The general tenor of these arguments is that if the authors of the Eighth Amendment had intended proportionality to be an issue, they would have said so; they did not say so, so it is not an issue. This is surely fallacious from the point of view of meaning-textualism. Given the parametric structure of punishments, based on the meaning of the word, and the given long literature on the appropriate relation between punishment and offense, the import of 'cruel punishments' will be not only the exclusion of punishments that are cruel no matter what the offense, but also of those that are cruel relative to the offense. Extra language would be required to exclude the second category, not to include it.

The phrase 'excessive fines' has the same structure as 'cruel punishments'. 'Excessive' picks out a subset of fines. 'Cruel' picks out a subset of punishments. A

case of fining needs a finer, a person fined, an offense, and a fine. Does ‘excessive’ pick out a subset absolutely, say fines that are so large as to be excessive no matter what the offense? Or does it pick out a subset relative to the offense? One naturally understands the latter, and it would take extra language to convey the former. The case is entirely parallel with ‘cruel punishments.’

So it seems that the *meaning* of the text of the punishments clause of the Eighth Amendment—as it would have been understood by semantically competent ratifiers in 1789, and by semantically competent readers of the Bill of Rights in 2009—prohibits punishments that are cruel relative to the offense. Let us turn now to the question of whether our two models for discovery of rights, or some combination of them, apply to the case of the right not to be cruelly punished as established by the Eighth Amendment.

The first way for an action to become cruel, without a change in the meaning of ‘cruel’, is for more humane alternatives to the action to become typically available, so that the same goals can be achieved is less painful ways. Which means for achieving a given ends are available, and typically known to agents to be available, clearly depends on time and place in several ways. Less painful methods of achieving a given goal may be discovered at a certain point in time; thereafter they may be typically available and known to be available in some places, to some groups of agents, but not in other places,

to other groups of agents. There will be relativity to time and space and other factors, with no change in the meaning of ‘cruel’. This falls under the Change Model.

For example, the guillotine and the electric chair were both promoted as more humane alternatives to hanging, the gas chamber was promoted as a humane alternative to the electric chair, and lethal injections as a more human alternative to the electric chair and the gas chamber. Whether any of these claims are true, I do not know. But suppose (which is certainly not obvious), that hanging imposes more pain and suffering than is proportionate to the crime of premeditated murder, and that death by guillotine is less painful than death by hanging. Then once the guillotine is widely available, known to be available, and known to be a less painful mode of execution, hanging as a way of executing someone for premeditated murder has become what it was not before, a cruel punishment, prohibited by the Eighth Amendment.

Now consider the penalty, common when I was a child, of having one’s mouth washed out with soap for using bad words; that is, being required to sit in the bathroom with a bar of soap in one’s mouth for some relatively short amount of time, say 10 or 15 minutes. In the movie *A Christmas Story*, a child subjected to this punishment fantasizes that it eventually causes blindness, and imagines his parents’ guilt when he returns home as an adult, blind from soap poisoning in his youth.

Although I suppose not now a very common punishment, one might think that washing one's mouth out with soap was an appropriate, proportioned punishment for the offense of using bad words, if one takes into account only the unpleasantness of sitting for 10 minutes with such a vile taste in one's mouth. The mother in *A Christmas Story* apparently thought so, and she seemingly was not a cruel person. But if she discovers that the punishment causes adult blindness, she will discover the punishment she used was cruel.

The use of long-term incarceration in prisons as a secular mode of punishment suitable for democratic republics is a relatively recent phenomenon, which developed over the past century and a half. It was conceived as a humane alternative to corporal and capital punishments for many crimes. I think it is fair to say that experience has taught us much, or should have taught us much, about how much pain and suffering is involved in such long-term incarceration, in the prisons that we can afford to build and maintain, and given the high percentage of the population that, at least in America, ends up in prison. At the same time that the prison system has evolved, there have been important developments in the sciences relevant to assessing pain and suffering, and the effectiveness of incarceration of various lengths as a method of deterrence and improvement of the incarcerated. Thus it would not be surprising if we were to discover

that some punishments regularly employed were cruel even though they were instituted with the intention of providing humane alternatives. Such discoveries would be discoveries that these punishments are unconstitutional, given the clear meaning that the Eighth Amendment had when it was ratified and that it has now. Meaning-textualism supports rather than undercuts the idea that we can discover that certain punishments that are not unusual are nevertheless cruel, and for that reason, unconstitutional.

4. Moral vision and constitutional interpretation

In the Tanner Lecture that begins his book *A Matter of Interpretation*, Scalia's explanation of textualism seems to advocate meaning-textualism. In his 'Response', conception-textualism seems to be his view.[21] This is particularly clear in his response to Dworkin, where he waxes poetic about whose moral vision is to guide interpretation of the Constitution. But there is no evidence that the Constitution expresses a moral vision that was shared by the authors or the ratifiers, who ranged from slave owners like Madison to abolitionists, from those who liked Hobbes to those who liked Locke to those who liked Hume and presumably to scores who had never read any of these authors, and who included people of a wide variety of religious and skeptical

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[21] Scalia (1998b).

persuasions. What the Constitution does give us is words that they all understood, and that at least in certain cases, like the Eighth Amendment, seem to have had the same meaning in 1789 that they have today, and which, in the last quarter century, the Supreme Court has consistently refused to follow.

The Eighth Amendment has not attracted much attention over the centuries compared to the First or the Fifth Amendments, or the amendments passed after the Civil War. The bulk of what one finds in constitutional law textbooks is fairly recent opinions authored or co-authored by Scalia. The philosophy of interpretation exemplified in these opinions is best described as opportunistic textualism, the search for some rationale, in text, intention, inferred conception, and elsewhere for not applying the clear meaning of the punishment clause to clearly cruel and disproportionate punishments brought to the court's attention, such as life imprisonment without possibility of parole for three relatively minor thefts, or long sentences for sale of a small quantity of marijuana.

Does the death penalty itself violate the Eighth Amendment? I am not convinced that it does. In present-day America it does seem impossible or at least extraordinarily difficult to employ it without violating the Fifth Amendment of due process. And, because of the difficulties entailed by the jurisprudence on matters of due process, the

only *mode* of employing it today seems cruel in a way that the Founding Fathers, or even those of us who remember an age of relatively quick executions, could scarcely have imagined: keeping people in prison long enough so that many of them are no longer the sort of people apt to commit such crimes, and then executing them. So, somewhat ironically, the Fifth Amendment, which is the basis for Scalia being quite certain that the death penalty is constitutional in spite of the Eighth Amendment, may be the cause of its being prohibited, in the present mode of carrying it out, by the Eighth Amendment.

5. Conclusion

Many of Scalia's writings about textualism strike this philosopher as quite sensible as a philosophy of legal interpretation. These writings describe what I have called meaning-textualism: we should understand the words as having the available meanings and meanings that they had at the time the laws were written, and would have been understood to have by the writers and ratifiers of the law and by the public affected by the law at that time. Meaning-textualism may not provide everything that is needed for interpreting all laws, since laws can be long and complicated in ways that challenge consistent interpretation. But it is surely a plausible starting point, especially for relatively short and simple constructions such as we find in the Bill of Rights.

Even there, however, dictionaries only carry us so far. Dictionaries focus on words; what happens when words are combined in phrases quickly gets complicated. The whole issue of predicating properties of *action*s, types of acts, in virtue of which they are protected or prohibited, raises a number of questions that are interesting and complex. I think philosophers of language can be helpful. My own efforts in this chapter are probably too simple and flawed in other ways. But I think more adequate efforts will only reinforce the naivety of Ring's Principle.

My efforts suffice to show the dangers of slipping from Scalia's plausible view, meaning-textualism, to the totally implausible theory he sometimes favors, conception-textualism, that it is not the meanings of the words the founders used that is crucial, but rather the opinions they had about the properties those words stood for. Whether the founders shared such opinions about cruelty, punishment, and other key properties to such an extent that it even makes meaning to talk about *the conception* of *the founders*, much less their 'moral vision', strikes me as beyond dubious. But even if I am wrong about this, it is surely what was said by the words they chose that we ought to worry about.